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# Introduction

**2 MAIN GOALS OF SECURITIES REGULATION:** **1)** Protect investors; **AND 2)** Foster fair and efficient capital markets [contribute to financial stability/mitigate systemic risk].

* **Capital Markets:** Broader regulatory structure of securities, banking and insurance.
* **Financial Markets:** All of the capital markets + anything else that may go into how markets move.
* **Security Markets:** About buying and selling securities.

**SECURITIES MARKET:**

* **Public Markets**: Companies selling stocks to the public.
* **Exempt/private**: Special rules that apply to a security, the general public cannot just buy. Can only sell to people with a unique relationship to the company. Exempt market is bigger than the public.

**TYPES OF REGULATION:**

* **Entity Based Regulator:** In Canada, currently we regulate Baking, Securities and Insurance separately.
* **Twin-Peaks Regulator:** Gives up on entity based structure (currently in Canada) and has one side deal with consumer protection and the other focuses on safety and soundness (e.g. seen in Australia).
* **Unified Regulator:** Banking, Insurance and Securities all regulated by one organization.
* **Other Option:** If do not have unified regulator, try and get coordination between the regulators.

**REGULATORY METHODS: 1)** Disclosure-based re issuers; **2)** Registration requirements for registrants (dealers & advisors**); 3)** Anti-Fraud Provisions including criminal sanctions.

**SECONDARY MARKET:** After the initial distribution, securities ***are bought and sold in the secondary markets***. **Types: 1)** TSX/TSX-V: must meet & maintain their requirements **// (2)** OTC or unlisted market: includes many debt securities & OTC derivatives **// (3)** Upstairs Market (face to face) btw institutional investors (less liquid/transparent/smaller) w/ assistance of dealers **// (4)** Upstairs Market w/o dealers **// (5)** Money Market: short term deb sec (eg. Commercial paper, debt of gov & corp – companies have strong credit ratings eg. Bank of Canada

## TYPES OF SECURITIES:

**[1] DEBT:** Commercial paper (short term), bonds and debentures

* ***Commercial Paper:*** IOU, investor buys, agreed on maturity date to pay back with interest, no interest along the way, and is unsecured, and is usually short term (<270 days)
* ***Bond/Debenture:*** Secured against some asset, company would need to talk to a credit rating agency since they are long term commitments, get fixed income along the way, good way of raising steady low-risk money. But won’t get a large return. Priority in event of bankruptcy.

**[2] EQUITY:** Buying a piece of a company.

* **Share:** Share pro-rata in any future profits and rights to some proceeds of sales of assets if the company dissolves.
  + Common Share: Get to vote, right to dividends, and liquidation rights.
  + Preferred: Usually for money partner i.e. venture capitalist // May get better dividend or asset rights than common shares.
  + Restricted: Cannot vote and restrictions on dividend rights.
* **Rights of Offering:** A right allows existing SH’s to buy more shares.
  + Holders of a specified number of rights will have the right to buy a share in the company for a predetermined price within a certain period of time **//** Rights to buy shares are normally tradable

**[3] DERIVATIVE SECURITIES:** Can be equity, debt or mixed. Key their value off some reference share (some underlying thing)(**Swaps + Options)**

**[4] SECURITIZED PRODUCTS:** Bundle of debt that gets bundled together and sold again.

## INVESTORS

**[1] RETAIL**: Everyday people **// [2] INSTITUTIONAL:** Sophisticated investors with a large staff.

## “Issuer” vs “Reporting Issuer”

**“Issuer” (BCSA 1(1)):** Means a person who **(a)** has a security outstanding, **(b)** is issuing a security, or **(b)** Proposes to issue a security.

**“Reporting issuer” (BCSA 1(1)):** Means an issuer that:

* **(a)** has issued securities in respect of which **(i) a prospectus was filed and a receipt was issued**; **(ii)** statement of material facts was filed and accepted; or **(iii)** a securities exchange take over bid circular was filed …
* **(b)** **has filed a prospectus or statement of material facts** and the **Exe DIR has issued a receipt for it** under this Act (see: (c)-(f)).

# Scope

**OBSERVATIONS THAT GUIDE INTERPRETATION: 1)** Securities regulation is protective, not punitive; **2)** Courts choose substance over form in interpreting the definition (i.e. they focus on the general economic effects of the whole transaction rather than the specific technical details).

## DEFINITION: “Security”

**BCSA 61:** One may not ***distribute securities***w/o having filed a prospectus **🡪** unless potentially exempt.

* **SECURITY:** Instrument issued to raise funds to capitalize an entity as a result, generate profits.
* ***Pacific*** emphasizes that the legislated definition is not exhaustive and the categories are not exclusive

**[1] Any document, instrument, or writing commonly known as a security (BCSA s.1(1)(a))**

* **COMMON KNOWLEDGE:** Need to determine the common knowledge among securities professionals (financial and legal community), not lay persons (***Gelderman*)**. It need not be known to the man “in the street” – just must be knowledge common among members of the community (***SEC v. Glen W Turner Enterprises*** (*ponzi scheme*)).

**[2] A doc evidencing title to, or an interest in, the capital, assets, property, profits, earnings or royalties of a person or company (1(1)(b)).**

* **TEST (look @ the purpose of the transaction) 🡪** Does a “document” show ***some form of*** investment or speculation (**e.g.** looking for profit, business prospect, etc)? (this is how courts have narrowed the broad definition under 1(b)).
  + Title doc to ½ interest in ***breeding chinchillas*** to share in profits = security (***Swain v. Boughner***)
  + ***Scotch whiskey receipts*** are securities when they are bought and sold as an investment (***Brigadoon***)
  + **Control can help determine whether something is a security or not** (***Raymond Lee –*** *Co. got a 20% interest in inventions where they helped with marketing and patents***// Held:** This is not a security, is a service. Reasons: **1)** Inventors remained in control of inventions; **2)** Inventors testified they did not think this was an investment; and **3)** Primarily a transaction for patent processing and marketing***)***

**[3] A document evidencing an option, subscription or other interest in or to a security (BCSA, s.1(1), *“security”* (c))**

* **Option:** Form of derivative. Is a K that entitles but does not require its holder either to buy or sell a particular security on a particular date at a specific price.
* **Subscriptions:** Sign-up forms for purchasing securities.
* **Rights:** Corps can raise capital quickly and with fewer regulatory requirements by granting existing security holders rights to purchase a specific # of additional securities at a specific price and time.
* **Warrants:** attached to bonds, give warrant holder right to buy a specific # of corp’s equity sec at specific price & during specific time period (referenced like an option).

**[4] Debt Security: a bond, debenture, note or other evidence of indebtedness, share, stock, unit, unit certificate, etc. Other than: (i) K of insurance and ii) E of deposit issued by savings institution** (these are excluded as they are governed by insurance and banking) **(1(1)(d))**

* **ISSUE:** Distinguishing a debt security from a doc evidencing indebtedness that is not a security.
* **FAMILY RESEMBLANCE TEST (*BC Sec Com v Gill,* BCCA citing *Reves*) *–*** Rebuttable presumption that certain types of debt instruments are securities, not banking products. Factors relevant whether presumption is rebutted:
  1. ***The Motivations*** that would prompt a reasonable seller and buyer to enter into the transaction: If the seller’s purpose is to raise money and the buyer’s purpose is to profit from returns, it’s a security;
  2. ***The intended distribution*** of the instrument: if it is one in which there will be ‘common trading for speculation or investment’, it’s a security;
  3. ***Reasonable expectations of the investing public***: The more the public expects a security, the more likely it’s a security;
  4. ***The existence of another regulatory scheme***: If there is no other regulatory scheme that reduces the risk of the instrument, it’s likely a security.

***BC Sec Com* -***2 individuals gave large amounts of $ to Gill for his investment co., he then gave them receipts* **//****Held:** These were Securities

**[5] \*Investment Contract (BCSA, s.1(1)(l)) 🡪 Catch-all Provision (e.g. *Joiner Leasing* (USSC) *–*** *Ppl bought potential oil-boom land expecting an investment return* **// Held:** This is a security**).**

**TEST (*Pacific Coast,* 1978 SCC –** *Bags of coins “on margin” = Investment K***):**  While the ***Howey*** and ***Risk Capital*** tests are helpful, they ***are not necessary***to determine whether an Investment K is a Security. **What is necessary is that**: ‘finding the K in question to be an investment K (and therefore a security) would ***support and advance the policy goals of securities regulation generally***.’

* **Policy of Securities Regulation:** It is about protecting the public and “full and fair disclosure.” Substance, not form, governs the interpretation of what is a security. Look at whether people are at risk (***Pacific -*** *risk b/c investors dependent on PC on how to function in futures mrkt***)**
* ***Re Kustom Designs –*** Investments expecting negative earnings, but resulting in a tax refund or lower tax bill, achieved through the efforts of others, was a financial benefit – which constitutes a profit for the purpose of investment K.

|  |
| --- |
| **What has been found to be an Investment K:** Units in a citrus Grove Development, where investors were not from the area, not farms, stayed in guesthouse (***Howey***) **//** Retail store membership program (***Hawaii*) //** Purchase of Silver Coins on Margin (***Pacific*) //** Real Estate Ventures **//** Some franchise where the franchisor retains a huge degree of control relative to the franchisee. |

**COMMON ENTERPRISE TEST (*Howey*** *(citrus grove in Florida)****,*** cited in ***Pacific***– *criterion was met***):**

1. There must be a “common enterprise” (***Pacific – Common enterprise found -*** *must be commonality b/w investor and the promotor (vertical), need not be commonality b/w investors themselves* *(horizontal)*), in which
2. Profits will come solely from the efforts of people other than the investors.
   * ***Pacific*** adopted a “more realistic” formulation of the second part: Holding that it was necessary only that “the efforts made by those other than the investor are the undeniably significant ones” (read out the word “solely”).

**RISK CAPITAL TEST: *Hawaii*** **expands the *Howey* test** for the Existence of an investment K (***Hawaii,*** discussed in ***Pacific –*** *criterion met)*:

1. **An offeree furnishes initial value to the offeror** [***Hawaii -*** *members required to contribute $320 or $820 > not simply a purchase of sewing machine, cookware, b/c these amounts far exceeded their wholesale value*];
2. **A portion of this initial value is subject to the risks of the enterprise** [***Hawaii*** *- members’ ability to recoup initial investment and earn income inextricably bound to success of the enterprise* **// *Pacific -*** *Investors are subject to the risk that PC goes insolvent. Insolvency risk is that PC is incompetent or cannot buy futures K’s at a rate that makes the business work*];
3. **The furnishing of the initial value is induced by the offeror’s promises or representations that the offeree will gain some benefit, over and above the initial value, as a result of the enterprise’s operation** [***Hawaii*** *- members were promised “commissions”/fixed returns*]; and,
4. **The offeree does not receive the right to exercise practical or actual control over the managerial decisions of the enterprise** [***Hawaii*** *- members arguably participated in a minor way in operating the enterprise, but Court focused on the “quality” of participation, not the “quantity*].

