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| **(1) What are the Objectives of Securities Legislation?** |

1. Protection 🡪 provides investors with protection from unfair, improper, or fraudulent practices
2. Efficiency 🡪 foster fair and efficient capital markets, which involves striking a balance in that investor protection schemes cannot be so onerous as to deter corporations from using capital markets to raise funds
3. Transparency 🡪 instils confidence in the capital markets

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| **(2) What is a Security?** |

1. **Does this instrument fit in the definition of a security in subsections (a)-(o)? – If yes, then it’s a security.**
2. **If light blue then this is not a security.**

* Basic concept: an instrument issued to raise funds to capitalize an entity and as a result, generate profits.
* Exceptions: Mortgages, bank/savings accounts, contracts of insurance, exchange contracts, accounts payable, sale of a franchise (*Century 21*)

**s.1(1)** – starting point is the statutory definition

1. a document, instrument or writing “commonly known” as a security – perspective of an informed professional
2. a document evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of person – includes a corporate person
3. a document evidencing an option, subscription or other interest in or to a security – anything entitling one to a security in the future is also a security (employee stock option for compensation)
4. a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certification or subscription other than…
   * 1. a contract of insurance issued by an insurer, and
     2. an evidence of deposit issued by a savings institution – this is an example of companies capitalizing through debt financing as opposed to equity financing
5. 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 does not include a contract issued by an insurer that provides for payment at maturity of an amount not less than ¾ of the premiums paid by the purchaser for a benefit payable at maturity
6. 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 other person
7. a profit sharing agreement or certificate
8. a certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate
9. an oil or natural gas royalty or lease or a fractional or other interest in either,
10. a collateral trust certificate,
11. an income or annuity contract, other than one made by an issuer
12. an investment contract – catchall provision
13. a document evidencing an interest in a scholarship or educational plan or trust,
14. an instrument that is a future contract or an option but is not an exchange contract
15. a permit under the *Oil and Gas Activities Act*,

whether or not any of the above relate to an issuer, but does not include an exchange contract

1. **Investment Contracts – catch-all provision if a capital raising instrument does not specifically fit within the enumerated list**

* Basic concepts: focus on investor protection, substance over form, emphasis on economic reality
* *Pacific Coast Coin Exchange v. Ontario (Securities Commission*), SCC 1978 – leading formulation of the test for an investment contract

1. Is there an investment of money in a common enterprise?
   1. Common enterprise – when the investor’s fortunes are interwoven with or dependent on the efforts or success of those seeking the investment or third parties
2. Is there an expectation of profits?
3. Are the profits to come solely from the efforts of others?
   1. Solely – whether the efforts of people other than the investor are the undeniably significant ones

* Stems from American jurisprudence
* *Securities and Exchange Commission v. WJ Howey et. al.*, USSC 1946

1. Is there an investment of money in a common enterprise with…
2. An expectation of profits…
3. That are to come solely from the efforts of a 3rd party?
4. *State of Hawaii Market Center Inc. et. al*., Superior Court 1971
5. An offeree furnishes initial value to an offeror,
6. A portion of this initial value is subjected to the risks of the enterprise (risk capital test),
7. The furnishing of the initial value is induced by the offeror’s promises or representation which give rise to a reasonable understanding that a valuable benefit of some kind, over and above the initial value will accrue to the offeree as a result of the operation of the enterprise, and
8. The offeree does not receive the right to exercise practical and actual control over the managerial decisions of the enterprise
9. Despite *Pacific Coast* CDN courts will sometimes take a policy driven, flexible approach to these tests with a focus on the economic realities in question
10. *Universal Settlements International Inc*., OSCB 2006 – in the context of viatical settlements (are securities)
    * Court focuses on the 3rd prong of the *Howey* test
    * Were the profits derived from the *undeniably significant efforts* of persons other than the investor?
      + Yes.

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| **(3) What is a Trade?** |

1. **Is the disposition of this security a trade?**

* Basic concepts: a trade is the disposition of a security for valuable consideration (sale, lease, assignment)
* Policy: goal of securities legislation is to regulate people in the business of selling securities
  + Due diligence, proficiency, background checks, capital requirements, capital adequacy
* Exceptions: a mortgage (legislation), a purchase, a gift, an inheritance, separation of spouses, splits of private and public companies, collateral
* Consequences: if trading in securities rises to the level of being a dealer then it triggers registration requirements

1. **Does the disposition fit within the statutory definition? If yes, then it’s a trade**

**s.1(1)** – statutory definition

1. any disposition of a security for valuable consideration whether the terms of the payment be on margin, installment or otherwise, but does not include a purchase of a security or a transfer, pledge, mortgage or other encumbrance of a security for the purpose of giving collateral for a debt – only a trade if you are selling

**a.1)** entering into a futures contract,

1. entering into an option that is an exchange contract,
2. participation as a trader (ie, intermediary) in a transaction in a security or exchange contract made on or through the facilitates of an exchange or reported through the facilitates of a quotation and trade reporting system
3. the receipt by a registrant of an order to buy or sell a security or exchange contract
4. 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, and
5. any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in (a)-(e) – catchall provision designed to ensure that anything done that could contain tactics or misrepresentations to influence the buyer will be caught by this legislation
6. **Where is the trade taking place and why do we care?**

* Basic concepts: anyone who trades in a jurisdiction is subject to that jurisdictions’ securities’ legislation
* Policy: to bring a larger number of parties within the net of securities’ legislation
* *Regina v. Mackenzie Securities* – any trade done in MB must comply with MB’s securities’ legislation
  + Even if the company does not actually have a physical presence in that jurisdiction
* *Re World Stock Exchange* – The “fundamental principles of securities regulation do not change based on the medium.”

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| **(4) Registration Requirements** |

1. **Does the trade rise to the level of “being in the business?” If yes, then this triggers the registration requirements.**

* Basic concepts: any entity in the business of trading must register as a dealer
  + In the business means “not a one-off”
* Policy: Proficiency requirements, background check
  + Commission does due diligence on these entities (history of fraud)
    - Recall that investor protection is an objective of securities legislation
  + Entities in the business of trading must be properly capitalized to compensate for any losses stemming from the illegal activity of brokers
* CP 31-103: five indicia that someone is in the business of trading

1. Holding herself out as a dealer or in the business
2. Acting in an intermediary capacity or a market facilitator (even on the purchase side)
3. Carrying on trading with regularity
4. Being or expecting to be compensated for the trade
5. Directly or indirectly soliciting others in connection with the activity

**s.34** – A person must not [be in the business of]

1. trade in a security or exchange contract,
2. act as an adviser,
3. act as an investment fund manager, or
4. act as an underwriter

unless the person is registered in accordance with the regulations and in the category prescribed for the purpose of this activity.

1. **Are there exemptions to the registration requirements? Yes.**

* CP 31-103 8.4(1): exemptions from the registration requirements
  + If someone is not engaged in the business of trading in securities or exchange contracts as a principal or agent, and
  + Does not hold herself or itself out as engaging in the business of trading in securities or exchange contracts as a principal or agent

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| **(5) Who Must File a Prospectus?** |

1. **Does this trade constitute a distribution? If yes, then this triggers the prospectus requirements.**

* Basic concepts: if a transaction involves a security + trade, then ask if the trade constitutes a distribution
  + WHY? – a prospectus is necessary when securities are distributed – or need an exemption

**s.1(1)** – a trade is a distribution if it is….

1. a trade in a security of an issuer that has not been previously issued – new on the market + usually distributed by the issuer itself
2. 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 – someone sells the shares back to the company who then sells them to someone else + very rare + triggers prospectus requirements because the issuer could have access to ‘material information’ that the public does not
3. a trade in a previously issued security of an issuer from the holdings of a control person – sale by the control person not the issuer itself + triggers prospectus requirements because control persons are presumed to have insider knowledge, assumption of influence = sale could constitute a ‘material event’ that can influence the market value/price of the shares
4. a trade by or on behalf of an underwriter in a security that was acquired by the underwriter, acting as an underwriter, before Feb. 1 1987, if the security continues on that date to be owned by or on behalf of the underwriter so acting,
5. a trade deemed to be a distribution
   * 1. in an order made under section 76 by the commission or the executive director, or
     2. in the regulations,
6. a transaction or series of transactions involving further purchases and sale in the course of or incidental to a distribution – catchall provision
7. a prescribed class of trade or transaction
8. **Who is a control person?**

* Policy: Assumption of access to information + influence
  + A control person’s sale sends a signal to the markets
* Defined in **s.1(1)** of the legislation as a person or combination of people acting in concert who hold sufficient numbers of voting rights attached to securities to affect control of the issuer materially
  + There is a rebuttable presumption that a person/block with more than 20% of the outstanding voting rights is an insider
    - Of course this is not actual control, but it is enough for this person to ‘materially affect’ the issuer

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| **(6) The Prospectus Process** |

1. **What is a prospectus?**

* Basic concepts: recall that if the trade constitutes a distribution then the prospectus requirements are triggered
  + Document that gives investors the detailed information about the issuer that they need to make informed valuation and investment decisions
  + Overriding principle is *full, true, and plain disclosure of all material facts* – **s.63(1)**
  + For the distribution to be legal the issuer must file a prospectus and get a receipt, qualify for a prospectus exemption under NI 45-106, or apply for a discretionary exemption under **s.76**

**s.61(1)** – unless exempted by the Act, a person must not distribute a security unless

1. a preliminary prospectus and a prospectus respecting the security have been filed with the executive director, and
2. the executive director has issued receipts for the preliminary prospectus and prospectus – this issuer will then be a reporting issuer and subject to continuous disclosure requirements as per **s.1(1)(b)**

**(2)** A preliminary prospectus and prospectus must be in the required form

* *Asbestos* *Minority Shareholders* – prospectus requirements designed to meet pubic policy/statutory goals of investor protection, efficient capital markets, confidence in them

1. **What if the issuer wants to file a prospectus in multiple jurisdictions?**

* Basic concepts: recall the passport system
  + Recognizes both the “passport prospectus” and the “dual prospectus”
  + Governed by NP 11-102 + MI 11-102
  + See pg. 15 of the big CAN

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| **Step #1: Secure an Underwriter** |

1. **What is an underwriter and what does she do?**

* Basic concepts: an underwriter has two fundamental roles that are designed to lend credibility to the issuer via their status as an experienced market participant
  + Act as a liaison between the issuer and the investors in a public offering, and
  + Ensure that the disclosure made by an issuer is complete and accurate

**s.1(1)** – an “underwriter” means a person who,

1. as principal, agrees to purchase securities for the purpose of distribution,
2. as agent, offers for sale or sells a security in connection with a distribution, or
3. participate directly or indirectly in a distribution described in paragraph (a) – (b)

but does not include

1. a person whose interest in the transaction is limited to receiving the usual and customary distribution or sales commission payable by an underwriter or issuer,
2. a mutual fund that accepts its securities for surrender and resells them
3. a corporation that purchases shares of its own issue and resells them, or
4. a bank with respect to prescribed securities or banking transactions