**Distinguish:** ***Pacific*** with ***Lazerman*** (this decision seems to “back-peddle” from ***Pacific*** and is likely a “better” decision**).**

* In ***Lazerman,*** the BCCA found that the K’s ***were not investment contracts*** (factual distinctions from Pacific: silver bars instead of silver coins (there is a mrkt for bars not coins) and Lazerman segregated purchasers’ funds instead of **commingling with its own**). The purchasers’ profits did not depend on Lazerman’s actions; they depended on the market price of silver. **Segregating the funds meant that there was no sharing of each other’s profits or losses and were not engaged in a common enterprise.**

**[6] Others (not important for us): (e), (h-k, m-o),**

## DEFINITION: “Trade” (BCSA,s.1(1)):

**Whether or not transaction qualifies as a “trade” determines whether that transaction is subject to securities reg.** **Under s. 34 of the BCSA and NI 31-103, a “trade” triggers the requirement that a registered dealer be involved in the transaction, unless an exemption applies.**

* **NB: BCSA 34:** A person must not **(a)** trade in a security or exchange K, **(b)** act as an adviser, **(c)** act as an investment fund manager, or **(d)** act as an UW, unless the person is registered in accordance with the regulations and in the category prescribed for the purpose of the activity.

**[a]** a **disposition** (i.*e. sell – a trade does not include a purchase*;*Focus on the seller (e.g. Pacific Coast co.))* **of a security for valuable consideration** (*no “other ppls money” issue if not*) whether the terms of 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 (**(a)).**

* **Focus is on SELLING**, it is a trade to sell a security but not a trade to buy a security (***Hennig –*** *Option exercise, from Hennig’s viewpoint, was effectively a purchase and, therefore, not a trade*)
* Must be a disposition for ***valuable consideration* (*Re Anchor –*** *Gift of common shares to EE’s is not a trade if no valuable consideration*).

**[a.1]** **entering into a futures contract** (**(a.1))** **+ [b]** **entering into an option that is an exchange contract** (**(b))**

* Any ‘entering into a derivative or making a material amendment to, terminating, assigning, selling or otherwise acquiring or disposing of a derivative is also a trade. **This INCLUDES acquiring derivatives**.

**[c]** **participation as a trader in a transaction in a security or exchange K** made on or through the facilities of an exchange or reported through the facilities of a quotation and trade reporting system (**(c))**

* **Captures:** Activates of an agent of a broker executing securities traders through any stock exchange, quoting and trade reporting system or alternative trading system.

**[d]** the **receipt by a registrant (i.e. dealer) of an order** to buy or sell a security or exchange contract (**(d))**

* A registrant includes traders but also anyone else engaged in the securities industries.
* Trade occurs when the broker ***receives the order, not when it is completed.***

**[e]** **a transfer of beneficial ownership of a security to a transferee, pledgee, mortgagee or other encumbrancer under a realization on collateral given for a debt** (**(e))**

**[f] any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the other branches ((f))**

* **LIMITS** of this broad branch are difficult to establish. Takes a “contextual approach” in determining whether acts were acts in furtherance of trade **OR** “sufficient proximate connection” as described in ***Re Costello.***
* **NO ACTUAL TRADE NEED EVER BE COMPLETED** for there to be a “trade” under this branch (**E.g.** if there is an ad for a trade it is deemed to be a trade. Trying to protect ppl early on).
  + **E.g.:** Meetings are trades, unless they are informational and not promotional **//** Advertising a security, I intend to issue later (as an issuer), is a trade. It is a solicitation in furtherance of a trade (very broad) **//** Bookkeepings and administrative functions performed by a trust company for mutual fund dealers are not trades (***Re: OSC and CAP ltd.)***
* **ACTIVITIES FOUND TO CONSTITUTE ACTS IN FURTHERANCE OF TRADES (*Re MP Global*): (1)** Accepting money from investors; **(2)** Depositing Cheques for Share Purchases; **(3)** Providing investors with subscription agreements; **(4)** Distributing promotional materials; **(5)** Issuing share certificates; **(6)** Organizing meetings with investors to organize the purchasing of securities

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

## DEFINITION: “Distribution” – (note (b) and (d) are not important) (NB: Incorporates the word *trade* (defined above))

**All distributions *are trades* in that they transfer securities for valuable consideration. Distributions only occur to the primary market.**

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

**[a]** a trade in securities that **have not previously been issued** (i.e. new to the market) (**BCSA, s. 1(1)(a))**

**[c]** a trade in a **previously issued security of an issuer from the holdings of a control person** (a person with more than 20% of the issuer’s outstanding voting securities is *deemed* a “control person”; however, a lower percentage than 20 may constitute control – each case must be evaluated on its particular circumstances) (**BCSA, s. 1(1)(c))**

* When a control person trades securities, those securities must be qualified with a prospectus (**Why:** Control person has access to info where other security holders do not; Has vested interest to ensure selling at high price; etc).
* Someone can be a control person with less than 20% of the company’s shares (***Re Deerhorn Mines/R v. Boyle*)**

**[e]** a trade **deemed a distribution: i) in an order under s.76 by commission or executive DIR; OR ii) in the regulations** (**BCSA, s. 1(1)(e))**

* **s.76(1)** 🡪 Residual discretion of Sec. Com. Senior staff to deem a distribution and force disclosure.

**[f]** any transaction involving a **purchase and sale or a repurchase and resale during distribution or incidental to distribution**: this includes securities purchased by an **underwriter** during a distribution, where the underwriter plans to resell the securities (**BCSA, s. 1(1)(f)).**

### Different Kinds of Distribution

**RI:** If you make a distribution you are a RI. Where a co. wants to distribute to the public, do it either **1)** **Direct issue** or **2)** hire **an UW** (main route). This company is called an **issuer.**

**[1] Direct Issue:** Issuer itself makes direct contact with potential purchaser’s w/o an investment dealer or broker.

**[2] UW Arrangements: 1)** Advises on financial situation/how to structure the transaction, **2)** Assists in the distribution of their securities by finding investors & conducting the transaction w/ them, **3)** performs risk-bearing function when they execute a firm commitment or bought deal by purchasing the issuers security that they will then resell, **4)** Gives a “seal of approval” on IPO – solidifies company’s value to prospective investors.

* **How UW’s are paid (UW Agreements): Bought deal (full risk) -** company sells 100% of shares to the UW and the UW sells them out to the world **(*Kerr –*** *bought deal can be detrimental to investors b/c a purchaser has no remedy of L rescission against the issuer for misrepresentation in the prospectus, as it is the UW who sells the securities*) **// Market Deal Offering (Medium Risk) -** K b/w issuer and UW and that the issuer cannot talk to other UWs but the UW can test to see if can sell securities profitably **// Standby Offering (Med-Low Risk) -** UW commits only to purchase sec that are not sold to investors at a certain price – guarantees issuer, a minimum amount of total proceeds **// Best Efforts Agency Agreement (Low Risk) -** UW will make their “best efforts” to sell the shares, only get paid on commission.

**How UW’s Limit their Risk: 1) Termination Clauses:** The UW can include a market-out clause and a disaster-out clause in the underwriting agreement. With a market-out clause, the UW can terminate the agreement if it determines, acting reasonably, that the securities cannot be marketed profitably; **2) Invite other UW’s; 3) Disclosure of Conflicts of Interest:** A potentially non-independent UW (ie: where the UW is a subsidiary of a bank to which the issuer owes money) should make disclosers pursuant to **NI 33-105**, Underwriting Conflicts, and if necessary, involve an independent UW.

## DEFINITION: “Materiality”

**BCSA 63** – must provide “full, true and pain disclosure of all **material facts.” // “Misrepresentation” –** means “an untrue statement of a **material fact” // BCSA 85 –** “provide disclosure of **material change**”

* **Material fact:** Must disclose when talking about prospectuses and misrepresentation.
* **Material change:** Part of disclosure requirements and is an issue w/ insider trading.
* **DIFFERENCES: 1)** MC is narrower**; 2)** MC has a timing element; **3)** MC is inherently dynamic and not static like facts (e.g. doing business in a country that suffers a coup and the government gets changed. This would be a material fact but not a material change. The fact is ambient in the world and does not individually affect you)

**Tests for Materiality:**

* **Market Impact Test (legally binding in Canada):** Info is material if it is reasonable to expect that the release of that information would impact the market price of the security. ***This is objective inquiry*** (***Coventree***).
  + **Reasonable Investor Test (used in the US + 51-102 Forms)**: Material fact or change is one that would be important to a reasonable investor in making an investment decision with respect to the relevant security. Must guard against hindsight and reliance on actual mrkt price changes **(*Coventree*).**
* **Probability/magnitude test (*YBM Magnex*)**: When determining whether a contingent (future) event is ***material***, you must weigh the likelihood of that event happening along with its severity on the stock price of the security (***YBM -*** *Probability of a formal charge in the US and look at the magnitude of that event on their business*) **🡪** Contextual analysis, but likely around 10% change in bottom line or employment, etc (**NB: *Use as an aid to the assessment of materiality***)

**Contextual factors will be relevant to Materiality (NP 51-201, s.4.2)**: Consider the nature of info itself, price volatility of the issuer’s securities, the prevailing conditions in the market and the size and nature of the issuer itself.

**"MATERIAL FACT" (BCSA s.1(1), NP 51-201 s.4.1):** A fact that (***when it arises***) that would **reasonably** be expected to have a significant ***effect on the market price or value of the securities*.**

* Material fact is a broader idea than material change (***Pezim***).
* A change to a material fact is not necessarily a material change. It will only be if it concern’s an issuers business, operations or capital (i.e. **Do not confuse a material change with a change in material fact).**
* ***Letter advising of concerns*** by sole creditor before IPO was not a material fact, thus did not need disclosure in IPO (***Coventree***)
* ***Negotiations can be a material fact*** – they may be material at an early stage, “well before the negotiations have reached a point of commitment to be characterized as” a material change (***AiT***).
* ***Real Potential for acquisition*** is a material fact (***Re Holtby***).
* ***Subsequent events alone cannot determine whether something is material at the time that it occurred,*** but they may support or corroborate a finding of materiality made on other grounds (***Re Kapusta***)

**Timing:** Must consider what could have been reasonably expected at the time the fact came to light, not what happened after).

**External Developments** (political, economic, geographic or social – such as political coup, natural disaster, etc): may be a material fact, generally it will be a material change only if its effect on the particular issuer is ***both significant and uncharacteristic for the industry*** (**NP 51-201, s.4.4)**

**“MATERIAL CHANGE” (BCSA s.1(1)):**

* **(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 DIRs of the issuer, or **(B)** senior mgt of the issuer who believe **that confirmation of the decision by the DIRs is probable** …
  + **NOT:** External political, economic or social developments.
  + Do not engage in “super critical interpretation of the meaning of material change.” Should be willing to interpret it broadly (***Coventree***).
  + ***Letter by sole crediting agency re policy change to not stop providing ratings for certain type of securities issued* =** Material Change (***Coventree –*** this was a major change in C’s biz).
  + ***Change in mineral assay results*** constitute material changes (***Pezim,* SCC *-*** *From the point of view of investors, new information relating to a mining property (which is an asset) bears significantly on the Q of that property’s value*).
  + ***Negotiations*** are a material change when there is a sufficient degree of certainty that the transaction will be completed (***Siddiqi –*** *“sufficient degree of certainty” reached when parties made an informal hand shake deal*).
    - A commitment from one party to proceed will ***not be sufficient*** to constitute material change (need both parties) (***AiT***).
  + ***Intra-quarter results are not a material change*** as they are temporary. Only material changes needed to be disclosed b/w the prospectus receipt date and the distribution date. If it is a material change there is a legal obligation to disclose, if not a material change do not have to disclose it (***Kerr,* SCC –** *Reduced jacket sales b/c warm weather*).
* **Subsequent events alone cannot determine that a change is material at the time that it occurred*,*** but they may support or corroborate a finding of materiality made on other grounds (e.g. found material based on all the E with increase in share price corroborating the determination **(*Re Kapusta –*** *Public Oil co found oil, withheld results awaiting more test, insiders bought shares. Share prices jump when discovery disclosed* **//****Held:** The test results had been sufficiently certain to give rise to a material change before some of the impugned trades by insiders (thus some engaged in insider trading)).

**Events that *may* give rise to Material Change (NP 51-201 s.4.3):**

1. Changes in ***corporate structure,*** such as take-overs, mergers or changes in share ownership that may affect control of the corp;
2. Changes in ***capital structure*** (e.g. Poison Pill);
3. Changes ***in financial results***, such as significant inc or dec in earnings projections, changes in assets or in accounting policies,
4. Changes in ***biz and operations*** (e.g. significant change in corp objectives, loss or gain of significant K’s, sign resource discoveries)
5. ***Acquisition or disposition***, and
6. ***Changes in Credit arrangements*** (e.g. ***Coventree***).

# Machinery

* **BCSCn** – for administrative/regulatory matters including compliance and enforcement
* **BCSC** – adjudicates on criminal & quasi-criminal matters
* **BCSC** – adjudicates on civil liability (i.e. investor lawsuits) incl under BCSA Part 16, 16.1

### BC Securities Commission

* Regulatory commission can make Rules that are very similar to government regulations but they can be created w/o going through legislative process.
* **2 Tier Structure:** Separates Advocate (Staff – may *seek* order against some) + Judge (Commission – make *order*)
  + **Level 1 – “Official Commission”:** Describes the first level of the commission which consists of up to 11 staff members. Appointed. **They hear appeals and hearings (BCSA s.4)**
  + **Level 2 – Staff:** Commission must appoint a person to be the executive director and chief administrative officer, who runs staff. Staff employed through K. Powers include investigation, supervising registrants, trading, prospectuses, distribution, continuous disclosure, proxies, TOBs, insider trading, self-dealing, enforcement of legislation including sanctions, and delegating responsibility to SROs (**BCSA s.8**).

**Rule Making Authority (BCSA 184-188): BC Sec Commission given rule making authority following the *Ainsley Corp* decision**.

* **BCSA 184** – Commission can make binding law themselves (i.e. if signing onto a MI and NI) “Notice-and-comment” rule making (faster than legislation):
  + Propose a rule and have to wait a certain amount of time (e.g. 60 days) for comments from people.
  + At end of comment period must issue another version of the rule and justify.
  + Publish the rule again and go through another comment period.
  + Then issue the rule and it becomes a binding piece of law.
* **BCSA 187** – Administrative powers re: Commission rules.

**Organizational Bias Concerns:** **1)** Regulators attempt to increase their own power and influence, even if such expansion goes beyond their justifiable scope of authority, **2)** Agencies may over-regulate and be over-conservative to protect themselves from failure, **3)** Policy will tend to focus on unquestioned internal rhetoric, perhaps discarding useful ideas from outside.

**NB: *Efforts to harmonize*** regulation across provinces (e.g. harmonizing definition of “insider trading”).

### Enforcement Procedure of Commissions

Complaint **🡪** Informal Investigation **🡪** Formal Investigation **🡪** Hearing **🡪** Appeal to Court of Appeal.

### Reviews and Appeals (Part 19 BCSA)

**OVERVIEW:** Enforcement by staff **🡪** Appeal to BC Sec Comm (**BCSA 165**) **🡪** Appeal to BCCA (**BCSA 167**) **🡪** Appeal to SCC

**[1] Internal Review:** Commission may review a decision of the executive director (**BCSA 165(2)**)

**[2] Review of SRO or Exchange Decision:** Executive Dir or person “directly affected” by a decision or instrument of an exchange or SRO may apply to the Commission for a hearing and review or appeal (**BCSA 28)**

**[3] Judicial Review of Commissions’ Decisions:** Limited use given must exhaust statutory right of appeal (below).

**[4] Statutory Right of Appeal to BCCA\* (BCSA 167(1))**: A person directly affected by a **decision of the commission** may appeal to the **Court of Appeal** with leave of a justice of that court. ***Exception:*** Cannot review a decision under 165 if connection w/ review of Ex Dir decision under s.48 or 76.

**6 Factors** the appellate body considers whether to grant leave to **appeal from securities tribunal** (***Walker v. BCSCn****)*:

1. Whether there is a Q of general importance as to the tribunals jurisdiction;
2. Whether appeal is on Qs of law involving statutory application, interpretation important to parties or interpretation of standard statutory wording,
3. Whether previous decisions show marked differences of opinion,
4. Whether prospect of success,
5. Whether appeal will lead to any clear benefit, and
6. Whether the issue has been considered by numerous appellate bodies.

**SofR:** that normally apply to Judicial Reviews have been imported into the statutory appeal context: **1) Reasonableness, or 2) Correctness.**

### National Instruments & Policies (have legal force under BCSA ss.184, 187)

* **NI:** Binding law effective in all jurisdictions.
* **MI:** Binding law that not all the provinces have agreed to (anything on BC securities commission website has been agreed to).
  + **CP**: **Companion Policy** – Explains the instrument (MI & NI)
* **NP:** Not binding (policy) but provides guidance on how things are interpreted and it is national so everyone has agreed to it.
* **MP: Multilateral Policy**

### Self-Regulatory Organizations

Commissions delegate substantial “front line” regulatory responsibility to Self-Regulatory Organizations (SRO’s) and to the Exchanges.

**BCSA Part 4** – Self regulating bodies, exchanges, Quotation and Trade Reporting systems and Clearing Agencies

* **s.23:** Self-regulatory bodies include exchanges, self-regulating organizations, quotation and trade reporting systems, and clearing agencies **// s.27**: Powers of the Commission are broad, and can take actions to control SROs **// s.28**: Appeals from a regulatory body will go to the Executive for approval, who will in turn, have it heard by the upper level of the Commission **// s.31**: SROs must appoint an auditor.

**Main SRO’s:**

* **Investment Industry Regulatory Organization of Canada (IIROC)**: Carries out its regulatory responsibilities through setting and enforcing rules regarding the proficiency, business and financial conduct of dealer firms and their registered EEs and through setting and enforcing market integrity rules regarding trading activity on Canadian marketplaces.
* **Mutual Fund Dealers Association** (**MFDA**): SRO for the distribution side of the Canadian mutual fund industry. The MFDA is structured as a not-for-profit corporation and its Members are mutual fund dealers that are licensed with provincial securities commissions.

**Main Exchanges: TSX:** Main exchange for senior issuers. Important Listing req’s include: financial condition and prospects, management, and sponsorship **// TSX-V:** Pre-dominantly for emerging companies and their venture class securities.

### Industry Best Practice

**Canadian Coalition of Good Governance (CCGG):** Represents the interests of institutional investors; CCGG promotes good governance practices in Canadian public companies and the improvement of the regulatory environment to best align the interests of boards and management with those of their shareholders, and to promote the efficiency and effectiveness of the Canadian capital markets.

# Federalism, Financial Regulation, and Potential Regime Change

* CND is the only industrialized country w/o a national securities regulator. **“Day-to-Day” Securities regulation = provincial “property and civil rights.” Federal jurisdiction over systemic risk and data collection (*Re Securities Act*).**
* **Cooperative Capital Market Regulator:** Feds + BC, ONT, SK, YK, NB + PEI – These governments released a Memorandum of Agreement setting out the terms of conditions to establish a Cooperative System.
* **Systemic Risk (topic of discussion):** “Risks that occasion a domino effect whereby the risk of default by one market participant will impact ability of other to fulfill their legal obligations, setting off a chain of negative economic consequences that pervade entire financial system” (***Re Securities Act).*** 
  + It can be a function of 3 criteria to help identify the systemic importance of an institution, market or instrument:
    - ***Size*** (volume of financial services provided by individual component of the fin system)
    - ***Substitutability*** (extent to which other components can provide that service in event of failure
    - ***Interconnectedness*** (linkages w/ other components of that system)

#### Re Securities Act, 2011

*Provinces challenged federal Securities Act* **// Held:** To have a federal securities regulator would be unconstitutional under the federal government’s **general trade & commerce power (s. 91(2) of Constitution Act)**, but they could have jurisdiction over “**mgmt of systemic risk”** + “**international data collection”** (these are national in scope). Feds cannot have power over day to day affairs of sec, that is under prov property & civil rights 92(13).

# Prospectus Process

|  |
| --- |
| **PENALTIES FOR NON-DISCLOSURE:**   * **s.162 Administrative Penalty:** if (a) Contravention and (b) in the Public Interest, the commission may order a penalty of not more than $1million * **s.164 Failure of Filing Requirements:** Cease trade order w/o hearing * **s.161 Enforcement Orders:** Doesn’t even need a breach, just a preventative tactic * **s.155.1 Restitution to Securities Commission** * **s.157 Orders of Compliance in the Public Interest** |

## Basic Requirements

* **PROSPECTUS REQUIRED (BCSA 61(1)**) **UNLESS EXEMPTED** a person ***must NOT distribute a security* UNLESS****: (a)** a preliminary prospectus and a (FINAL) prospectus respecting the security have been filed with the exec DIR, **AND** **(b)** the exec DIR **has issued receipts**.
  + **NB: Discretionary Exemption (BCSA 76):** An issuer can request a discretionary exemption. Commission may allow exemption in certain circumstances where it is not prejudicial to the public interest.
* **VOLUNTARY FILING (BCSA 62):** Even though a person is **NOT DISTRIBUTING SECURITIES,** a preliminary prospectus and a prospectus that are in the required form may be filed for: **(a)** the purpose of enabling the issuer to **become a reporting issuer**, or **(b)** any other prescribed purpose **// WHY 🡪** Can legitimize you with your lenders (some lenders require prospectus even if you never issue shares)
* **CONTENT (BCSA 63(1)):** A prospectus must provide **full, true and plain disclosure of all material facts** **(above)** relating to the securities issued or proposed to be distributed.
  + **“Full, True and Plain Disclosure” (*Coventree*):** 
    - **Full** – Achieved when disclosure is made of facts sufficient to permit investors to make an informed decision.
    - **True** – Disclosure is accurate and not misleading and does not omit a fact that is either material itself or is necessary to under the facts that have been disclosed
    - **Plain** – understandable to investors and in plain language

**DETERMINE THE PRINCIPAL REGULATOR (MI 11-102 S.3.1(2)):** Principal regulator is the jurisdiction with the issuer’s head office. If that isn’t clear, look at **1)** Location of issuer’s management; **2)** Location of the issuer’s assets and operations; **3)** Location of the Canadian trading market or quotation system on which the issues securities are located; **4)** Location of the issuers securityholders.