* Agency Agreement
  + Promise to use best efforts to sell securities as issuer’s agent for commission (7% cap)
* Firm Commitment
  + Purchases the issuer’s securities and then resells them (profit is the underwriter’s spread)
* Bought Deal
  + A firm commitment made at the preliminary prospectus stage
  + As per *Kerr* the purchaser has no remedy of rescission against the issuer for misrepresentation since the UW is the seller

1. **What is the underwriter’s liability?**

* Basic concepts: found in the statute at **s.131**
  + Recall goals of statute, underwriter is in a good position to discover + compel disclosure of the issuer’s material facts
  + UW must undergo a due diligence investigation
* Underwriter’s Certificate: included in the prospectus + result of the due diligence
  + Certifies that “to the best of our knowledge, information, and belief” that this document constitutes full, true, and plain disclosure of all *material facts*
  + Less onerous than “Issuer’s Certificate”

1. **What defences are available to the UW if the prospectus does not contain ‘full, true, and plain disclosure of all material facts?’**

* **s.131(5)** – provides a due diligence defence
  + UW not liable for misrepresentations/omissions of material fact in the prospectus unless
  + The UW did not conduct a ‘reasonable investigation’ as to provide ‘reasonable grounds’ for the belief that there was no M/O
* Reasonableness of investigation judged according to the *standard of a prudent person* in the particular situation in which the UW finds herself
* Basic concepts: as derived from case law
  + UW can rely on experts re: scope of their profession/independent
  + *Escott* – leading American case, one cannot sub-delegate one’s due diligence responsibility
  + *Re AE Ames* – UW must seek out all relevant material facts + cannot just rely on what the issuer says
  + *YBM* – reaffirms the statement in *Re AE Ames* + “to the best of our knowledge, information, and belief” is a requirement to obtain information necessary to back it up before the underwriter can make an affirmation
  + *Re Software Toolworks* – if no reasonable effort could verify a statement then UW can rely on issuer + must qualify it (risk factor)

1. **How can the underwriter manage her risk?**

* Invite other underwriters – joint + several liability
* Indemnity from the issuer
* Accumulate sufficient expressions of interest before signing the underwriting agreement
* Lockups + blackout periods
* Market-out clause
  + Standard in underwriting agreements
  + Lets the UW terminate if, acting reasonably, it determines the securities can’t be profitably marketed
* Disaster-out clause
  + Lets the UW terminate if a significant event affect’s the issuer’s business or capital markets
  + *Retrieve Resources* – ‘state of the financial markets’ refers specifically to the market for the specific shares to be placed

1. **What if the underwriter has a conflict of interest?**

* NI 33-105, *Underwriting Conflicts* requires a non-independent UW to make certain disclosures under a prospectus or other document
* Policy: set out in CP 33-105CP to NI33-105
  + Ensure that investors are purchasing securities that have been priced through a process unaffected by conflicts of interest, and
  + Receive full, true, and plain disclosure of all material facts re: issuer/securities

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| **Step #2: Develop & File and Preliminary Prospectus (get a receipt)** |

1. **What is contained in a preliminary prospectus?**

* Basic concepts: who gets entry to the market is regulated by NI 41-101, *General Prospectus Requirements* and Form 41-101F1, *Information Required in a Prospectus*
  + All the same information as a final prospectus with 3 exceptions
    - Securities price, price paid to UW + auditor’s report
  + Includes board resolution authorizing it, an UW agreement, financial statements, senior officers’ certified notes + note this document is not final
  + Executive director must issue a receipt as soon as practicable barring additional filing requirements in the public interest as per **s.64(1)**
* Long-form Prospectus: generally includes the following
  + The issuer’s business plan
  + The issuer’s current and expected activities
  + Financial statements
  + 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
    - Experience of mgmt., reliance on key person, regulatory restraints etc. – arguably this is moving CDA towards the ‘reasonable investor’ test for materiality
  + Disclosure of estimated net proceeds to be received
* FOFI: acronym for ‘future-oriented financial information
  + Not mandatory but if included then it must…
    - Have a cautionary note that actual performance may vary, and
    - Comply with the FOFI requirements in NI 41-101
  + FOFI must be based on assumptions that are reasonable in the circumstances + update it if the underlying assumptions change
* *Kerr v. Danier Leather* – FOFI has an implied representation of reasonableness up until the prospectus is receipted b/c this implicitly represents mgmt.’s best judgment + based on facts and reasonable assumptions
* *Omnicare* – issuers in America must disclose facts/assumption material to the forecast

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| **Step #3: Comments and Revisions During the Waiting Period** |

1. **What is the waiting period and what can the issuer do during it?**

* NI 41-101 defines waiting period
  + Time between issuance of a receipt for the preliminary prospectus + issuance of a receipt for final prospectus
  + During this time the activities of the issuer are restricted in terms of their communication with potential investors
    - *Notice Re Cambior Inc*. – during the waiting period ads are limited to those that **(i)** alert the public as to the availability of the preliminary prospectus, **(ii)** give advice as to where to find it, and **(iii)** solicit expressions of interest

1. **What are the preliminary prospectus amendment requirements?**

* NI 41-101 s.6.5(1) – the amendment requirement is triggered post-filing of a PP by a *material adverse change*
  + File within 10 days

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| **Step #4: File a Final Prospectus (get a receipt)** |

1. **What happens after you file the final prospectus?**

* Basic concepts: subject to **s.64** (additional filing requirements re: public interest), the executive director must issue a receipt for a prospectus under **s.65(2)** as soon as practicable
* WOW then ur a reporting issuer WOW, much continuous disclosure lol wow

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| **Step #5: Distribute Securities** |

1. **What happens after you file the final prospectus?**

* Basic concepts: post-receipt but pre-closing of the distribution the prospectus amendment requirement is triggered by a *material change*
  + Lower threshold than for a preliminary prospectus
  + Requirement as per NI 41-101 6.6(1)
* Policy: it is during this gap that investors are actually relying on disclosure to make decisions re: the ensuing distribution of securities
  + If poor results are due to a material change then this should be disclosed but not the fact of it itself
  + Business judgment rule also does not apply to the duty of disclosure, can’t be used to undermine Act
* *Pezim* – express obligation to amend the prospectus when there are changes in the business, operation, assets or ownership of the issuer that would reasonably be expected to have a significant effect on market price or value (as per definition in **s.1(1)**)
* *Kerr* – affirmed above statement in *Pezim*, also no obligation to amend a final prospectus for the modification of material *facts*, just changes

1. **What if the investor changes her mind after getting the final prospectus?**

* Under **s.83(1)(a)** the FP has to be delivered before any purchase contract is entered into, or **(b)** within 2 days of signing the final purchase agreement or it is not binding
* Under **s.83(3)** for it to not be binding the investor must send written notice of intention to withdraw within 2 days of receiving the FP
* Called the 2 day “cool down” period

1. **What if the investor discovers a misrepresentation or omission in the prospectus?**

* Can bring a claim against the issuer under both the common law and **s.131(1)(a)** – easier to make out because of deemed reliance + inclusion of omissions
* Purchaser has a right to damages under **s.131(1)(b)** against a number of parties
  + (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, and
  + (v) every person who signed the prospectus
* Damages are limited under **s.131(10)** to any depreciation in share price resulting from the misrepresentation
* *Pearson v. Boliden* – rescission isn’t meant to protect investors from their own bad deals
  + No damages for depreciation arising before the misrepresentation was revealed

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| **Alternate Prospectus Forms** |

1. **Are there alternative to the long-form prospectus? Yes.**

* Short Form Prospectus - NI 44-101, *Short Form Prospectus Distributions*
  + Available to reporting issuer with a good disclosure record + securities listed on an eligible stock exchange – continuous disclosure information is already available to the market
  + Different than a LFP b/c issuer can engage in some limited marketing activities if the SFP is filed within 4 days of the activity – very useful for underwriters in making a firm commitment
  + SFP includes the following: distribution plan, intended market, proceeds use, rights attached to securities, any proposed acquisition with high likelihood of completion, other relevant information
* Shelf Prospectus - NI 44-102, *Shelf Prospectus*
  + Same eligibility as a SFP
  + Flexibility because the issuer can respond quickly to market opportunities due to the 25 mth. window to close on the offer
  + Only need supplemental information
* Post-Receipt Pricing Prospectus
  + Available for those who don’t qualify for a SFP
  + All issuers + specific transaction + single type of security
  + Shelf life of 90 days
* Multi-Jurisdictional Disclosure System (MJDS) - Companion Policy to National Instrument 71-101, *The MJDS*
  + Lets issuers in CDA + USA access each other’s markets
  + Reduces duplicative regulation in cross-border offerings, issuer bids, take-over bids, business combinations and continuous disclosure/other filings
* Capital Pool Companies
  + Not popular in CDA
  + Can raise a pool of money without setting out specific use of proceeds other than some general investment criteria

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| **(7) What is Materiality?** |

1. **Why do we care about materiality?**

* Efficient Market Hypothesis: rationale for continuous disclosure system
* Relevant information is absorbed by capital markets so quickly that at any given moment the stock price is reflective of the market’s collective assessment of all available information
  + Therefore, in an efficient market, value = price of a security, because its disclosure regime allows for accurate assessment of the underlying value by maximizing information available
  + Christopher C. Nicholls, *Corporate Finance and Canadian Law*
* Correct valuation of a share would be a function of the dividends a corporation would be expected to distribute over the course of its lifetime
  + A. Klein and John C. Coffee Jr., *Business Organizations and Finance*

**s.1(1)** "material change" means,

**(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 in subparagraph (i) 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)** a 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 decision to implement a change referred to in subparagraph (i) made

**(A)** by the directors of the investment fund or the directors of the investment fund manager,

**(B)** by senior management of the investment fund who believe that confirmation of the decision by the directors is probable, or

**(C)** by senior management of the investment fund manager who believe that confirmation of the decision by the directors of the manager is probable;

**s.1(1)** – "material fact" means, when used in relation to securities issued or proposed to be issued, a fact that would reasonably be expected to have a significant effect on the market price or value of the securities;

1. **How do we determine materiality?**

* **Market Impact Test (MIT)** determines materiality for purposes of both terms in Canada:

o   Information is material if it could reasonably be expected to have a significant effect on the market price or market value of a security

* Found in **s.1(1)** of the BCSA w/r/t material change and material fact
* **Reasonable Investor Test (RIT)** is the US Test for materiality:

o   Info is material if there is a substantial likelihood that a reasonable investor would consider it important to an investment decision. \*Note: the reasonable investor need only consider the information, not act on it.