## NI 41-101 *General Prospectus Requirements* 🡪 Regime to prepare, file and distribute a “long form” prospectus.

**Form of Prospectus (s.3.1):** Issuer filing a prospectus must file the prospectus in the form of **Form 41-101F1.**

**NON-FINANCIAL DISCLOSURE (Form 41-101F1) Key Items:**

* **Item 8 – Management’s Discussion and Analysis –** Discusses financial statements and situations
* **Item 21 – Risk Factors –** List of all material factors that “**a reasonable investor** would consider relevant to an investment in the securities” listed in order of seriousness (21.1) **🡪** Attracts attentions b/c explosive area for liability

|  |
| --- |
| **OTHERS: Item 1 –** Cover Page Disclosure – Must include specific regulatory language **// Item 3 –** Summary of Prospectus **// Item 5 –** Description of the Biz **// Item 6 –** Use of Proceeds **// Item 10 –** Descr of the Securities Distributed **// Item 11 –** Consolidated Capitalization **// Item 12 –** Options to Purchase Securities **// Item 13 –** Prior Sales **// Item 15 -**  Principal and Selling Securityholders **// Item 16 –** DIRs and Exec OFR’s **// Item 17 –** Executive Compensation **// Item 23 –** Legal Proceedings and Regulatory Actions **// Item 25 –** Relationship b/w issuer or selling Securityholder and UW **// Item 27 –** Material Contracts **// Item 28 –** Experts **// Item 29 –** Other material Facts **// Item 30 –** Rights of withdrawal and Rescission **// Item 36A –** Marketing Materials. |

**FINANCIAL MATTERS:** Each prospectus must file **recent, audited financial statements**. Must follow International Financial Reporting Standards (IFRS) (**NI 41-101 Part 4**)

* **Key Items (Form 41-101F1): Item 32 – Financial Statement Disclosure for Issuers:** Annual financial statements for past 3 financial years + recent interim financial report for most recent period **// Item 33 – Credit Supporter Disclosure // Item 35 – Significant Acquisitions // Item 36 – Probable Reverse Take-overs.**

**CERTIFICATION REQUIREMENTS: (NI 41-101 Part 5).**

* **5.3 ISSUER** – CEO, CFO and any 2 DIRS must certify that the “prospectus contains full, true and plain disclosure of all material facts**.”**
* **5.9 UNDERWRITER –** Wording of the certificate is the same, except that it is prefaced w/ “to the best of our knowledge, information and belief.”

**REGULATORY DISCRETION:** Exec DIR holds ***discretion to issue final receipt***, but shall issue unless it is not in the ***“public interest”*** (**ss 64-65).**

* **E.g. of Prejudice to Public Interest (“PI”):** Someone in company convicted of fraud multiple times (***Cycomm –*** *Co. OFR had poor past conduct, Sec Comm refused to issue receipt*) **//** No biz plan (***Inline –*** *DIR withheld receipt*). **BUT** other than these “high threshold” issues, likely wont find prejudice.
  + Sec Commission gets a lot of deference from the courts regarding what is in the PI and what is not (***Re Cycomm***)
  + Discretion is not unlimited. Broad discretion so long as fostering fair and efficient capital markets and protecting investors (***Asbestos Minority Shareholders,* 2001 SCC).**

## Mechanics and Stages of Prospectus

**SEDAR:** Almost all filing done by issuer is done electronically through SEDAR.

**[1] PRE-MARKETING:** Generally, not allowed. Occurs when a party communicates with potential investors before a public offering and includes other promotional activity that occurs ***before a preliminary prospectus is filed***.

***Exemptions* (that allow for pre-marketing):**

* **[1] Short Form Prospectus and Bought Deal Exemption (NI 41-101, Part 7)** - If doing a short form prospectus (already public co.) and UW doing it on a bought deal that is strict (cannot get out) **//** Allows investment dealer to engage in road shows and provide standard term sheets and marketing materials after a bought deal as been announced but before the reporting issuer has obtained a recipe for the short form preliminary prospectus.
* **[2] Testing the Waters IPO Exemption** **(NI 41-101, s.13.4)**: Permits pre-mrkting of IPO deals before filing preliminary prospectus.
  + **Req’s: 1)** Non-public issuer (i.e. not a RI), **2)** Investment dealer (UW) must make the solicitation on the issuer’s behalf.
  + ***7 Conditions*: i)** Reasonable expectation of filing your prospectus in the near future**, ii)** Has to be an investment deal (only UW can take advantage), **iii)** None of the controlling SH’s can be already public companies, **iv)** Only talk to accredited investors**, v)** note on materials that not prospectus, **vi)** Anyone talked to has to sign a confidentiality document, **vii)** Have to stop testing at ***least 15 days before filing preliminary prospectus***.

**[2] PRELIMINARY PROSPECTUS:** Contains all the information that will be in a final prospectus, except price and other related manners. You will receive feedback from the Principal regulator with comments (in 10 days). You might then get a preliminary receipt.

**(a) *Waiting period*:** Time b/w when the issuer receives a receipt for its preliminary prospectus and when it receives its receipt for its final prospectus. During waiting period, there will be no sale or any acceptance of an offer to buy securities.

* **BUT** 🡪 A dealer of an issuer (UW) may **(a)** Communicate with a person by IDing the security proposed to be distributed stating the price, the name and address of a person from whom purchases may be made, **(b)** Give out Preliminary Prospectus, **(c)** ***Solicit expressions of interest* (BSCA 78(2))**
  + **While securities cannot be sold at this time the investment dealer (UW) can solicit intentions to buy (subscriptions) from potential investors.**
* **CEASE TRADE ORDER:** If the exec DIR considers that a preliminary prospectus does not substantially comply with s.63, Exec DIR may, without giving notice, order that trading be ceased **(BCSA 81).**
* **Info Investment Dealers can distribute at this time:** During the waiting period, road shows (presentations to potential investors) (**NI 41-101, s 13.9**), Green Sheets (10 pg long summaries, not intended for public but for investment dealer reps), and other marketing materials are permitted, but must correlate to **NI 41-101, s 13.7**: Under **(b),** all information distributed must be disclosed in or derived from the preliminary prospectus, **(c)** Cautionary language provided for in the preliminary prospectus must be highlighted in any marketing material, **(g)** Investment dealer must provide a copy of the preliminary prospectus.

**(b) *Quiet period*:** From time of deal with UW until the final prospectus receipt, trying to keep information locked down (not a legal term just a practical point).

**(c) *Amendment to Preliminary Prospectus*: NI 41-101 (s.6.5)** – Amendment to preliminary prospectus must be filed during waiting period if there is a ***material adverse change* (i.e.** only have to disclose “bad” facts; not good news which can be included in final prospectus)*.* Must ***be filed as soon as practicable***, but in any event within 10 days after the day the change occurs

**[3] FINAL PROSPECTUS (Regulatory + Civil Liability Attach to this Doc) (NI 41-101 9.2)** Revamped and approved version of the preliminary prospectus. Sales and offers to buy are based on it. Issuers must submit a “blacklined” copy of prospectus when submitting the final prospectus (shows all the changes made).

* **MATERIAL GIVEN ON DISTRIBUTION (**From date of receipt for final prospectus**):** Person distributing security may give out **(a)** Prospectus**, (b)** any record filed with or referred to in the prospectus, **(c)** any materials in s.78(2**) (BCSA 82)**
* **OBLIGATION TO SEND PROSPECTUS ON ORDER TO PURCHASE:** To perspective purchaser either before entering the purchase agreement or w/in 2 business days (**BCSA 83(1))**
  + **COOLING OFF PERIOD:** Purchaser has 2 business days to allow a cooling off period so they can decide if they want to withdraw from buying (for 2 days you can get out of the deal with no penalties) (**BCSA 83(3)**).
* **COMMISSION AND ED HAVE THE ABILITY TO ISSUE EXEMPTION (BCSA 84)**

**(a) *Amendment to Final Prospectus:* NI 41-101 (s.6.6)** - If btw final prospectus receipt and close of distribution period, a *material change* occurs (good or bad) MUST file amendment, **within 10 days of change***.*

**(b) *Distribution period:*** Once an issuer obtains a receipt for its final prospectus, it can begin distributing securities under it. Usually the period is very short b/c UW’s strive to have all securities issues under a prospectus subscribed for in advanced.

**(c) *Lapse***: A prospectus will lapse 12 months after the receipt of the final prospectus, unless issuer obtains exemption or files a new prospectus (**NI 41-101, s 17.2)**

### Alternative Forms of Prospectus

**Short Form Prospectus** (**NI 44-101**)**:** Certain qualified, repeat issuers are allowed to file a short form prospectus. Covers basic info about the particular issue and use of proceeds. Other info typically in a long-form prospectus is unnecessary b/c that info is already on file with the Commission. **Long Form Prosp incorporated by reference.**

* **QUALIFICATIONS:** Issuer must be electronic filer on SEDAR **//** be reporting issuer in at least one juris in CND **//** Have sec listed on exchange, and cannot have ceased operations or have cash or its exchange listing as its principal asset **//** Must be up to speed w/ all it continuous discl obligations in every juris **//** Must have current annual financial statements and current Annual Info Form in 51-102F2 *Annual Info Form* on file as part of its CD in at least one juris.

### Passport System

***Passport System*** (**MI 11-102**) – Market participants need only comply w/ the securities law of one principal regulator (typically where the head office is at). Then still have to file w/ all the other regulators if issuing securities across CND, but the deal is the other regulators are “host” regulators who defer to the principal regulator.

* ***Must Individually File w/ ONT:*** ONT has not signed on to MI 11-102, but agreed to cooperate under **NP 11-202**. If issuer files a prospectus in multiple provinces including Ont, the **dual prospectus** system applies and there are two principal regulators (OSC + other primary regulator). Both principal regulator and OSC reviews the prospectus, generally issuer will only deal with principal reg, and OSC advises princip reg of any concerns. So concerns sorted out and finally principle reg issues receipt, it is deemed in ON. ON can opt out, PR will try and resolve ON’s concerns, if not resolved, then no deemed receipt in ON.
* ***Limits***: 1) Still have to pay every regulator the same amount as before despite them doing no work if they are a host, 2) Limited utility as ONT did not join (80% of mrkts), 3) Civil Liability is completely unaffected.

### Multijurisdictional Disclosure System (MJDS)

**MJDS –** Permits US issuers to use US docs in place of CND docs, provided those issues are in compliance w/ US Securities legislation. This is reciprocated for Canadian issuers in the US (**71-101CP)**.

* US issuers can use US continuous disclosure documents that are compliant with US securities laws in Canada
* Issuers must file a PP in all jurisdictions of Canada
* Issuers can choose the principal jurisdiction in Canada to review the material filed and a receipt will be issued as long as disclosure requirements have been met
* Certification requirements for the issuer and UWs are the same as usual – full, true and plain disclosure of all material facts

# Continuous Disclosure Obligations

**2 CATEGORIES OF CONTINUOUS DISCLOSURE: 1) Periodic Disclosure, 2) Timely Disclosure**

**Rationale:** Where CD functions properly, it supports both goals of securities regulation by fostering investor protection, and enhancing capital market efficiency. CD ***advances investor protection by ensuring that all investors have sufficient info to make rationale*** ***decisions***. Boosts investor confidence, which leads to increased participation in capital mrkts. Also boosts mrkt efficiency by providing investors w/ the info they need to ID the issuers most deserving of capital (**NB:** May also create a positive and ethical culture w/in a company)/

**Definition of “reporting issuer” (BCSA 1(1)):** Means an issuer that

* **(a)** has issued securities in respect of which **(i) a prospectus was filed and a receipt was issued**; **(ii)** statement of material facts was filed and accepted; or **(iii)** a securities exchange take over bid circular was filed …
* **(b)** **has filed a prospectus or statement of material facts** and the **Exe DIR has issued a receipt for it** under this Act (see: (c)-(f)).