* **Realistically** → the RIT is creeping into the MIT because something that would reasonably be expected to have a significant effect on market price or value is something the reasonable investor would probably consider to be important in making an investment decision,
  + See *Coventree*
* *Sharbern Holdings* – test for materiality: objective from the view of a reasonable investor, fact misstated/omitted is material if there is substantial likelihood if important to investor in making an investment decision (US test!), Emphasis on substantial likelihood; not sufficient if the fact “might” have been considered important, not necessary that the fact would have changed the mind of the investor
* *Coventree* – proper test is MIT but this subsumes RIT

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| **(8) Continuous Disclosure Requirements** |

1. **Is this entity a reporting issuer? If yes, then it is subject to continuous disclosure requirements.**

* Basic concepts: Most common way to qualify is to **(i)** file a prospectus and, **(ii)** receive a receipt from the Executive Director of the Commission
* Policy: Securities law’s objective of investor protection includes making sure they always have access to the information necessary to make investment decisions

**s.1(1)** – reporting issuer means an issuer that

1. has issued securities in respect of which
   * 1. a prospectus was filed and a receipt was issued,
     2. a statement of material facts was filed and accepted, or
     3. a securities exchange take over bid circular was filed

under a former enactment – securities issued under a predecessor Act + got a prospectus = reporting issuer

1. has filed a prospectus or statement of material facts and the executive director has issued a receipt for it under this Act – securities issued this Act + got a prospectus receipt = reporting issuer
2. has any 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 – listed on any stock exchange (TSX for our purposes)
3. is an issuer that has exchanged its securities with another issuer or with the holders of the securities of that issuer in connection with an amalgamation, merger, reorganization, arrangement or similar transaction if one of the parties to the amalgamation, merger, reorganization, arrangement or similar transaction was a reporting issuer at the time of the amalgamation, merger, reorganization, arrangement or similar transaction, - when an entity that is not a reporting issuer combines with one then it becomes a reporting issuer
4. is designated as a reporting issuer in an order made under section 3.2 – regulatory power to deem an entity to be a reporting issuer, for example trading securities on an exchange not recognized by the Act

**e.1)** is a person that is within a prescribed class of persons, or

1. has filed a securities exchange take over 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 section 88 that the issuer has ceased to be a reporting issuer – takeover bid context
2. **What do the continuous disclosure requirements entail?**

* Basic concepts: periodic disclosure of interim + annual financial statements and accompanying reports **and** timely and accurate disclosure of material changes experienced by the issuer
  + Consists of both periodic and timely disclosure requirements
  + Governed by NI 51-102
* Policy: vast majority of trading in securities occurs on secondary markets (between investors, issuer out of picture) and we want those investors to have access to sufficient disclosure
  + Recall objectives of efficient markets and confidence in them
* Also makes it easier for reporting issuers to raise capital b/c they can rely on information already out there
* Role in corporate governance b/c they must disclose ongoing business practices

**s.85** - a reporting issuer must, in accordance with the legislation – RI usually means filed a prospectus + got a receipt

1. provide prescribed periodic disclosure about its business and affairs,
2. provide disclosure of material change – not material facts though
3. provide other prescribed disclosure

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| **Periodic Disclosure Requirements** |

1. **What are periodic disclosure requirements?**

* TSX 🡪 regular, set intervals
  + Must file on an annual basis certain documents containing prospectus-level disclosure
* Financial Statements
  + Annual = within 90 days of the end of the fiscal year, interim = disseminated over 3 mth. periods
  + Part 4 of NI 51-102 – include an income statement, balance sheet, statement of retained earnings + cash flow statement
* Management Discussion & Analysis
  + Companion information to financial statements (same timelines)
  + Explains the results of financial reports through context of the business practices - narrative
  + Must discuss positive + negative development and any material changes
    - Here, material is different than the statute: “Would a reasonable investor’s decision whether or not to buy, sell, or hold securities in your company likely be influenced or changed if the information in question was omitted or misstated? If so, it’s likely material.”
* Annual Information Form – AIF
  + Very detailed disclosure about the issuer - Part 6 of NI 51-102
    - History, operations, financial affairs
  + Same timeline as an annual financial statement + on SEDAR
  + *Re Rim* – directors and officers had a duty to TIM to provide proper oversight to ensure policies, procedures, an disclosure obligations under the Act were complied with
    - Here, problem in that RIM was not providing accurate information in its annual information forms (AIFs)
* Information Circular and Proxy Solicitations Before AGMs
  + All reporting issuers have to distribute a proxy form + information circular to all registered holdings of voting securities in advance of a SH meeting
    - NI 51-102 s.9.1
  + Management circular – done every year after the AGM
  + Dissident circular – group of shareholders requisitions a meeting
* See proxy solicitation below or pg. 33 of the big CAN

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| **Timely Reporting Requirements** |

1. **What are timely reporting requirements?**

* Basic concepts: triggered by a material change in the issuer’s affairs
  + Part 7 of NI 51-102 – must send out an immediate press release + full report to be released within 10 days unless it would be unduly prejudicial to disclose the information as per s.7.1
  + File on SEDAR + public website
* Material Change Report - MCR
  + Disclosure document detailing the material change
  + 51-102F3, “*Material Change Report*”
  + See definition of material change above
    - *Pezim* – materiality means something that reasonably would be expected to have a significant effect on the market price of value of the securities of the issuer
    - *Kerr* - “Material change” is limited to a change in the business, operations or capital
      * his 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.”
    - *Re AiT* - “In the context of a merger and acquisition transaction, it is necessary to establish whether there is sufficient commitment from both parties of the transaction to determine whether a “decision to implement” the transaction has taken place.”
* Policy: market participants are forced to perform pricing and evaluation functions in the most prompt + efficient manner

1. **What about material changes that are contingent or uncertain?**

* The US Probability/Magnitude test has been adopted into CDA
  + This test is to analyze when these events (mergers, lawsuits etc.) become sufficiently crystallized that they are required to be disclosed as material changes
  + This probability is analyzed in relation to its potential significant – as per the reasonable investor test
* *YBM* – applied the P/M test (not binding but helpful
* Business Acquisition Report **–** BAR
  + A reporting issuer must file a BAR within 75 days of an acquisition of a business or related business as per NI 51-102 s.8.2
  + What is a significant acquisition? – 3 tests in s.8.3(2)
    - Asset test, investment test, income test
  + Includes an income statement of retained earnings, cash flow statement, balance sheet, notes to the financial statements and annual financial statements must be audited
* Policy: transparency and comparability in financial data underpinning a significant acquisition

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| **(9) Types of Markets (Primary, Secondary, Exempt) & the Passport System** |

1. **What is the passport system?**

* All CDN regulators except for ON have agreed that one securities regulatory authority can act as the principal regulator for all materials relating to the filer
  + NI 41-101 expressly recognizes this system
  + MI 11-102 + CP 11-102 are designed to implement it
    - Gives a market participant access to the capital markets in multiple jurisdiction by dealing only with its principal regulator + meeting harmonized set of requirements
    - ON can still be a principal regulator

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| **The Primary Market** |

1. **What is a primary market?**

* Basic concepts: where an investor can purchase previously unissued securities through the prospectus process
  + **s.1(1)(a)** definition of a distribution
  + The issuer can sell its own securities or through the services of an underwriter
  + Primary market transactions require a prospectus
    - Example = IPOs

1. **What is primary market liability?**

* Recall, this is when securities are issued under a prospectus
* Can sue either under the common law tort of misrepresentation + the statute (usually both)

**s.131** – someone who has purchased securities issued under a prospectus as part of a distribution from an underwriter or issuer has a right of action in misrepresentation – there are comparable provisions for other relevant documents like the offering memoranda, circulars etc.

1. deemed reliance on the misrepresentation/omission – at common law you must show reliance, statue easier
2. sets out who can be sued – joint and several
   * issuer, security holder in sale from a control block, underwriter, every director at the time of filing, everyone who signs the prospectus, everyone who provided consent to use opinions/reports/information in the prospectus
   * Damages against the underwriter are limited in **s.131(9)** to no more than the total public offering price represented by the portion of the distribution underwritten

**s.131(3)** – right to rescission as a remedy if the purchaser still holds the securities

* only available against the issuer or the underwriter in a firm commitment
* Damages are available against everyone in **s.131(b)** up to the extent of the shares’ depreciation resulting from the misrepresentation/omission
  + Ceiling = purchase price
  + Amount can be reduced in **s.131(10)** if the defendant can show
    - (1) the depreciation in price was caused in all or in part by factors other than its misrepresentation; and
    - (2) that the depreciation in price is not reflective of the depreciation in value experienced by the plaintiff.
* *Kerr* - “*prima facie* measure of damages is the depreciation in the price of the security, which is equal to the price paid less the post-misrepresentation price.”

1. **Are there any defences for primary market liability? Yes.**

**PURCHASER’S KNOWLEDGE OF THE MISREPRESENTATION**

* Issuer’s only defence other than **s.131(1)** depreciation
* **s.131(4)** – complete defence available if the defendant proves that the purchaser knew of the misrep. when she purchased securities

**NO KNOWLEDGE**

* **s.131(5)(a) -** if the defendant can prove that the document containing the misrepresentation was filed without her knowledge or consent
* Not available to the issuer

**WITHDRAWAL OF CONSENT**

* **s.131(5)(b) -** if he or she withdraws consent previously given to a prospectus or takeover bid circular
* Must occur after the issue of a receipt for the prospectus and before the purchase of the securities by the issuer + when the defendant becomes aware of the misrepresentation + provide reasonable general notice of the withdrawal
  + Probably to investors who purchased on basis of the misrep.
* Not available to the issuer

**RELIANCE ON EXPERT**

* **s.131(5)(c) -** if the misrep. is in a portion of the prospectus made on expert authority or a part that purports to be an expert’s report/opinion then the defendant must prove she had no reasonable grounds to believe and did not believe there to be a misrepresentation
* Not available to the issuer

**DUE DILIGENCE**

* **s.131(6)-(7)** provides that the defendant is not liable unless he failed to conduct reasonable investigation to provide reasonable grounds to have no belief that there was a misrepresentation
  + (6) - experts
  + (7) - non-experts
* For experts re: their opinions and reports as well as for other individuals (directors) re: other portions of the prospectus – “non-expertised” parts of the prospectus
* *Kerr* – appears to suggest that the onus is on the plaintiff to prove the defendant didn’t act diligently
  + Purpose of legislation: “It protects investors from the risks of an unregulated market, and by its assurance of fair dealing and by the promotion of the integrity and efficiency of capital markets it enhances the pool of capital available to entrepreneurs.”
  + Not necessary that a plaintiff must have sold their shares and crystallized their loss in order to recover
* *Escott* – assessed reasonableness of defendants’ actions on an objective standard
* *YBM* – moved toward a modified objective test
  + “…it best to consider the reasonableness of the respondents’ diligence and their belief from the perspective of a prudent person in the circumstances. This necessarily entails both objective and subjective considerations including their degree of participation, access to information and skill.”

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| **The Secondary Market** |

1. **What is a secondary market?**

* Basic concepts: allow people to trade in securities upon which a prospectus has previously been filed
  + This is not a distribution because the investors are trading in the “issued” securities of a reporting issuer
    - Example = central depositories
    - Most important = the national exchanges

1. **What is secondary market liability?**

* Policy: same behind continuous disclosure requirements; vast majority of all security trades (94%) take place on the secondary market between investors
* Triggers: **failure to comply with continuous disclosure requirements + public material misrepresentation**
* Basic concepts: can be found in any document required by regulations + voluntary documents
  + Divided into core + non-core documents
    - Easier to make a case for core documents
    - Officers = a prospectus, a takeover bid or issuer bid circular, directors’ circular, a rights offering circular, the AIF, the MD&A, and annual financial statements
    - Officers who are not also directors = a prospectus, a takeover bid or issuer bid circular, directors’ circular, a rights offering circular, the AIF, the MD&A, and annual financial statements, and material change reports and interim financial statements
* *Imax* - leave must be sought to bring secondary market liability before court (good faith + reasonable likelihood of success)

**s.140.3(1)** provides right of action where responsible issuer or person with actual, implied, or apparent authority releases document containing a misrepresentation – reliance need not be proven

**s.140.3(2)** provides right of action where person with actual, implied, or apparent authority on behalf of a responsible issuer makes a public oral statement containing a misrepresentation – reliance need not be proven

**s.140.3(3)** provides right of action where influential person with actual, implied, or apparent authority on behalf of a responsible issuer makes a public oral statement OR releases document containing a misrepresentation– reliance need not be proven

**s.140.3(4) of BCSA:** provides right of action where responsible issuer fails to make timely disclosure of a material change and a person has purchased the issuer’s security between the time of the required disclosure of the change and its actual disclosure

**s.140.4(6) of BCSA** provides due diligence defence

* + Not available to the issuer
  + Damages vary greatly depending on the defendant is
    - These caps do not apply where defendant had knowledge and directly authorized, permitted, acquiesced in making of representation

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| **The Exempt Market** |

1. **What is the exempt market?**

* Basic concepts: recall that issuing new securities is a distribution under **s.1(1)(a)** of the definition
  + This *prima facie* triggers the prospectus requirements
  + BUT – both reporting and non-reporting issuers have the right to issue under a prospectus exemption
    - Sometimes referred to as private placements
  + Recall, even if a distribution doesn’t trigger the prospectus requirements it will trigger the registration requirements
    - Most exemptions overlap but this cannot be assumed
    - See NI 45-103 for registration exemptions
* NO STATUTORY LIABILITY
* NI 45-106 governs when an issuer to investor transaction can take place without a prospectus (priary market)
* NI 45-102 governs resale rules designed to prevent “backdoor underwriting” (secondary market)

1. **Who qualifies for a prospectus exemption?**

**SMALL AND MEDIUM-SIZED ENTERPRISES AND START-UPS**

**Private Issuer Exemption** – NI 45-106 s.2.4

* Policy: need to address the specific problems of start-up, small or medium-sized issuers by giving them more flexibility to generate working amounts of capital
  + Encourages established financial institution creditors to invest in these by minimizing legal barriers
* Definition: NI 45-106 s.2.4(1)
  + Not a reporting issuer or an investment fund – recall that to be an RI you must file a prospectus
  + Closely-held issuers + shares are beneficially owned by no more than 50 persons + this excludes employees or former employees of the issuer and its affiliates
  + Issuer’s constating documents must contain a restriction on share transfer
    - WHY? – gives the issuer control and knowledge re: changes or increases in shareholders
* Who can the shares be issued to?
  + To an enumerated class of persons as per NI 45-106 s.2.4(2)(a)-(l)

1. a director, officer, employee, founder or control person of the issuer – recall presumption about a person/block with more than 20% of the voting rights
2. a director, officer or employee of an affiliate of the issuer – does not include a control person
3. a spouse, parent, grandparent, brother, sister, child or grandchild of a director, executive officer, founder or control person of the issuer – does not include all officers
4. a parent, grandparent, brother, sister, child, or grandchild of the spouse of a director, executive officer, founder or control person of the issuer – does not include the spouse of all officers
5. a close personal friend of a director, executive officer, found or control person of the issuer – does not include all officers
6. a close business associate of a director, executive officer, founder or control person of the issuer,
7. a spouse, parent, grandparent, brother, sister, child or grandchild of the selling security holder or of the selling security holder’s spouse
8. a security holder of the issuer,
9. an accredited investor
10. a person of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, person described in paragraphs (a)-(i) – another corporation
11. a trust or estate of which all the beneficiaries or a majority of the trustees or executors are person described in paragraphs (a)-(i), or
12. a person that is not the public – a private issuer can issue to persons not enumerated if it can satisfy this requirement that they are not member of the public

* Policy: can issue to these people because they are in a position to know the issuer + find out about it without requiring the information contained in a prospectus
  + Public is of course not in this position – who is the public?
  + *Securities and Exchange Commission v. Ralston Purina Co.* - the “need to know test”
  + *R v.* *Pipegrass* – the “common bonds test”
    - When someone is not a member of the public because they have common bonds of interest/association with the issuer
  + WHY? - Mark R. Gillen, *Securities Regulation in Canada*
    - Unlikely that a private issuer will take advantage of these people + access to information

**Friends, Family, and Business Associates Exemption** – NI 45-106 s.2.5

* Policy: need to address the specific problems of start-up, small or medium-sized issuers by giving them more flexibility to generate working amounts of capital
  + Assume they are in a position to know the issuer + find out about it without requiring the information contained in a prospectus
* Basic Concepts: can either a private issuer (see above) + a reporting issuer
  + Different than the private issuer exemption because there is no restriction on to whom the securities can be sold
  + Not available in ON
    - **Founder, Control Person, and Family** as per NI 45-106 s.2.7 is ON’s more tightly circumscribed version of this exemption
    - Excludes “close person friends” + “close business associates”
  + If an issuer distributes under this exemption then must file a report as per 45-106F1 within 10 days
* Definition: NI 45-106 s.2.5(1)
  + Can sell securities to the following people + in any amount + without providing disclosure
* Who can the securities be issued to?

1. a director, executive officer or control person of the issuer, or of an affiliate of the issuer, - does not include all officers
2. a spouse, parent, grandparent, brother, sister, child or grandchild of a director, executive officer or control person of the issuer, or of an affiliate of the issuer, - does not include all officers
3. a parent, grandparent, brother, sister, child or grandchild of the spouse of a director, executive officer or control person of the issuer or of an affiliate of the issuer, - does not include all officers
4. a close personal friend of a director, executive officer or control person of the issuer, or of an affiliate of the issuer, - close is a qualitative assessment to see if ‘x’ is in a position to the capabilities and trustworthiness of ‘y’ with a focus on length and depth of relationship
5. a close business associate of a director, executive officer or control person of the issuer, or of an affiliate of the issuer, - close is a qualitative assessment to see if ‘x’ is in a position to the capabilities and trustworthiness of ‘y’ with a focus on length and depth of relationship
6. a founder of the issuer or a spouse, parent, grandparent, brother, sister, child, grandchild, close personal friend or close business associate of a founder of the issuer,
7. a parent, grandparent, brother, sister, child or grandchild of a spouse of a founder of the issuer,
8. a person of which a majority of the voting securities are beneficially owned by, or a majority of the directors are, persons described in paragraphs **(a)** to **(g)**, or – another corporation

**Safe Security Exemptions** – NI 45-106 s.2.34-2.38

* Policy: these securities are so safe that a prospectus is redundant
  + Bonds, debentures, other indebtedness of governments, municipal corporations, ON school boards etc.

**Government Incentive Security Exemption** – OSC 45-501

* GIS is security or unit/interest in partnership which invests in a security issued by a company which has agreed to renounce amounts in favour of the holder that will constitute expenses for Canadian exploration, development, or oil gas and property
* Policy: tax incentives to promote activities of junior exploration issuers

**WEALTHY/SOPHISTICATED INVESTOR EXEMPTIONS**

**Accredited Investor Exemption –** NI 45-106 s.2.3

* Policy: these market participants have the investment expertise/financial resources such that they do not need a prospectus before make an investment decision
* Basic concepts: this exemption depends on the purchaser
  + Neither registration or prospectus requirements apply here
  + Includes financial institutions such as banks, loans or trust corporation, insurance companies, credit unions, appropriately regulated pension and mutual funds
  + Individuals can also qualify by meeting one of three tests
  + Must submit a risk acknowledgment + report trade to regulators within 10 days

1. Financial assets test
2. Net asset test
3. Income test

**Minimum Amount Investment Exemption –** NI 45-106 s.2.10

* Basic concepts: Focus on acquisition cost of the securities of a single issuer to the purchaser + full payment in cash at the time of trade ($150K)
  + Purchase must act as principal
* Policy: if an investor is prepared to pay such a high amount = an assumption that she is sophisticated enough to make such a decision without a prospectus

**PRE-EXISTING RELATIONSHIP EXEMPTIONS**

**Stock Dividends –** NI 45-106 s.2.31

**Business Combinations/Reorganizations –** NI 45-106 s.2.11

* Policy: no need to add to the difficulties of an issuer in financial distress
* Basic concepts: if a trade in securities is in connection with an amalgamation, merger, reorganization, or arrangement + then neither the dealer registration requirements or the prospectus requirements apply + if it meets one of the following three requirements:
  + Done under statutory procedure
  + Described/disclosed in an appropriate circular as approved by security holders
  + Dissolution or winding-up of an issuer

**Conversion/Exchange of Securities -**  NI 45-106 s.2.42

* Basic concepts: a security holder executes the conversion or exchange feature of their securities + this triggers the issuing of new/underlying securities
  + Give prior written notice to the regulator who can object within 10 days
* Policy: the shareholder already knows enough about the issuer to make an informed decisions

**Rights Offerings –** NI 45-106 s.2.1

* Basic concepts: issuer grants rights to its security holders to acquire additional securities
  + Issuer must given notice to the shareholders and regulators as per a rights offering circular under NI 45-101
  + Give prior written notice to the regulator who can object within 10 days
  + Only if this would result in less than 25% of the outstanding class (not a major financing)
    - As per BLG, *Securities Law and Practice*
* Policy: a means of alternative financing

**Trades to Employees –** NI 45-106 s.2.24

* Basic concepts: participation must be voluntary
  + Distribution can be by either the issuer or a control person + made to its employees or those of its affiliates
  + Employees includes executive officers, directors and consultants
* Policy: basis for incentive plans
  + Equity participation as remuneration

**Discretionary Exemptions – s.76, *BCSA***

* Basic concepts: can apply to the regulator for a transaction specific exemption from prospectus requirements
* Policy: focus on investor protection to ask whether this would be prejudicial to the public interest

**BC INSTRUMENTS**

**Existing Security Holders -** BCI 45-534

**Crowd-Funding –** BCI 45-535

**Investment Dealer –** BCI 45-536

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| **Resale Restrictions of Securities Purchased on the Exempt Market** |

1. **What happens when the original purchaser who qualified for an exemption wants to resell?**

* Basic concepts: there must be full disclosure before securities move from the exempt market to the open market
* Policy: to prevent backdoor underwriting + protect subsequent investors