**Continuous Disclosure (BCSA 85)** - A “reporting issuer” must, in accordance with the regulations,

* **(a)** provide ***prescribed periodic disclosure*** about its business and affairs,
* **(b)** provide disclosure ***of a “material change***,” and
* **(c)** provide ***other prescribed disclosure*.**

## [1] Periodic Disclosure (85(a))

**OVERVIEW:** Requires financial disclosure, MD&A, AIFs, certification, compensation disclosure, and proxy and information disclosure.

* **W/in 90 days of financial year’s end, Issuer files: 1)** Annual FS (audited); **2)** MD&A (filed w/ FS); **3)** Annual Information Form.
* **W/in 45 Days of Each Quarter, files: 1)** Interim Financial Statements (may voluntarily audit); **2)** MD&A (filed w/ FS)

### Financial Disclosure

**[i] *Accounting Standards*:** Reporting Issuer’s financial statements must be prepared according to International Financial Report Standards (IFRS) (this is principles-based accounting and less rules-based) (**NI 52-107, s.3.2(1))**

**BASIC “FORMULAS”: Statement of financial position =** revenues – expenses **//** **Comprehensive income =** More detail breakdown of what’s coming in **// Changes of statements in equity –** Shares outstanding **// Statement of Cash Flows –** Money coming in and going out.

**[ii] *Timing, Delivery & Filing*:**

* **ANNUAL Financial Statements:** A non-venture RI must file audited annual financial ***statements within 90 days*** of its year-end (**NI 51-102 s.4.2**) It must compare the current year’s results to the previous year’s **// Info Filed:** a statement of comprehensive income, statement of changes in equity and a statement of cash flows for the financial year, statement of financial position as at the end of the financial year, and notes to the annual financial statements must be filed (**NI 51-102 s.4.1)**
  + **NB:** A **“**venture issuer**”** has 120 days **🡪 “Venture Issuer” (NI 51-102 s.1(1)**)**-** RI that did not have any of its securities listed or quoted on at of the TSX or other exchanges (Special rules for small companies not listed).
* **INTERIM Financial Statements:** Periods ending 9, 6, and 3 ***months before the end of its financial year* (i.e “quarterly”)**. Due w/in ***45 days*** for non-venture issuers (**NI 51-102 ss.4.3-4.4)** **//** **Info Included:** Same info as annual statements (above). Need not include an auditors report, but are subject to an auditor’s review (**NI 51-102 s.4.3(3))**
  + If an auditor has not performed a review of an interim financial report the interim financial report must be ***accompanied by a notice*** indicating that the interim financial report has not been reviewed by an auditor (**s.4.3(3)(a))**
  + **NB:** 60 days of the end of the interim period for “venture issuers” (**NI 51-102 s.4.4).**

**Delivery of Financial Statements:** RI must send annually a request form to the ***registered holders and beneficial owners*** of its securities, other than debt instruments, asking if they request AFS and MD&A. For interim, not required to send copies of statements past 1 year **(NI 51-102 s.4.6).**

**Filing of Financial Statements: NI 51-102 s.4.7 sets out filing criteria:** The first annual FS and interim financial reports that an RI must file are FS for the financial year and interim periods immediately following the periods for which FS of the issuer were included in a document filed: **(a)** that resulted in the issuer becoming a RI.

* **Date:** Must file those annual statements on or before the later of the filing deadline in s.4.2 or the 20th day after becoming an RI
* **Exemption (s.4.7(4)):** RI is not required to provide comparative interim financial info for periods that ended before the issuer became a RI if: **a)** to a reasonable person impracticable to present prior-info, **b)** prior-period info that is available is presented, and **c)** the notes to the interim financial report disclosure the fact that the prior-period info has not been prepared on a basis consistent w/ thje most recent interim financial info.

**[iii] *Auditors Reports*:** Audited Financial Statements (i.e. all annual statements and any interim statements the issuer voluntarily chooses to have audited) must be audited in accordance w/ “fair presentation framework” of the IFRS (**NI 52-107 s.3.3)**

* **Purpose:** Their audits are intended to enable security holders to oversee mgmt, not to assist SHs in personal investment decisions. No fid duty to public or shareholders (***Hercules Mgt***)
* **Change of Auditor (NI 51-102 s. 4.11) –** Extensive set of disclosure requirements re: what happens if disagree, fire or hire a new auditor. Must disclose all of the info, auditor must provide statement of why they understand they were fired and you must provide a statement.

**[iv] *Significant or Material Information*:** Financial statements need contain only significant – i.e. material – matters (**NB:** Prospectus principle of full disclosure of all material facts equally applies to financial statements).

**[v] *Exemptions*:** Commission may grant an exemption from any part of NI 51-102, subject to any condition or restrictions it imposes (**s.13.1(1))**

**[vi] *Forward Looking Info; Future-Oriented Financial Info (“FOFI”); and Financial Outlook.***

* **Forward-Looking Information**: is **broadest term** and covers all disclosure regarding possible events, conditions or financial performance that is based on assumptions about future economic conditions and courses of action. It includes FOFI w/ respect to **prospective financial performance, financial position or cash flows**, presented either as a forecast or a projection.
  + **FOFI & Financial Outlooks:** aretypes of forward looking info about prospective financial performance, financial position or cash flows. This info is FOFI when presented in the format of a historical statement of fin position, statement of comprehensive income or statement of cash flows, when presented in any other form it is a financial outlook.
* Whether you talk about prospectus or continuous disclosure this is how you discuss forward looking information.

**Disclosure of Forward-looking Info (NI 51-102):**

1. Must have ***reasonable basis*** for disclosing FLI and the assumptions underpinning it (**4A.2)** (***Kerr –* SCC Held:***FOFI implies a material fact that the forecast is obj reasonable at the time it is made* ***🡪*** *This increases the chances that FOFI may give rise to an action for misrepresentation*).
2. The Issuer should caution readers about the risk factors, limitations of that info and ID it as forward looking (**4A.3)**. ***Must state*** the date on which mgt approved the FOFI or financial outlook, explain its purpose and ***caution investors*** that the info may not be appropriate for other purposes(**s.4B.3).** Issuer can rely on “**safe harbour”** provision in prospectus to limit liability (may protect issuer from liability if person relies on that info for purposes other than those stated in disclosure).

### Management’s Discussion & Analysis (MD&A) (51-102 Part 5)

MD&A is a “narrative explanation” form the issuer’s mgt of the most important aspects of the issuers positions. It is designed to help investors understand and assess the issuer’s financial performance and future prospects (**Form 51-102F1 s.1(a)).**

* Must be filed with every **annual AND interim financial statement** (**NI 51-102, s.5.1(1)) // Must CONFORM** to **Form 51-102F1 //** Board of DIRs or audit committee **must approve MD&A before it can be filed (NI 51-102, s.5.5).**
* **General Provisions (Part 1):** Avoid boilerplate language (**51-102F1 s.1(d))** **//** Only *material information* must be disclosed (see case law) (**s.1(e)**) **//** Use Plain language (**s.1(n)**)
* **Required disclosure includes**: Overall performance, operations, risks, quarterly results, liquidity, capital resources, off-balance sheet arrangements, transactions between related parties, proposed transactions and changes in accounting. Must send to registered or beneficial owners on request**.**

**MD&A Should:**

* Help current and prospective investors ***understand what the financial statements*** show and do not show;
* Discuss ***material information that may not be fully reflected in the financial statements***, such as contingent liabilities, defaults under debt, off-balance sheet financing arrangements, or other K’al obligations;
* ***Discuss important trends and risks*** that have affected the financial statements or are reasonably likely to affect them in the future; and
* Provide ***information about the quality, and potential variability***, of your company’s profit or loss and cash flow, to assist investors in determining if past performance is indicative of future performance.

### Annual Reports and Annual Information Forms (AIFs) (NI 51-102 Part 6)

**[1] *Annual Reports:*** NOT req’d by securities law. Glossy docs sent to securityholders summarizing past fiscal year.

**[2] *Annual Information Forms* -** provides a high level picture discussion of everything that has gone on in the year. Must be filed ***w/in 90 days* of the end of issuer’s fiscal year to file w/ SEDAR** (**NI 51-102 ss6.1, 6.2).**

* Includes similar info in prospectus, only ***material info*** need be disclosed (**Form 51-102F2 Part 1(d)).**
* **Focus:** On material info about issuer and biz at the end of recent financial year in context of past & future developments, risks and other external factors that may impact issuer (**Part 1(a)).**
* **18 Items in an AIF, e.g.:** Description of corp structure, general development and description of biz, description of capital structure and dividends, info on DIRs and OFRs and their interest, if any, in material transactions or K’s.
  + **\*Executive Compensation** – **Per Item 18.1, Form 51-102F6**

### Certification Requirements

**CEO/CFO must certify: 1) annual financial statements** (**NI 52-109 Part 4**; **Form 52-109F1**) and **2)** **interim filings** (**52-109 Part 5;** **Form 52-109F2**).

* **Board or audit committee must approve the statements**. CEO and CFO (or equivalent) of RI must certify that the two documents ***do not contain any misstatements or omissions of material facts.*** Must state that materials fairly present any financial information to best of their knowledge. Must be attached to primary documents.
* **LIABILITY:** Makes top management accountable (and civilly liable) for the FS and other docs.

### Proxy and Information Circular - Relates to shares with voting rights attached

**“Proxy”:** means a ***completed and executed form of proxy*** by which a security holder has appointed a person as the security holder's nominee to attend and act for [i.e. vote] and on the security holder's behalf at a meeting of security holders [i.e. AGM of the Corp] (**BCSA 116; NI 51-102 s.1.1**)

**[1] Proxies:** MGT must mail a form of proxy to each securityholder (registered and beneficial), either before or at the time as the notice of the meeting to which the proxy applies. **MGMT must solicit proxies for annual & special meetings, at which at least one DIR will be elected (NI 51-102 Part 9)**

* **NB:** B/c DIRs can be elected for terms of 3 years there may be SH’s meetings which no DIR will be elected, thus mgt not required to solicit proxies **//** Important to know which system incorporated under (e.g. *CBCA* or *BCA*) wrt shareholder voting rules.
* **Exemption from Proxy Solicitation Rules:** If a RI is incorporated, organized or continued under a jurisdiction w/ “substantially similar” proxy req’s, the issuer may comply w/ those req’s instead (**NI 51-102 s.9.5)**

**[2] Form of Proxy:** Means a ***written or printed form*** that, when completed and executed, appoints a proxy (**BCSA 116; 51-102 s.1.1**)

* States that any person can be nominee for proxy **//** Must allow the securityholder to vote separately on each matter or group of related matters **//** Can revoke your proxy up to the very last minute (and vote another way).

**How to Vote Proxies at Meeting:**

* **DEFAULT:** The chair at a meeting has the right not to conduct a vote by way of ballot (**BCSA 118(1))**
  + Methods: Voice vote, by acclamation, etc.
* **EXEMPTION:** Default does not apply if: **(a)** a poll is demanded by a security holder… **OR (b)** more than 5% of all voting rights attached to all the securities, that are entitled to be voted and to be represented at the meeting, ***are represented by proxies who are required to vote against*** what would otherwise be the meeting's decision on the matters referred to in (1) (**NB:** since choices of dissident proxy are to vote for or withhold, (b) will never apply to a DIR as you cannot vote against a DIR)(**BCSA 118(2)**)

**[3] Information Circular:** Must contain information to enable securityholders to make informed decisions on proxy votes.