**RESTRICTED (HOLD) PERIOD -** NI 45-102 s.2.5

* NI 45-102 s.2.3 – s.2.5 applies to securities bought under the following exemptions:
  + Accredited investor
  + Family, friends and business associates
  + Affiliates
  + Offering memorandum
  + Minimum amount investment
* **Note:** it does not apply to the private issuer exemption
* NI 45-102 s.5(1) – if the following conditions in sub. 2 are not satisfied then the first trade is deemed to be a distribution
  + Issuer is/has been a reporting issuer for 4 mths. immediately preceding the trade,
  + At least 4 months have elapsed since the distribution date (original trade), - not required for the seasoning period (more restrictive)
  + Legend requirements have been complied with + date of distribution recorded (original trade), - not required for the seasoning period (more restrictive)
  + cannot be a control distribution,
  + No unusual effort is made to prepare the market or create additional demand
    - BLG, *Securities Law and Practice* says an unusual effort to prepare the market/create a demand has taken place if one of the following activities is engaged in by or on behalf of the vendor
      * Dissemination to prospective purchasers of material soliciting orders to purchase (unless it’s just a letter of communication re: identifying securities and advising their availability)
      * Formation of a selling group to coordinate the efforts of more than one registrant to effect the sale
      * Implementation of any plan to manipulate or adjust the market price of securities (other than price stabilization)
      * Marking of a sale to a purchaser with whom the vendor is not dealing with at arm’s length to put the purchaser in a position to resell the securities free of constraints
      * Re control block sales if there is a market for the securities then making a sale other than a sale made in the market in which securities of the particular class are customarily traded and in a manner customary in the market/sale made under an exemption
  + No extraordinary commission or consideration is paid to a person/company in respect of the trade,
    - BLG, *Securities Law and Practice* says that an extraordinary commission or consideration is paid in respect of a trade if the trade is effected….
      * On an agency basis + aggregate compensation paid to the registrant through whom the securities are sold is greater than that which is customary in agency transactions of a similar size/similar securities in the relevant market (fair market value comparable transaction)
      * Through a stock exchange or other market in which it is customary for registrants to trade on an agency basis but the securities are instead sold by the vendor to another registrant acting as principal if the sale was pre-arranged to avoid operation of clause (a)
      * Through the sale of securities by the vendor to a registrant and the excess of the then market value of the particular securities over the price paid is greater than that which is customary in principal transactions of similar size/similar securities in the relevant market
  + If the selling security holder is an insider or officer of the issuer she must have no reasonable grounds to believe the issuer is in default of securities regulation

**SEASONING PERIOD –** NI 45-102 s.2.6

* NI 45-106 s.2.4 – s.2.6 applies to securities bought under the following exemptions
  + Private issuer
  + Rights offering
  + Business combination and reorganization
  + Takeover bid + issuer bid
  + Employee, executive officer, director, consultant
* Unless the conditions in s.2.6(3) are satisfied then the original trade is deemed to be a distribution
  + Issuer is/has been a reporting issuer for 4 mths. immediately preceding the trade,
  + Cannot be a control distribution,
  + No unusual effort is made to prepare the market or create additional demand
    - BLG, *Securities Law and Practice* says an unusual effort to prepare the market/create a demand has taken place if one of the following activities is engaged in by or on behalf of the vendor
      * Dissemination to prospective purchasers of material soliciting orders to purchase (unless it’s just a letter of communication re: identifying securities and advising their availability)
      * Formation of a selling group to coordinate the efforts of more than one registrant to effect the sale
      * Implementation of any plan to manipulate or adjust the market price of securities (other than price stabilization)
      * Marking of a sale to a purchaser with whom the vendor is not dealing with at arm’s length to put the purchaser in a position to resell the securities free of constraints
      * Re control block sales if there is a market for the securities then making a sale other than a sale made in the market in which securities of the particular class are customarily traded and in a manner customary in the market/sale made under an exemption
  + No extraordinary commission or consideration is paid to a person/company in respect of the trade,
    - BLG, *Securities Law and Practice* says that an extraordinary commission or consideration is paid in respect of a trade if the trade is effected….
      * On an agency basis + aggregate compensation paid to the registrant through whom the securities are sold is greater than that which is customary in agency transactions of a similar size/similar securities in the relevant market (fair market value comparable transaction)
      * Through a stock exchange or other market in which it is customary for registrants to trade on an agency basis but the securities are instead sold by the vendor to another registrant acting as principal if the sale was pre-arranged to avoid operation of clause (a)
      * Through the sale of securities by the vendor to a registrant and the excess of the then market value of the particular securities over the price paid is greater than that which is customary in principal transactions of similar size/similar securities in the relevant market
  + If the selling security holder is an insider or officer of the issuer she must have no reasonable grounds to believe the issuer is in default of securities regulation
* Basically, if the reporting issuer has been so for at least 4 mths. then the securities can be resold at anytime

**CONTROL DISTRIBUTIONS**

* Basic concepts: recall that a sale by a control person is a distribution as per **s.1(1)(c)** of the definition
  + Different than the hold and seasoning periods because those original trades are merely deemed to be dispositions
  + Applies if the security holder is a control person who purchased her securities on the exempt market + now wants to sell them
  + Must complete form 45-102F1 + file on SEDAR 7 days before first trade
* Four options: file a prospectus, apply for a discretionary exemption, find a purchaser who qualifies for an exemption, or satisfy the resale conditions in NI 45-102 s.8
  + Issuer who originally issued the restricted securities is or has been a reporting issuer for 4 mths.
  + Control person who is selling has held the securities for at least 4 mths.
  + No usual effort made to prepare the market or create additional demand (see above)
  + No extraordinary commission or consideration is paid to a person/company in respect of the trade (see above)

1. **What are the consequences of issuing shares without a prospectus if the exemption conditions are not met?**

* *Jones v. FH Deacon Hodgson Inc*., - such a breach is fundamental to the statutory scheme of protecting investors from unauthorized trading
  + If prospectus exemption conditions are not met the distribution is illegal and can be set aside at any time

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| **(10)** **Self Regulatory Organizations & National Exchanges** |

1. **What is an SRO?**

* Basic concepts: primary regulators (provincial securities’ commissions) delegate authority to second-level regulators (SROs) to regulate the standards/procedures of CDN capital markets – ongoing oversight
* Defined in securities legislation
  + An SRO is a “person or company that is organized for the purpose of regulating the operations and standards of practice and business conduct, in capital markets, of its members and their representatives with a view to promoting the protection of investors and the public interest.”
  + Includes exchanges, alternative trading systems (ATSs), and quotation systems
* Investment Industry Regulatory Organization of Canada (IIROC) is the most important SRO
  + Retained by many marketplaces

1. **What is a national exchange?**

* Basic concepts: many exchanges in CDA where secondary market trading occurs
  + Recall, issuer is out of the picture + prospectus has already been filed
* Companion Policy to NI 21-101, *Marketplace Operation*
  + Regulates all marketplaces operating in CDA + distinguishes between different marketplace participants
* **TSX** 🡪 largest exchange in CDA that facilitates trading between reporting issuers who want market liquidity for their securities
  + Must file for listing + most onerous requirements
  + Largest companies list here
* **TSX-V** 🡪 this is the venture exchange
  + Less onerous requirements than the TSX
  + WHY? – smaller size of companies listed here
* **Bourse** **de** **Montréal** 🡪 solely a derivative exchange
* **CNSX** **+** **Equitas** 🡪alternative exchange designed to compete with the TSX
* **QTRSs** 🡪allows for registered dealers to post offers + sell information
  + Dealers can then also sell the securities themselves
* **TSX** **Private** **Markets** 🡪 designed to facilitate trading in securities of a non-reporting issuer
  + Example = those trading on the exempt market

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| **(11) Corporate Governance** |

1. **Where is the overlap between securities regulation and corporate law?**

* Division is not a bright-line, overlap in four areas

1. Proxy solicitation process
2. Corporate governance disclosure
3. Officer certification requirements
4. Audit committee independence

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| **#1 – Proxy Solicitation** |

1. **What is a proxy?**

* A proxy is a “a completed and executed form of proxy by which a SH has appointed a person as the security holder’s nominee to attend and act for the security holder and on the security holder's behalf at a meeting of securities holders.”
  + This same definition is found in **s.116** + s.1.1 of NI-51-102
* Basic concepts: when mgmt. of a reporting issuer gives notice of a meeting it must also “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.”
  + s.9.1(1) of NI 51-102
  + When? for every AGM + special meeting called by the issuer
* This proxy solicitation has to come with an information circular – management circular – those sent by shareholders are called dissident circulars (no need if less than 15 being contacted)
  + s.9.1(2) NI 51-102
* *Re Pacifica Papers* – under **s.150(1)** no proxies can be solicited before the information/proxy circular/notice has been distributed, BCCA said this isn’t enough to invalidate the support agreements as they aren’t even binding, always revocable
  + As per the statute, no firm view so simultaneous compliance is probably allowed
* Policy: as per Canada, Senate, *Report of the Senate Standing Committee on Banking, Trade, and Commerce on Corporate Governance* effective corporate governance is grounded in ongoing SH involvement which is founded in continued communication between company and its shareholders
* How shareholders exercise their voice as opposed to the exit
  + Can use both to signal a lack of confidence but voice is more preferable and precise

1. **How does the issuer communicate with beneficial shareholders when soliciting proxies?**

* NI 51-102 s 9.2(2)–provides exemptions to circular requirements for solicitations made to the public by broadcast, speech, or publication where the solicitation is to <15 shareholders
* Registered shareholder = legal owner of the share
  + Shareholder rights (voting) are exercised on behalf of registered shareholders
* Beneficial shareholder = in the ownership of the intermediary but held for the benefit of the purchaser
  + Improved communication via NI 54-101
  + NOBO – shareholder does not object to being identified as the beneficial owner of the registered shareholder’s stock
    - Under NI 54-101 the issuers can send material directly to NOBOs
  + OBO – does object
* *Telus* – example of proxy process used in a proxy contest
  + Both a management circular + dissident circular were distributed

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| **#2 – Corporate Governance Disclosure** |

1. **Why do we provide guidance on corporate governance practices?**

* Basic concepts: in CDA corporate governance practices are voluntary but mandatory disclosure for reporting issuers to show how they are meeting the guidelines in lieu of the specific standard
  + “Comply or explain” model in NP 58-201
* Policy: balance between providing investor protection and fostering fair and efficient capital markets + confidence in them

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| **#3 – Officer Certification Requirements** |

1. **How are corporate officers held accountable for the quality and accuracy of the issuer’s disclosure?**