* **MANDATORY TO SEND WHEN THERE IS A “SOLICITATION” (NI 51-102 s.1.1) (***Broad term that captures most activities directed at influencing a SH’s vote*)**:** Means **(a)** Requesting a proxy whether or not the request is accompanied by or included in a form of proxy **(b)** Requesting a securityholder to execute or not to execute a form of proxy or to revoke a proxy **(c)** Sending a form of proxy or other communication to a securityholder under circumstances that to a reasonable person will likely result in the giving, withholding, or revocation of a proxy **OR** **(d)** Sending a form of proxy to a securityholder by MGT of a RI.
* **AUTOMATIC EXEMPTIONS FROM SENDING INFORMATION CIRCULAR (incl Dissent Proxy Circular) (NI 51-102 9.2):** 
  + **(1)** Does not apply to a solicitation by a person or company in respect of securities of which the person or company is the beneficial owner,
  + **(2)** If total # of securityholders who proxies are solicited is not more than 15 (cheaper and easier to talk to 15 ppl personally) – **Dissent Proxies can rely on this as well.**
  + **(4)** **Public Broadcast Exemption** **for Dissident Proxies (applies in most cases):** Person or company, other than mgt of the RI, may solicit proxies from registered securityholder w/o an info circular by public broadcast, speech or publication ***about dissident proxy that is going out* (e.g.** by press release, statement on radio or TV, public available website). Prescribed materials and disclosure must be filed on SEDAR
    - **But** **(4)** does not apply to person or co. that is proposing a takeover/acquisition/restructuring, they need to file either an information circular (for acquisitions/restructuring) or a “other document”, which would be a takeover bid circular (**9.2(5))**
    - For applicants seeking to rely on this exemption in connection w/ election of DIRs, a document containing prescribed info concerning the proposed nominees must be filed on SEDAR (**s.9.2(6))**

**Form of Information Circular (Form 51-102F5):** Must include sufficient info so that investors are aware of their rights. Info in the circular must be given as of a specified date nor more than 30 days before the info circular is sent out.

* **There are 16 Req’s for an info circular (51-102F5): E.g.** Must be dated, state whether person or company giving proxy has power to revoke it; persons making solicitation must be identified; if taken by mgmt, and if any DIR intends to oppose mgmt., etc.
* **Board Independence:** Only form where you get detailed info whether the board is independent, have independent audit committee, how the board is structured (corporate governance).

**Form of Executive Compensation must be attached (Form 51-102F6):** This is the only other place other than AIF about detail of executive compensation information. Disclose certain “Named Executive OFRs”: CEO, CFO, and the next three highest paid ppl as long as they make more than $150,000.

* Must include any compensation paid, awarded, granted, given, directly or indirectly, etc. (**Form 51-102F6 s.1.3(1**))
* Broadly defined throughout **//** Contains a compensation discussion and analysis section.

**[4] Dissident Proxy:**

* SH’s have tended to rely on proxy contests as an effective means to replace DIR’s, challenge the implementation of SH rights plans and to speak out against fundamental transactions approved by mgt and/or the board of DIRs. A proxy contest occurs when a ***dissident solicits SHs’ proxies*** and the ***right to vote those Shareholder shares in favour of the dissident group’s objective***.
* **Typical Issues:** Say on pay and executive compensation; board diversity; ethical business practices; board independence; majority voting for DIRs (either have to vote “yes” or “withhold”, no way to express opposition).

**[5] Consequences of Proxy Irregularities (Form 51-102F5):** If proxy procedures are not followed properly, SH’s could legally challenge it later to undo the decision reached by the proxy votes.

### Communications/Delivery of Periodic Disclosure

***RI must send securityholders***:a form each year allowing those holders to request copies of annual or interim financial statements, along with an MD&E for each + All proxy-related materials **🡪** **BUT** AIF’s need not be delivered (filed on SEDAR).

**Communication with Beneficial Owners of Securities (NI 54-101):** Registered SH = Broker **//** Beneficial SH = “You”

* RI has to ask the registered SH’s about info about who the beneficial SH’s are. Registered SH’s have 3 days from receipt of request to give the issuer that information.
  + **NOBO**: Non-objective beneficial owner (SH) 🡪 Beneficial owners who do not object to having their identity revealed to the issuer. ID of NOBO’s disclosed to the issuer, who sends docs directly to the beneficial owner.
  + **OBO:** Objective beneficial owner 🡪 Do not want the issuer knowing who you are (can stay secret). Issuer sends docs to intermediary, which forwards them to the beneficial owner.
* **NB:** Now all docs must be filed on SEDAR. Docs that must be delivered can be done electronically (with certain requirements see: **NP 11-201**) or via mail.

**Delivery:** Securityholders are entitled to have periodic disclosure delivered to them on request.

* **4 Components:** 
  + **1.** **Notice:** The recipient should receive notice that the document has been or will be electronically “delivered.”
  + **2. Access:** The recipient should have “easy access to the document.” In an accessible program. Available for an appropriate length of time. A permanent record should be available, if requested.
  + **3. Delivery of an Unaltered Document:** Recipient should receive an unaltered and uncorrupted document.
  + **4. Evidence of Delivery:** Should be evidence that the document was delivered.

## [2] Timely Disclosure (85(b))

**Timely disclosure of** “***material change***” (not material fact though) **-** defined in **BCSA s. 1** and in **NI 51-102** (slightly differently) **//** MCR inform commissions, market participants and public about important changes in issuer’s affairs (good and bad).

**DEFINITION OF “MATERIAL CHANGE”:** See above (**E.g. *Pezim;* *YBM Magnex***): Only changes in business, operations or capital can be material changes. Also note that a change to a material fact is not necessarily a material change. It will only be if it concern’s an issuers business, operations or capital.

* Disclosing the risk of Material Change does not exempt the issuer from disclosing when the actual material change occurs (***Coventree***)

### Material Change Reports (NI 51-102 Part 7/85(b))

**If a Material Change Occurs** 🡪 Must ***file material change*** **report** in the necessary form (**51-102 Part 7**)

* **NEWS REPORT/FILE:** **(a)** First thing is **immediately file a new release** that is signed by exec OFR (CFO, CEO, COO) describing the nature and substance of change, **(b)** as soon as practicable (w/in 10 days) file **Form 51-102F3** (10 days is a long time, cannot sit on it for 10 days should really be issuing form alongside news release) (**7.1(1))**
  + **Best Disclosure Practices (4 steps) (NP 51-201, Part 6)**
    - Issue news release through widely circulated news or wire service
    - Advance public notice before conference call to discuss info
    - Hold conference call in open manner eg. web casting
    - Provide dial-in and/or web replay or make transcripts of the call available for a reasonable period of time.
* **CONFIDENTIAL MCR (“Exception to Public Report” – MCR release is delayed, still confidentially file w/in 10 days):** 2 ways to file confidentially. Must provide written reasons for non-disclosure and convince Commission every 10 days that info should remain confidential. Cannot sell securities until info disclosed and disseminated (**51-102** **s.7.1(5))**
  + **[1] Detriment:** When in the issuers reasonable opinion immediate disclosure “would unduly detriment” its interests (e.g. pursuing a specific strategy) (**7.1(2)(a)).**
  + **[2] MGT:** When decision made by senior mgmt amounts to a material change and is awaiting probable board approval. Must have no reason to believe persons w/ knowledge of decision are buying or selling the issuer’s securities (**7.1(2)(b)).**

## [3] Selective Disclosure

* Accidental or intentional dissemination to a select group of individuals of information about an issuer that is not yet publicly available **//** If a RI discloses some material information it should make an i***mmediate public announcement and request exchanges to halt trading until that announcement is disseminated*** (**NP 51-201 s.3.6**)
* CSA views it unfavorably due to need for level playing field.
* Concerns about regulating selective disclosure since it might have a “chilling effect” between RIs and their analysts.

# The Exempt Market

**3 ways to sell securities**: **1)** Issue prospectus; **2)** Legislative/Regulatory prospectus exemption; **3)** Discretionary Prospectus Exemption.

**Exempt Market:** If selling w/in closed system can issue securities w/o filing a prospectus (**NI 45-106).**

* Less protection for investors **//** Markets are also less fair **//** More room to “game” the mrkt.
* ***Why needed*** **– i)** Allows small companies to raise capital; **ii)** People who invest in these markets are different (they may be safer, or we care about them less).

**CLOSED SYSTEM CONCEPT (replaces “to the public” idea):** Model ensures that securities cannot be traded without either a prospectus or an exemption from the prospectus requirement. Securityholders ***wishing to trade an exempt market security can***:

1. Continue to trade the security **within the closed exempt market** by relying on further exemptions;
2. The issuer **may file a prospectus to qualify the securities already distributed** (transforms securities from exempt mrkt to freely traded securities);
3. **Under the resale rules in NI 45-102, the securityholder may hold the exempt securities until a specified ‘hold period’ expires.**

**RATIONALE (*5 Main Reasons Exemptions*)*:***

* **1)** Prospectus takes time and money: **Costs**: i) Direct – out of pocket (commission to UW, fees, etc); ii) Indirect – Searching for UW and marketing; iii) Intangible (shares immediately start trading above issuing price).
* **2)** Exemption may be more appropriate if the issuer is offering securities only to a narrow range of investors;
* **3)** The Commissions not willing to approve a prospectus or the issuer may be unable to satisfy the prospectus disclosure req’s;
* **4) *Not able*** to find a registered dealer willing to sell securities through prospectus;
* **5)** The Issuer may ***prefer not to become*** a RI subject to continuous disclosure req’s.

**WHO NEEDS A PROSPECTUS:** Members of the Public (not ppl intimate with the issuer) (***Ralson Purina*)**

**COMMON BONDS TEST:** They know each other well enough the investor would not be defrauded.

## TYPES OF PROSPECTUS EXEMPTIONS:

**NB: Discretionary Exemption (BCSA 76):** An issuer can request a discretionary exemption. Commission may allow exemption in certain circumstances where it is not prejudicial to the public interest.

* ***Re Uranium*:** Exemptions can be tailor-made to the situations of the company.

### (A) No Need to Know: Purchaser already familiar w/ Issuer or Securities (NI 45-106, Part 2 Div 1)

**[1] Rights Offering (NI 45-106** **s.2.1):** A distribution to issuer’s existing security holders to purchase more shares of issuer on pro rata basis. Fast way to raise capital. ***Issuer must*** provide written notice of details of offering to regulator in advance of offering. Regulator has 10 days to raise any objections.

* **Prospectus req’s does not apply to rights offering if** (**s.2.1(3))**: **a)** Issuer is a RI in jurisdiction in CND; **b)** Filed all periodic and timely disclosure requirements (not behind on their filings), **c)** File the rights offering and give ppl advanced warning; **d)** Concurrently w/ filing the rights offering notice, issuer files a rights offering circular; **g)** The Subscription price you will pay for rights offering is: **i)** If there is a published mrkt (e.g. TSX) = Price of rights are lower than mrkt price **OR ii)** If no published mrkt = Price is lower than the fair value of the security.
* On closing date of issue, must issue a ***news release*** (**s.2.1(5))**

**[2] Reinvestment Plan (NI 45-106** **s.2.2):** If you get dividends from the co, these are ***automatically rolled into buying more shares*** in the company (Must meet requirements of **s.2.2(1)-(5)**)

* **Don’t need prospectus as**: Securityholders already hold securities and have access to relevant info; and since automatic there is no choice being made, so does not require disclosure to make an informed choice.