* Basic concepts: a “certification of disclosure” aims to hold them accountable
  + Governed by NI 52-109 which deals with officer certification and sets out disclosure and filing requirements for all reporting issuers
  + CEO/CFO (or certifying officers) to personally certify that there are no misrepresentations, financial statements fairly present the financial condition of the issuer, that any deficiencies in internal control/fraud involving managers/significant employees has been disclosed to the auditor/audit committee etc.
    - Called *material weaknesses*
  + Sanctions in CP 52-109
    - Quasi-criminal, administrative, or civil proceedings
* Fair presentation: a quantitative and qualitative assessment of whether the financial statements provide a materially accurate and complete picture of the issuer’s financial conditions, results of operations, cash flow
  + Beyond confirming that the documents comply with GAAP
  + *Kripps* – GAAP is just a tool + when it doesn't result in fair presentation then it needs to be revised
    - Quotes *ter Neuzen*: if a standard practice fails to adopt **obvious and reasonable** precautions which are readily apparent to the ordinary finder of fact, then it is no excuse for a practitioner to claim that he or she was merely conforming to such a negligent common practice.”
  + *CNR v. Vincent* – question of law as to what the duty of care in a certain relationship
* Policy: improve quality, reliability, and transparency of annual/interim filings + other materials submitted under securities legislation

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| **#4 – Audit Committee Independence** |

1. **Why does an audit committee have to maintain its independence?**

* Basic concepts: certain oversight functions re: financial recording/reporting
  + As per corporate law, their duty is to the shareholders not the corporation
  + ‘Audit capture’ is a problem where consulting services to corporate clients far exceeds the audit fees
    - Not independent + not effective gatekeepers
  + Governed by NI 52-110
    - Committee that has oversight + made up of independent members
    - s.1.4(3) sets out relationships with an issuer that would reasonably interfere with the auditor’s exercise of independent judgment + list of related ppl. who can’t be on the audit committee

1. **Other than independence, what requirements must members of the audit committee meet?**

* Financial literacy 🡪 able to read and understand financial statements of complexity similar to the issuer’s
* Independent legal counsel 🡪 right to retain as such
* Financial risk mitigation 🡪 charged with this on behalf of the board + review every set of financial statements prior to publication

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| **(12) Insider Trading** |

1. **What is the background to insider trading?**

* Policy: stems from the 1965 Kimber Report, distinguish between two situations
  + An insider can buy and sell securities in her company
  + An insider cannot use confidential information acquired by virtue of her position to make profits by trading in the securities of her company
  + Result = full, public disclosure of all transactions effected by insiders + sanctions
* Based on “equal access” to information and disallowing risk-free trades

1. **What is legal insider trading?**

* Basic concepts: insider trading can be legal if the trader is a reporting insider
  + **Insider + no access to material non-public information (MNPI) + files an insider trading report**

**s.(1)** – defines insider as

1. a director or officer of an issuer – not necessary to have a title
2. a director or an officer of a person that is itself an insider or subsidiary of an issuer – person is a corporation here, subsidiary includes all chains of corporations under control of the issuer as per >50% of voting shares = an issuer controlled by another issuer
   * + - Control defined in **s.1(3)** – person controls an issuer if
       - **(a)** it holds the voting securities by/for benefit of that person, and
       - **(b)** if the voting rights attached to those securities were exercised then the person could elect the majority of issuer’s directors
3. a person that has
   * 1. beneficial ownership of, or control or direction over, directly or indirectly, or
     2. a combination of beneficial ownership, and control or direction over, directly or indirectly.

securities of an issuer carrying more than 10% of the voting rights attached to all the issuer’s outstanding voting securities, excluding for the purpose of the calculation of the percentage held, any securities held by the person as underwriter in the course of a distribution – a significant shareholder

1. an issuer that has purchased, redeemed or otherwise acquired a security of its own issue, for so long as it continuous to hold that security
2. a person designated as an insider in an order made under section 3.2, or
3. a person that is in a prescribed class of persons
4. **What does an insider have to do to trade legally?**

* Basic concepts: a reporting insider must file an insider trading report (ITR)
  + Under NI 55-104 s.3.2 an insider has to disclosure her beneficial ownership/control over securities of the issuer within 10 days of becoming insider/change
  + Subsequent changes in 5 days

1. **Who is a reporting insider?**

* Basic concepts: not all insiders have to report, just drawing a line between those who can and cannot trade
  + Defined in NI 55-104, then these insiders must file an insider profile on SEDI + an ITR as a signal to the market under NI 55-102, then NI 55-101 sets out exemptions - major exception is a director, CEO, CFO or COO of a subsidiary of the issuer that is not major
    - A director, CEO, CFO or COO of the reporting issuer, of a “major subsidiary” of the reporting issuer, or of a “significant SH” of the reporting issuer – major means over 30% of the assets/revenue of the reporting issuer
    - A significant SH of the reporting issuer – more than 10%
    - A person “responsible for a principal business unit, division or function of the reporting issuer”
    - An individual who performs functions similar to functions performed to those listed above
    - the reporting issuer itself
    - An insider who, in the ordinary course of biz, receives or has access to information as to material facts or material changes concerning the reporting issuer before the material facts or material changes are generally disclosed; and (ii) directly or indirectly exercises, or has the ability to exercise, significant power or influence over the business, operations, capital or development of the reporting issuer;
* *Re British American Oil Company Ltd.* - “…in the complex of companies there are only certain groups of individuals who are privy to what might be viewed as executive or policy knowledge which would affect their market decisions.”

**s.2(2) + (3)** – imposition of retroactive reporting requirements on directors + officers of entities that becomes insiders

1. **When is insider trading illegal?**

* Basic concepts: **someone in a special relationship + with the reporting issuer + has knowledge of a material fact or change + this information has not been generally disclosed**
* Three elements = special relationship, traded on material information, not generally disclosed
* **s.57.2(2)** – prevents purchase or trading of the issuer’s securities where a person is in a special relationship with the issuer + knows of a material fact/change with regards to the issuer which has not been generally disclosed
  + General prohibition against tipping

**SPECIAL RELATIONSHIP**

**s.3** – defines SR

1. a special relationship includes insiders (see above), affiliates, and associates – affiliated if one issuer is a subsidiary of the other or each is controlled by the same issuer as per **s.1(2)**
2. of the issuer
3. of a person proposing to make a takeover bid of the issuer;
4. of a person proposing to become a party
   1. to some sort of business combination with the issuer, or
   2. acquire a substantial portion of its property

**b)** a person engaging in or proposing to engage in any business or professional activity with or on behalf of the issuer or with persons in (a) is in a special relationship with the issuer – lawyers, accountants, experts

**c)** expands special relationship to cover employees/directors/officers of the issuer or of anyone in (a) – (b)

**d)** someone who knows a material fact or change of the issuer from a previous special relationship is also in a SR now

**e)** tippee liability is if the tippee knew of a material fact or change, having acquired the knowledge from another person at the time when

1. that person was in a special relationship with the issuer and,
2. knew or reasonably ought to have known the other person was in a SR with the issuer

* *Azeff* – how far does this special relationship extend outwards with the passing of information?
  + Brokers will have it but none of the clients they then advised were b/c they shouldn’t have reasonably ought to have known, this is just what they pay their brokers to do: advise

**MATERIAL INFORMATION**

**The information on which the insider makes the trade must meet the standard of materiality**

* *Pezim* – fact does not need to be a material change in order to be a material fact
* *Re Donnini* – brings the P/M test from *Re Sheridan* into CDA
  + M of the material fact in terms of share value determines how much P of it occurring is required for a proposed transaction to be a material fact
  + Market impact is CDN statutory – “would reasonably be expected to have a significant effect on the market price or value of securities” + now can use US reasonable investor test to analyze this

**GENERALLY DISCLOSED**

**Not defined in the legislation, look to case law**

* *Harold P. Connor* – information must have been disseminated to the general public + public must have been given adequate time to digest that information given its nature/complexity
* This has been adopted by NP 51-201

1. **What about tipping?**

* Basic concepts: this shit is also illegal AF
* **s.57.2(3)** – where a person is in a special relationship with the issuer and knows of a material fact or fact with regards to the issuer which has not been generally disclosed, they must not inform another party of that MNPI
  + Tippee liability found in **s.1(1)(e)** of the definition of special relationship
* Three elements: tipper (x) must be in a special relationship with the reporting issuer + x informs the tippee (y) of a material fact or change other than in the necessary course of business + this information has not been generally disclosed
  + Tipper will always be guilty, even if the tippee did not know about the tipper’s special relationship
  + Tippee will be guilty only if she knew that the tipper was in a special relationship
* *Re Rankin* – example of how difficult it is for enforce insider trading and tipping rules

**TIPPEE BECOMES THE TIPPER**

* As per **s.3(e)** the tippee is also in a special relationship with the issuer because he or she got material information from someone in a special relationship + knew/ought to have known about the special relationship
* THEN, now that the tippee is in a SR, the tippee who then passes this MNPI along is now a tipper

1. **Are there any other prohibitions? Hells to the YES.**

* **s.57.2(4)** – someone who is engaged in a takeover or business combination with the issuer + knows of a material fact or change that has not been generally disclosed cannot inform another party of that information – unless it is in the ordinary course of business
* **s.57.2(5)** – if someone is in a special relationship with the issuer and knows of a material fact/change then this person cannot recommend to another to engage in a purchase or trade of the issuer’s security – the recommendee is not liable b/c did not receive any MNPI

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| **(13) Defences to Insider Trading and Tipping** |

1. **Are there any statutory defences? – Mhmmmm you know it.**

**s.57.4** provides defences to the abovementioned offences, including:

1. **Reasonable belief in other party’s knowledge**: a person does not contravene **57.2(2)** where one hasreasonable belief of other party’s knowledge of material fact/changes – insider trading
2. a person does not contravene **57.2(3) or (4)** where one has reasonable belief of other party’s knowledge of material fact/change – tipping/takeover
3. a person does not contravene **57.2(2)** where transaction is entered under written automatic dividend reinvestment plan, purchase plan, or as the result of a written legal obligation entered prior to obtaining knowledge of the material fact/change or MOI (material order information) – insider trading
4. a person does not contravene **57.2(2)** where transaction is entered by an agent under specific unsolicited instructions of principal; where agent solicited instructions prior to knowledge of material fact/change or MOI; or where agent/trustee enters transaction because of principal’s involvement in written automatic dividend reinvestment plan, purchase plan, or written legal obligation – insider trading
5. corporate persons do not contravene **57.2(2) or (5)** if no individual involved has knowledge of material fact/change or MOI or is acting on recommendation/encouragement of someone who does – insider trading/recommending

**s.136.2** provides relief from liability for contravention of **s.57.2** – a general due diligence defence to show that it was reasonable to believe the information had been generally disclosed

a person is not liable if after a reasonable investigation occurring before the person

1. entered the transaction,
2. informed another person of material fact/change, or
3. recommended/encouraged transaction,

the person had no reasonable grounds to believe that material fact/change had not been generally disclosed – “reasonable grounds” signals due diligence

* Recall *Harold P. Connor* – test for when something has been generally disclosed: information must have been disseminated to the general public + public must have been given adequate time to digest that information given its nature/complexity
* *Charterhouse* – a warning letter isn’t enough to ground this defence