**[3] Private Issuer (NI 45-106** **2.4) –** Private issuer is **a)** Not a RI or investment fund, **b)** has 50 or fewer securityholders, **and c)** constating document restricts the right of securityholders to transfer its securities (**s.2.4(1))** 🡪 **Defined around the small # of securityholders.**

* **There is a list of ppl who can get**: EE’s/OFR’s/DIRs as well as their family/close personal friends/close biz associates (**2.4(2)(a-l)**).
  + **NOTE:** can issue securities under this exemption to persons not enumerated if you can satisfy the requirement that they are not members of the public re: **2.4(2)(l)**
  + ***Policy rationale:*** These persons are in a position to know the issuer or to find out about it without requiring a prospectus to provide the info. The test for who constitutes “the public” has been set out in various cases, but is largely contextual.
    - **Need to Know Test:** Categories of ppl who can invest in exempt mrkt are those who do not need to know everything that would be in disclosure; thus not “the public” (***Ralson Purina –*** *co offered SH’s to EE’s*)
    - **Common Bonds Test**: the public is those who are not in any sense friends of associates of the issuer, or persons having common bonds of interest or association (***Piepgrass,* ABCA –** *Fellow farmers not enough to constitute common bond***).**
* **Other req’s:** No commission or finders fee can apply.

**[4] Friends, Family and Business Associates (NI 45-106** **s.2.5)**

* A distribution to “family,” “close personal friends” or “close business associates” of the **issuer’s DIRs/Exe OFRs/Control Person** is exempt. Not available in ONT. No restriction on the number of investors to whom securities may be sold
* **There is an exhaustive list of who qualifies (s.2.5(1)(a-i))** (2 degrees up and down (parents, grandparents, children and grandchildren); 1 degree side-ways (siblings, spouse) in relationship to ppl in co).
* **Determination of “close personal friend” and “close business associate” requires a subjective analysis**:
  + **“Close Personal Friend”** is one who has known the person in question (e.g. DIR) long enough to be in a position to assess that persons capabilities and trustworthiness. Must be a direct relationship. Not simply b/c related, belong to same org, or used to work together. Must look at the length and nature of relationship, and the amount of friends that have been distributed to (**45-106CP s.2.7).**
  + **“Close Business Associate”** sufficient prior business dealings with a DIR, OFR, founder or control person of issuer to be in a position to assess that person’s capabilities and trustworthiness. Look at the length of time the associate knew the DIR (etc), when business K’s between the two started, and the amount of Ks done, and the number of business associates the registrant relied on (**45-106CP s.2.8)**
    - **Insufficient:** to rely on statement signed by a purchaser that they are a “close personal friend” or “biz assoc”
* **Other req’s:** No commission or finders fee can apply (**e.g.** Issuer cannot locate long-lost grandchild and try and sell securities as defeats the reasoning behind this).

**[5] Affiliate Exemption (NI 45-106** **s.2.8):** Distribution to an “affiliate” of an issuer is an exempt distribution.

* **“Affiliate” (s.1.3):** Company is an affiliate of an issuer if one is a subsidiary of the other, or if each is controlled by the same person **// Rationale:** Issuer is unlikely to take advantage of its affiliate, and affiliates share so much info that prospectus-level disclosure is unnecessary. There are remedies if an affiliate is taken advantage of as well (e.g. majority-owned subsidiary pays too much for its parent corps securities, minority SH’s in the subsidiary can bring an oppression remedy).

**[6] Employee, Exe OFR, DIR and Consultant (NI 45-106 s.2.22 – 2.29):** Distribution **by issuer or by a control person** in securities of issuer to an EE, executive officer, director or consultant of issuer is an exempt distribution. EE stock options etc. must be voluntary participation.

* ***Rationale***: 1**)** EE’s, Exe OFRs, and DIRs likely already know much about the issuer, **2)** EE and MGT investment in an issuer is seen to be in the interest of the issuer and its securityholders as a whole.

### (B) No Need to Know: Purchaser is Sophisticated or Otherwise Able to Protect Itself

**[1] Accredited Investor (NI 45-106** **2.3):** Institutional Investors are accredited as they have a level of expertise req’d to take care of themselves.

* Financial institutions such as banks, loans or trust corporations, insurance companies, credit unions, appropriately regulated pension and mutual funds, and govts are designated as accredited investors (defined in **s 1)**
* Individuals can qualify for this status by ***way of 1 of 3 different tests***:
  1. **“Financial assets test”** requires aggregate realizable value exceeding $1M before taxes, but net of any related liabilities
  2. **“Net asset test**” individual who (alone or w/spouse) has net assets of at least $5 million. (total liabilities subtracted from total assets (including residence).
  3. “**Income test”** net income before taxes exceeding $200K in 2 most recent calendar years OR whose combined spousal income exceeded $300K over that time, and who “reasonably expects” to exceed that level in the current year.
* Dealer registration requirement does not apply to a trade where purchaser is an accredited investor and a principal (**s 2.3(1))**
* Cannot create an organization (e.g. a Charity) solely for the purpose of falling in the accredited investor definition (**s.2.3(5)).**
* Where **accredited investor is an individual**, purchaser is required to submit risk acknowledgment form (**Form 45-106F4**).
* Issuer **must** report the distribution w/in 10 days of the distribution to commission in **FORM 45-106F1**, or in BC, the more extensive **FORM 45-106F6.**
* ***Policy rationale:*** these market participants have the investment expertise and/or financial resources that they don’t need a prospectus before making an investment decisions

**[2] Minimum Amount Investment (NI 45-106** **2.10)**

* No prospectus if: **a)** person is not an individual (corp or trust), **b)** person purchasing as principle**, c)** Investing more than $150K in cash, **d)** the distribution is of a security of a single issuer (**s.2.10)**
  + ***Rationale:*** If willing to put 150K in likely will do research on the investment.
* Issuer must report distribution w/in 10 days to commission in **FORM 45-106F1** or in **BC FORM 45-106F6.**

### (C) No Need to Know: Investment Very Safe

Canada Savings Bond, provincial equivalents, municipal bonds, bank bonds etc. Also includes **short term debt**, as long as not convertible, company has approved credit rating from DRO eg. commercial paper, IOU, maturing not more than one year from date of issue.

* **Short Term Debt (NI 45-106** **s.2.35) – only historical significance**

### (D) Redundancy or Dual Regulation: Prospectus-level info available from another source

**[1] Business Combination (NI 45-106** **s.2.11)**

* Dealer registration requirement does not apply to trade of security in connection with an amalgamation, merger, reorganization, or arrangement if it falls under one of the following: **(1)** made under statutory procedure**; (2**) described/disclosed in an appropriate circular, approved by security holders, or **(3)** which is a dissolution/winding-up of an issuer
* When a company offers its shares in exchange for the shares of a target in a takeover bid, this is technically a distribution
* ***Policy rationale:*** Takeover bid or amalgamation will be accompanied by the same sort of disclosure that would be contained in a prospectus (bid circular)
  + Regulators do not want to add to the difficulties of an issuer in financial distress, and creditors may have access to other avenues of information through the terms of their debt agreements

**[2] Take-over Bid and Issuer Bid (NI 45-106** **s.2.16):** A distribution made “in connection with” (could be interpreted broadly) a take-over bid or an issuer bid is an exempt distribution. Bid is already accompanied by a bid circular so prospectus is not required.

**[3]** **Acting as an UW (NI 45-106** **s.2.33): E.g.** If doing a bought deal, and selling securities from issuer to UW, that transaction b/w issuer and UW does not require a prospectus to the UW. Main prospectus req’s is from UW to the public.

### (E) Cost/Benefit Analysis: Ensuring Smaller Issuers and Not-for-Profits can access Capital Markets

**[1] Offering Memorandum Exemption (NI 45-106** **s.2.9)**

* OM is used as a substitute for prospectus level of disclosure. **Can only be used by issuers**. It MUST contain a risk acknowledgement, and it **must be signed**. The commission does not receipt it, and a misrep in an OM does attract liability. Need not be an eligible investor. When you distribute through this exemption, you must report within 10 days to the commission.
* Allows two days for cancellation. **Must be a qualifying issuer** that reports files on SEDAR, has never defaulted on these and has filed AIFs recently.

**[2] Asset Acquisition (NI 45-106** **s.2.12):**

* A distribution made as consideration for the acquisition of assets owned by the purchaser, if those assets have a fair value of at least $150K. Must report it w/in 10 days in **Form 45-106F6.**
* **E.g.** Startup needs a new IT system, will pay IT services company in your own shares. Buying an asset from them (but must be less than $150K, thus do not have to give them a prospectus). IT company would have to figure out for themselves if your shares are worth enough.

**[3] Isolated Distribution by Issuer (NI 45-106** **s.2.30):** An isolated distribution (e.g. a small issue to a trade creditor that is unable to use another exemption) by an issuer in its own securities is exempt if two conditions met:

* **1)** Distribution not part of similar successive transactions;
* **2)** Distribution must not be by a person whose usual business is trading in securities.

Must report it w/in 10 days in **Form 45-106F6.**

### Equity Crowdfunding Exemption (BCI 45-535)

**Crowdfunding:** A method of funding a project or venture through small amounts of money raised from a large number of people over the internet via an Internet portal intermediary (e.g. Kickstarter). BCSNc used **BCSA 48 & 76** to provide discretionary crowdfunding exemptions from the registration and prospectus requirements (used these rules to promulgate the instrument as opposed to BCSA 184 (which is usually used)).

**Equity Crowdfunding:** Under an Equity Securities Model ppl receive securities for their monetary contributions.

* **Dealer Registration Exemption (BCI 45-535, s.7):** Funding portals must either be registered or may rely on this registration exemption. Registered funding portals are subject to registrant regulation
* **Exemption from Prospectus (BCI 45-535, s.8)**: Provides exemption for crowdfunding of capital**. Req’s:** **(b)** Distribution and payment facilitated through a funding portal**, (e) aggregate funds raised by any person must not exceed $250,000**, **(f)** the issuer group is restricted to no more than 2 crowdfunding distributions in a calendar year; **(h)** The issuer uses an offering document to conduct the distribution and provides the offering document to the funding portal for the purpose of making it available to a purchaser through the funding portal’s website; **(i)** Issuer amends the offering document in the event the offering document is no longer true … ; **(j)** the issuer provides a purchaser with a K’al right to withdraw an offer to purchase an eligible security that may be exercised by the purchaser delivering a notice to the funding portal within 48 hours of (i) the purchaser’s subscription or (ii) the funding portal notifying the purchaser that the offering document has been amended; **(p) No persons invests more than $1500.**

### Miscellaneous (Part of Div 2: Transaction Exemptions)

**[1] Petroleum, natural gas and mining properties (NI 45-106 s.2.13):** The prospectus requirement does not apply to a distribution by an issuer of a security of its own issue as consideration for the acquisition, directly or indirectly, of petroleum, natural gas or mining properties or any interest in them.

**[2] Securities for Debt (NI 45-106** **s.2.14):** Here we are talking about RI (whereas before was just an issuer). Have a creditor (you owe money) and you are settling your debt by issuing them securities.