1. **Are there any common law defences? – Yes.**

* Necessary Course of Business – tipping in **s.57.2(3)**
  + NI 51-201 – selective disclosure where an issuer discloses MNPI to a variety of people
    - Communications with vendors, suppliers, officers, employees, parties to negotiations, lenders, legal counsel, auditors, government agencies etc.
  + When this happens, onus on RI to ensure the recipient know they cannot buy or sell until such MNPI is generally disclosed
  + *Royal Trustco* – disclosing information to a SH as part of an attempt to defend a takeover bid is not in the necessary course of business, defence not available
* Reasonable Mistake of Fact - tipping in **s.57.2(3)**, insider trading in **s.57.2(2)**
* *Fingold* – this defence requires the defendant to prove that she “had a genuine reasonable belief” that the information in question was not material’
  + In other words, did she believe that this information would have substantial effect on the company’s share price? – subjective belief
  + Then, show on a BoP that this was a reasonable belief – objective indicia
* *Harper* – discussion of the “reasonableness standard”
  + If the results are objectively material then the defendant needs to show on a BoP that she didn't think that they were + that this belief was reasonable

1. **How can people and entities pre-empt insider trading issues? Best practices.**

* Blackout period: ban on trades for 24 hours after the MNPI is no longer material or made public to prevent affiliates or partners from triggering insider trading provisions
* Chinese wall: internal separations within entities through policies and procedures to protect the flow of information & thereby protect employees/management from insider trading
* Grey list: list of stock that are ineligible for trade by an investment bank’s risk arbitrage division that is composed of firms working with the bank that the bank probably has inside information about

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| **(14) Change of Control Transactions – Takeover Bids** |

1. **What is a takeover bid?**

* Policy: in CDA takeover bids are seen good for the economy and so legislation is designed to incentivize them
  + WHY? – we want to see resources in the hands of effective management
  + Seeks to protect the target shareholders by regulating the buyer and not the seller (this is not a trade)
  + 3 focuses on shareholder treatment: equality, disclosure, timing
* Basic concepts: occurs when a bidder corporation makes an offer to purchase the outstanding shares of a target corporation
  + Hostile 🡪 occurs when target management and directors do no invite and are not generally in favour of the bid
  + Friendly bids 🡪 occurs when the target management approves of the takeover and cooperates with the bidder in selling the bid to target shareholders
* Defined in s.1.1 of MI 62-104
  + An offer to acquire outstanding voting securities or equity securities of a class made to one or more persons, any of whom is in the local jurisdiction or whose last address as shown on the books of the offeree issuer is in the local jurisdiction, where the securities subject to the offer to acquire, together with the offeror’s securities, constitute in the aggregate 20% or more of the outstanding securities
  + 20% or more threshold can be met by aggregating the holdings of multiple parties acting “jointly and in concert”
* “Jointly and in concert” is defined in s.1.9(1) of MI 62-104 – a question of fact

1. the following are deemed to be acting jointly or in concert with an offeror:
   * 1. a person that as a result of any agreement, commitment or understanding with the offeror or with any other person acting jointly or in concert with the offeror, acquires or offers to acquire securities of the same class as those subject to the offer to acquire;
     2. an affiliate of the offeror
2. the following are presumed to be acting jointly or in concert with an offeror:
   * 1. a person that, as a result of any agreement, commitment or understanding with the offeror or with any other person acting jointly or in concert with the offeror, intends to exercise jointly or in concert with the offeror or with any person acting jointly or in concert with the offeror any voting rights attaching to any securities of the offeree issuer
     2. an associate of the offeror
3. **How does one launch a bid?**

* Two means of commencing a bid

1. Deliver the bid to the target company’s shareholders
   1. Bid = takeover bid circular + a marketing document to convince SHs to accept the bid
   2. Favours the target board
2. Publish an announcement of the bid in a major daily newspaper
   1. s.2.10(2) of MI 62-104 provides that if second method is chosen, bidder must also file and deliver a copy of the bid to target’s office
   2. s.2.10(1) of MI 62-104 says this copy must be accompanied by a takeover bid circular
   3. Favours the offeror b/c every formal bid must remain open 35 days (now 105) + this starts from when the bid is commenced

* Minimum Deposit Period
* Old rules = offerees get at least 35 days to consider their bid and deposit their securities under the terms
  + Cannot take up or actually purchase any securities deposited under the TOB
  + Allows the board to assess and respond to the bid
  + SH can tender and withdraw up until expiry of this period

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| **#1 – Equality** |

1. **What is involved in this obligation of equality?**

* Basic concepts: governs the bidder’s behaviour b/c designed to protect the target shareholders
* *Report of the Committee To Review the Provisions of the Securities Act (ON) Relating to Take-Over Bids and Issuer Bids* – goal of even-handed treatment of shareholders

**PRO RATA TAKEUP**

* A bidder may offer to acquire less than 100% of the shares and then more than the desired number are actually tendered
  + Then the bidder purchases the same proportion of shares from all tendering SHs according to the number of shares that each SH tendered
* s.2.26(1) of MI 62-104provides that if the bidder seeks a partial bid for less than 100% of the outstanding shares of the target, shareholders are assured that the bidder will take up the shares on a ***pro rata*** basis so that the bidder purchases the same proportion of shares from all tendering shareholders according to the number of shares each shareholder tendered (rather than first-come, first-serve on tendered shares)
  + *Pro rata* takeup

**IDENTICAL CONSIDERATION**

* Identical consideration 🡪 all holders of the target’s securities shall receive identical consideration
  + No collateral benefits
* s.2.24 of MI 62-104**:** offeror, or any person acting jointly or in concert with offeror, must not enter into any collateral agreement, commitment or understanding that has the effect, directly or indirectly, of providing a security holder of the offeree issuer with consideration of greater value than that offered to the other security holders of the same class of securities.
  + Collateral benefit prohibition
* s.2.23 of MI 62-104:provides that all holders of the target’s securities shall receive identical consideration
  + Prevents shareholders who tender early from missing out on profits later if the offer price is increased after they tender – also prevents side deals from being made with particular shareholder
  + Identical consideration
* s.2.4(1) of MI 62-104:provides that if, within 90 days immediately before a takeover bid, an offeror acquired securities of the class subject to the bid in a transaction not generally available on identical terms to holders of that class of securities, must offer at least the consideration paid for those securities
  + Must pay at least as much in takeover bid
  + Identical consideration

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| **#2 – Disclosure** |

1. **What disclosure obligations are on the target board and the bidder?**

* Basic concept: ensure that shareholders have full information about the bid and bidder
* s.2.8 of MI 62-104provides that all shareholders in a particular jurisdiction are entitled to receive the bid documents
* s.2.12(1) of MI 62-104provides that if there is any variation in the terms of a bid, bidder must deliver **notice of variation** to every person or company to whom the takeover bid circular or issuer bid circular was required to be delivered and whose securities were not taken up at date of variation
* s.2.17(1) of MI 62-104provides within 15 days of a bid has been commenced, target’s board of directors must provide a **director’s circular** to its shareholders containing a recommendation to either accept or reject the bid (directors are also permitted not to make a recommendation).

**EARLY WARNING SYSTEM**

* When someone acquires control of 10% or more of the voting/equity securities of an issuer…
  + Must file a press release, same for every subsequent 2% increase + report with the regulators
* Policy: gives the target board a heads up re: creeping takeover bids + lets SHs get in touch with each other

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| **#3 – Timing** |

1. **What timing requirements are in place to protect target shareholders?**

* s.2.28 of MI 62-104provides that a takeover bid must remain open for at least 35 days to provide target holders with time to consider the offer
  + Minimum deposit period – subject to the new rules
* s.2.29 of MI 62-104bidder cannot take up or accept any shares for purchase deposited by tendering shareholders during the 35-day period
* s.2.32(2) of MI 62-104provides that once shares are taken up they must be paid for within 3 business days + all tendered shares must be taken up with 10 days
* s.2.32(4) of MI 62-104provides that a bidder may extend the offer period if it takes up all of the shares tendered during that period

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| **(15) Changes to Takeover Bid Requirements** |

1. **What three key amendments are in place?**

* Policy: response to concern over imbalance between America’s “just say no” policy + this not being an option in CDA means that the 35-day minimum deposit period wasn’t long enough for the target board to respond
* Bid Period Requirement: bids must be open for 105 days except
  + When the target board issues a release identifying a specified alternative transaction (white knight), thereby starting an auction
  + Recall objective of giving SHs informed choices
* Minimum Tender Requirement: non-exempt takeover bid has to receive tenders of more than 50% of the outstanding securities
  + *De facto* SH vote
* 10-Day Extension Requirement: once a bid has been made then the offer must be extended for 10 days once minimum tender conditions + all other conditions have been met
  + Gives holdout SHs a chance to tender

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| **(16) Exemptions from Takeover Bid Requirements** |

1. **When is one exempt from the takeover bid requirements?**

* BLG with Paul G. Findlay, ed., *Securities Law and Practice* - sets out exemption
* Normal course purchase exemption: s.4.1 of MI 62-104
  + Purchase of no more than 5% of any class of the issuer’s outstanding voting/equity securities in a year period
  + Consideration can’t exceed FMV + securities must be listed on a published market
* Private agreement exemption: s.4.2(1) of MI 62-104
  + Purchaser can enter an agreement with up to 5 vendors that isn’t made to security holders generally
  + Consideration can’t exceed 115% of market price
  + Derogation of equality principle
* Non-reporting issuer exemption: s.4.3 of MI 62-104
  + When there is no published market + no more than 50 holders of the securities are subject to the bid
* Foreign takeover bid exemption: s.4.4 of MI 62-104
  + Securities primarily traded on a foreign market
* *De minimis* exemption: s.4.5 of MI 62-104
  + When the target has a max. of 49 beneficial holders of target securities…
  + Who in the aggregate hold less than 2% of the outstanding shares of the class
* Prescribed in the regulations: For example, MJDS takeover bids
  + Dank

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| **(17) Defensive Tactics to Takeover Bids** |

1. **What can the target board do?**

* Basic concepts: during a hostile takeover the board is in an inherent conflict of interest
  + Fiduciary duty to the corporation vs. keeping their jobs
  + Usually the board will set up a Special Committee to review terms of the bid + alternatives to make recommendations to the board
* Governed by NP 62-202 – generally regulators find tactics acceptable if the actions are intended to secure a better/offer or result for target shareholders as opposed to entrenching themselves
* s.1.1(4) – the following tactics will come under scrutiny
  + the issuance, or the granting of an option on, or the purchase of, securities representing a significant percentage of the outstanding securities of the target company,
  + the sale or acquisition, or granting of an option on, or agreeing to sell or acquire, assets of a material amount, and
  + entering into a contract other than in the normal course of business or taking corporate action other than in the normal course of business

**SHAREHOLDERS’ RIGHTS PLAN (SRP) – POISON PILL**

* Basic concepts: a document adopted prior to or during a takeover bid that sets out when a bid will be permitted
  + Permitted bid clause usually stipulating terms favourable to the company
* Then, if the bid is not permitted (usually no board approval) then the SRP is activated
  + Rights are granted to all shareholders except for the bidder
  + Result = massive dilution of bidder’s holdings + very uneconomic to proceed
    - SRPs usually cease-traded under **s.89** then the bid can proceed
* Policy: buy the target board time to find a white knight
  + Very efficient, widely used, never triggered
* *347883 Alberta Ltd.* – when considering a ‘cease-trade application’ look to if the directors in adopting the defensive tactics culminating in the issuer bid met the onus to show that they acted in the best interests of the corp. as a whole + whether their actions were reasonable in relation to the threat posed
* *Re Royal Host* – no holy grail for when a pill must go (test for cease trading)
  + Balance between permitting board to fulfill fiduciary duty and protecting the rights of shareholders to tender shares as they see fit
  + Quote policy from *Jorex* - “Primary concern….whether those tactics are likely to deny or severely limit the ability of SHs to respond to a TB or a competing bid or may have the effect of denying to SHs the ability to make a fully informed decisions and of frustrating an open TB process.”
  + Factors to be considered (not exhaustive)
    - whether shareholder approval of the rights plan was obtained;
    - when the plan was adopted;
    - whether there is broad shareholder support for the continued operation of the plan;
    - the size and complexity of the target company;
    - the other defensive tactics, if any, implemented by the target company;
    - the number of potential, viable offerors;
    - the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;
    - the likelihood that, if given further time, the target company will be able to find a better bid or transaction;
    - the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
    - the length of time since the bid was announced and made;
    - the likelihood that the bid will not be extended if the rights plan is not terminated

**WHITE KNIGHT**

* Basic concepts: when faced with a hostile takeover the target board will often look for a favourable alternative
  + Then, enter a support agreement to facilitate the takeover
  + Usually get the Special Committee to review the alternatives as the target must canvass the market as per *Maple Leaf Foods*

**SALE OF THE CROWN JEWELS**

* Basic concepts: agreement between target and a 3rd party to sell a significant asset if the initial bidder is successful
* *Re CW Holdings* – Pre-Acquisition Agreement with the white knight contained option in favour of crown jewel, allowed by the court
  + Asset options are intended to be a competitive bid-stimulating inducement
  + May be an acceptable measure to take where:
    - They do not represent a violation of the fiduciary duty to maximize SH value,
    - Balance between inhibition/stimulation has been struck well,
    - Price represents reasonable value for asset,
    - and competing bid is at high enough value to justify option

**BREAK FEE – BUST-UP FEE**

* Basic concept: agreement between white knight and target may have such a clause indicating that if the merger does not happen then the target will pay a certain fee to the white knight
  + Result = adds to the acquisition cost of someone other than the white knight
* Anita Anand, “Break Fees: Loathed but Legal”
  + Regulators have no authority to interfere + strike down a contract that SHs don’t like
    - Can only assume jurisdiction via “investor protection”
* *Re CW Holdings* – the agreement also had a break fee clause
  + Not *prima facie* improper but they might be due to their quantum
  + Will be acceptable where....
    - Necessary in order to induce a competing bid to come forward,
    - Where bid represents better value for shareholders, and
    - Break fee represents reasonable commercial balance between potential negative effect as auction inhibitor and potential positive effect as auction stimulator

**LITIGATION**

* Basic concepts: done to delay takeovers through injunctions, challenging disclosure provided in the circular etc.
* *Re Chapters* + *Re Canfor* = examples of when the ulterior motive of the application was likely delay

**ISSUER BID**

* Basic concepts: launching bid by which company purchases its shares from its shareholders in competition with the hostile bidder

1. **What are the duties of the board when defending against a bid?**

* **s.122(1)** of the *CBCA* – every director and officer in exercising their powers/discharging their duties shall

1. act honestly and in good faith with a view to the best interests of the corporation and; - fiduciary duty
2. exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances – duty of care as per the business judgment rule

* *Teck* – acting in good faith is the test for whether the directors’ actions to frustrate control was legitimate
* *Producers Pipelines* – did the directors in adopting the defensive tactics meet the onus to show they acted in the best interest of the corporation (fiduciary duty) + reasonable in relation to threat posed (duty of care)?
* *Maple Leaf* – did management successfully take steps to avoid their conflict of interest?
  + If the board has acted on the advice of a committee composed of persons having no conflict of interest and it has acted independently + in good faith + made an informed recommendation as to the best available transaction for the SHs in the circumstances then the business judgment rule applies
  + Once target is in play then duty is solely the company’s best interest
  + No duty to conduct an auction – rejection of *Revlon* – b/c this is just one way in which a conflict can be avoided
  + If proper procedure is followed courts will generally show deference to the business decision
* *Re BCE Inc.* – most recent SCC jurisprudence
  + SCC confirms that directors must act in best interests of the corporation, regardless of whether interests of stakeholders are coextensive or not
  + Fair treatment and consideration: as long as directors demonstrate proper procedure and consideration of interests, courts should show deference to their decisions – business judgment rule

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| **(18) Enforcement** |

1. **How do regulators enforce the rules contained in securities legislation?**

* Three categories: criminal (true, quasi), civil, administrative
* Investigatory powers: **s.142 of BCSA** allows BCSCB to order investigations that are:
  + expedient to the administration of the BCSA,
  + the regulation of securities in another province,
  + in respect of matters regarding securities traded in BC/another jurisdiction
* **s.143 of BCSA** gives broad powers of investigation to the enforcement branch of BCSCB without the need to satisfy any threshold evidential or suspicion requirements
  + Usually initiated in response to a complaint, tip, or high-profile transaction
  + Powers of the investigators
* *Deloitte* – usually the information obtained in investigations is confidential but commission can order its disclosure if it is in the ‘public interest’
  + Must reasonably balance privacy expectations with the public interest on the Stinchcombe standard of relevance

**CRIMINAL ENFORCEMENT POWERS**

* **True criminal enforcement powers found in the ol’*CC***
* *Drabinsky* – example of using the *Criminal Code* to prosecute a securities related matter in ON

**ss.380, 382, 382.1 and 400 of CCC** all provide offences related to securities law – indictable offences for which prison sentences of up to 15 years are available

* + BUT - not a prominent feature of enforcement of securities law in CDA
  + WHY? – BARD is a high burden of proof + *mens rea* is very difficult to establish

**s.380(1)** – indictable offence to “by deceit, falsehood or other fraudulent means” defraud the public  or any person of “property, money, or valuable security or any service” where the subject matter exceeds $5000

**s.380(2)** – offence of affecting the public market prices of “stocks, shares, merchandise or anything that is offered for sale to the public” with intent to defraud

**s.382** – an offence to fraudulently manipulate stock exchange transactions by engaging in various strategies, such as matched orders and wash trading to “create a false or misleading appearance of active public trading.”

**s.382.1(1)** – insider trading – it is now an indictable offence to directly or indirectly buy or sell a security knowingly using inside information that the accused possesses by virtue of various relationships to the issuer

* + **s.382.1(2) –** offence of tipping -- hybrid offence
  + BUT – these are inconsistent in at least 3 ways with the quasi-criminal offence of insider trading in provincial securities statutes
    - Under the CC the Crown has to prove that the accused knowingly used insider info. to trade securities, higher threshold
    - It refers to trading in securities of issuers generally, not just reporting issuers
    - Various relationships include “by virtue of being a shareholder of the issuer” in sub. (a)

**s.400** – anyone who “makes, circulates or publishes a prospectus…that he knows is false in a material particular, with intent” to induce someone to become a shareholder or partner, or to deceive or defraud members, shareholders, or creditors of a company is guilty of an indictable offence

* **Quasi-criminal enforcement powers found in s.155(1)** **of the *BCSA***
* Must be proven beyond a reasonable doubt
* *Landen* – BARD meant someone couldn’t be found guilty of tipping since the largely circumstantial evidence wasn’t enough for this onerous burden of proof
* *Zelitt* - example of how the trend is shifting, more likely to use QC powers

**CIVIL ENFORCEMENT POWERS**

* Rarely exercised by provincial commissions
* **s.157 of BCSA** gives BCSCB powers to apply to court where it thinks someone has contravened the Act and it thinks bringing the matter before a court is in the public interest
  + Under this section, courts can exercise powers unavailable to commission, including setting aside transactions which are impugned (pretty radical/unusual), payment of restitution, disgorgement of illegally-made profits, and rectify non-compliance
* Orders to comply with securities law, rescinding transactions, requiring compensation or restitution, payment of damages, disgorgement, rectification of part non-compliance

**ADMINISTRATIVE ENFORCEMENT POWERS**

* Basic concepts: this is the most common source of sanctions
  + Power to make orders of various kinds in the public interest + impost sanctions following a hearing
  + Must interpret public interest in accordance with statutory mandate
  + **Can make an order even when there is no breach of statute**
* Mary Condon, “The Use of Public Interest Enforcement Orders by Securities Regulators in Canada”
  + Notable consistency across the provinces in the articulation of public interest that was the basis for making orders
    - Linked to goals of maintain public confidence in and the integrity of the capital markets over market efficiency
* *Wilder* - Purpose of the OSA = to provide protection to investors from unfair, improper or fraudulent practices, and to foster fair and efficient capital markets and confidence in those markets
  + Nothing inconsistent with the Law Society’s role in regulating the legal profession and the OSC’s exercise of jurisdiction in reprimanding W
  + Commission can reprimand lawyers

**s.161 of BCSA** says that BCSCB can, after a hearing before commission, make a permanent order which is in the public interest do not require a breach of securities law, only a finding that the order is in the public interest

**s.161 of BCSA** provides for five kinds of orders:

* + That a person comply with or cease contravention of the Act
  + That a person cease trading in the securities involved in the violation (either of the specific issuer or generally)
  + That any or all exemptions set out in regulations do not apply to that person
  + That a person resign or be prohibited from acting as a director/officer of an issuer (any issuer, reporting, BC, Canadian, or otherwise)
  + That a person’s registration be suspended

1. **How should the commission exercise this discretionary power?**

* **Use of s.161** **public interest power in the absence of a breach is controversial**
* *Re Canadian Tire* – as per *Cablecasting*, commission must exercise discretion in the public interest + proceed with caution when there’s no breach
  + Therefore the conduct or transaction being sanctioned must be a clearly demonstrated abuse of shareholders in particular + capital markets in general

1. **What sanctions are available?**

* *Asbestos* - objective of the “in the public interest” power is restraining future conduct which is likely to be prejudicial to the public interest in fair and efficient capital markets
  + Public interest jurisdiction is animated by **both** the purposes of the Act to provide protection to investors from unfair, improper or fraudulent practises and to foster fair and efficient capital markets and confidence in capital markets
  + Protective/preventive and not punitive: the focus is protection of societal interests not the punishment of individual moral faults – *Wholesale Travel*
* Four considerations in the public interest section itself
  + seriousness and severity of the sanctions applied for,
  + effect of imposing such a sanction on the efficiency of, and public confidence on Ontario capital markets
  + a reluctance to use the open-ended nature of the public interest jurisdiction to police out-of-province activities, and
  + a recognition that these powers are preventive in nature, not remedial

1. **What role does general deterrence play?**

* *Re Cartaway* – yes, this is an appropriate/necessary consideration in making protective and preventive orders, really fits with the dictionary definition of preventive