* **Just for reporting issuer**: As you don’t want to put a burden on a lender to do piles of due diligence before they will give a company a loan. Creditor can look at disclosure and have an idea if shares are worth anything.

**[3] Issuer Acquisition or redemption (NI 45-106** **s.2.15):** Issuer creating more of its own securities to hold itself. Does not have to write a prospectus for itself. They are both the issuer and the purchaser.

**[4] Security-holders outside the local jurisdiction (“province”) (NI 45-106** **s.2.17):** Don’t have to file documents in the local jurisdiction (BC) if the transaction is one that the securityholder is outside the jurisdiction and the distribution would be in connection with a take-over bid or issuer bid. There would be other requirements for disclosure for a takeover bid (e.g. US takeover bid provisions). Thus if get one of those don’t need to file a prospectus (equivalent of 2.16 but works for security holders outside BC).

## Resale of Securities Exemption (NI 45-102)

**3 WAYS TO RE-SELL SECURITY ISSUED UNDER NI 41-106 PROSPECTUS EXEMPTION:**

* **[1]** Trade within closed exempt market only, by relying on further exemptions.
* **[2]** Issuer Files Prospectus to Qualify the already distributed exempt market securities, transforming them into freely trading securities.
* **[3] Under NI 45-102 Resale Rules, hold exempt market securities until “hold period” expires, then sell**\*

### Under (3) - Resale Rules (NI 45-102)

|  |  |
| --- | --- |
| **Hold Period:** Keeps securities distributed under **NI 45-106** Prospectus exemption from being freely trades for a time period.   * **2 main categories: 1) Restricted Period; 2) Seasoning Period** | |
| **Restricted Period:** Applies to exemptions granted under NI 45-106 that are listed in **NI 45-102, Appendix D.**  **Appendix D covers these NI 45-106 Exemptions (s.2.3) - “Common Bonds” Related: Accredited Investors** (s.2.3), **Family, friends and biz associates** (s.2.5), **Affiliates** (s.2.8**), Offering Memorandum** (s.2.9), **Minimum Amount Investment** (s.2.10), **Asset Acquisition** (s.2.12), **Petroleum** (2.13); **Additional Investment in Investment Funds** (s.2.19), **Isolated Distribution by Issuer** (s.2.30)    **7 Conditions to Satisfy Restricted Period (NI 45-102 s.2.5):**  **1)** Issuer must have been RI in Canadian jurisdiction for minimum 4 months prior (must already have periodic disclosure and prospectus);  **2)** Minimum 4 months must have passed since original distribution (prevent “backdoor underwriting”)  **3)** Security Certificate must have legend denoting the original 4-month trading restriction or written notice must be given to original purchaser;  **4)** Trade can’t be a control distribution  **5)** No unusual effort to prepare the market or create demand  **6)** No extraordinary commissions or consideration can have been paid  **7)** If seller is insider or officer, they can’t have reasonable grounds to believe that issuer is in default of securities legislation  **Once restricted period observed:** securities can be traded freely on public capital markets. | **Seasoning Period:** Applies to exemptions granted under NI 45-106 that are listed in **NI 45-102, Appendix E.**  **Appendix E covers these NI 45-106 Exemptions (s.2.4) - More In relation to the nature of the security: Rights Offering** (s 2.1), **Reinvestment Plan** (s 2.2), **Private Issuer** (s 2.4), **Business Combination and Reorganization** (s 2.11), **Take-over Bid and Issuer Bid** (s 2.16), **Offer to Acquire to security holder outside local juris** (2.17); **Investment Fund Reinvestment** (s 2.18), **Private Investment Club** (s 2.20), **Private Investment Fund – Loan & Trust Pools** (s 2.21), **EE, Exe OFR, DIR and Consultant** (s 2.24)  **5 Conditions to Satisfy Seasoning Period: (NI 45-102 s 2.6)**  **1)** Issuer must have been RI in Canadian jurisdiction for minimum 4 months prior  **2**) Trade can’t be a control distribution  **3)** No unusual effort to prepare the market or create demand  **4)** No extraordinary commissions or consideration can have been paid  **5)** If seller is insider or officer, they can’t have reasonable grounds to believe that issuer is in default of securities legislation  ***What’s Missing (compared to 2.5):*** Does not include no “backdoor UW”; no legending requirements; don’t have to hold securities for 4 months as well 🡪 Less of a risk of that behaviour under those particular exemptions.  **Once seasoning period observed**: securities can be traded freely on public capital markets. |

**Different resale rules for different exemptions:**

* **“Restricted Period” exemptions must satisfy two additional conditions: 1)** A minimum of 4 months must have passed since the original distribution and **2)** the security certificate must include a legend denoting the original 4-month trading restriction.
* For exemptions subject to “Restricted Period”, indication that Securities Commissions are more cautious about these securities entering public capital markets, so they have created a more onerous process.

# Registrant Regulation

**Registrants:** Can be individuals or corporations:

* **[1] “Dealers”:** A person (which includes a corp) engage in (or hold themselves out as engaging in) the biz of trading in securities and acting as UW’s (**BCSA s.1(1)) -** a dealer can be investing on its own account or be acting as an agent for other ppl;
  + **“Sales-person”:** Individual employed by a dealer to make trades on a dealer’s behalf (dealer here = corp entity; sales person = individual working for corp) (**s.1(1)).**
* **[2] “Advisor”:** Person (incl corp) engages in (or holds themselves out as engaging in) the biz of advising in securities (i.e. person gives advice of where to put money) (**s.1(1))**
* **[3]** "**Investment fund managers**": Person who directs business, operations or affairs investment funds (**s.1(1))**
  + **“Investment fund”**: a mutual fund or a non-redeemable investment fund (**s.1(1))**

Firms and individuals must be registered (e.g. advisor firm and individuals must be registered). Cannot be registered advisor or dealer w/o a corporate entity you are connected with.

**Objective of Registration Req’s:** Intended to protect investors from unfair, improper or fraudulent practices and enhance capital markets integrity and efficiency.

## Registration Requirements

**BCSA 34** - Persons must be registered under the applicable securities legislation, if they: **(a) trade** in a security or exchange contract; **(b) act as an adviser**; **(c) act as an investment fund manager**, or; **(d) act as an UW** (i.e. investment banker)

* If meet the req’s the commission cannot refuse to register you (**BCSA 35**)
* Must not do (a-d) unless registered.

### Dealers and Advisers

**EXEMPTION FROM REGISTRATION**:a person or company is exempt from registration if the person or company **(a)** is not engaged in the business of trading in securities or exchange Ks as a principal or agent, and **(b)** does not hold himself, herself or it (**NI 31-103 s.8.4(1)**)

**BUSINESS TRIGGER:** The req’t to register w/ the Commissions **as a dealer or advisor** is triggered if the person or company holds themselves out as ***engaging in the business of trading or advising*** in securities (**BCSA s.1(1)**)

* **FACTORS -** One factor alone may not be determinate (***Re Empire Consulting*)** (look @ quantity + quality of services provided):
  + **Engaging in activities similar to a registrant** (**e.g.** promoting securities or stating in any way that the individual or firm will buy or sell securities – **CP 31-103 s.1.3)**;
  + **Intermediating trades or acting as a market maker** (**e.g.** typically takes the form of the biz commonly referred to as a broker. Making a market in securities is also generally considered to be trading for a biz purpose - **CP 31-103 s.1.3**);
  + **Directly or indirectly carrying on the activity with repetition, regularity or continuity** (**e.g.** The activity does not have to be their sole or even primary endeavour. Regularly trading or advising in any way that produces, or is intended to produce, profits is considered to be for a biz purpose - **CP 31-103 s.1.3)**;
  + **Being, or expecting to be, remunerated or compensated**; and
  + **Directly or indirectly soliciting (e.g.** Contacting anyone to solicit securities transactions or to offer advice may reflect a business purpose **- CP 31-103 s.1.3).**
* **Generally:** One-time trading or advising activities are not considered to be in the biz of trading or advising (i.e. lawyers)
* **Advice must have an effect on markets or investors:** **1)** Reciting Facts is not advising, but talking about merits is, **2)** Business purpose may not be found if the trading or advising activities are incidental to a primary business **(*Re Morrison*)**
* **Disclaimer has no effect on whether a business trigger is effected (*Re First Federal Capital*)**

### Investment Fund Managers (NI 31-103 s.7.3)

**Overview:** There is no “in the business” registration trigger for investment fund managers. If a person or company directs – or has the power to direct – the business, operation or affairs of an investment fund, it will be subject to registration (**BCSA 1**).

* **“Investment fund**”: “a mutual fund or a non-redeemable investment fund”.
* **Functions of investment fund managers:** establishing a distribution channel for the fund; marketing the fund; overseeing the fund’s compliance and risk management programs; overseeing day-to-day administration, etc.

## Firm Categories For Registration

**Dealers - Firm Registration (NI 31-103 s.7.1):**

* **1)** **Investment Dealer** – Full service category, may act as dealers or UW’s in respect of any security (**s.7.1(2)(a)**); Investment dealers must be members of IIROC (**s.9.1**).
* **2)** **Mutual Fund Dealers** – May act as dealers regarding securities issued by a mutual fund, labour-sponsored investment funds, or labour-sponsored venture capital corporation (**s.7.1(2)(b)**): except in Quebec, must be a part of MFDA (**s.9.2**);
* **3)** **Scholarship Plan Dealers** – May act as dealers only in respect of securities issued by a scholarship plan, education plan, or educational trust (**7.1(2)(c)**)
* **4)** **Exempt Market Dealer** – allowed to trade only in exempt mrkt securities (still have to register, just are dealing with securities in the exempt market) (**7.1(2)(d)**)
* **5)** **Restricted Dealer** – Dealer whom restrictions have been placed on them (**7.1(2)(e)**)
  + As long as register in most full-service category (bigger) don’t have to register in the others (smaller) but that does not work vice-versa.

**Advisor - Firm Registration: 2 Categories**

* **1) Portfolio Managers –** May act and advise in respect of any security (**NI 31-103 s.7.2(2)(a)**)
* **2) Restricted Portfolio Managers -** May act as advisors regarding any security in accordance to terms of registration (**7.2(2)(b))**(**e.g.** restricted to a specific type of security, such as oil and gas securities or real estate and mortgage securities)

## Individual Categories of Registration (NI 31-103 s.2.1)

An individual who acts on behalf of a registered firm must **register in 1+ ind categories**. An ind may need to register in both firm and individual categories (**e.g**. sole proprietor register as a portfolio manager (firm category) and as an advising representative (individual category).

* Cannot act for more than 1 firm at a time.

**(i) Dealing Representative (for firms in dealer category):** May act as a dealer or UW in respect of a security that the individual’s sponsoring firm is permitted to trade or underwrite (**NI 31-103 s.2.1(2)(a)**) (**NB:** Can be a dealer rep for exempt mrkt dealer as well)

* **To be a dealing representative for an Investment Dealer**: must be an approved person under IIROC rules (**NI 31-103 s. 3.15(1).**
  + A partner, DIR, OFR, EE, or agent of an approved member firm who is approved by IIROC or another Canadian SRO (**Dealer Member RulesR. 1.1**)
* **To be a dealing representative for a Mutual Fund Dealer**: must be an approved person under MFDA rules (**NI 31-103 s. 3.15(2))**
  + A partner, DIR, OFR, compliance officer, branch manager, alternate branch manager, EE or agent of the MFDA member (**MFDA By-law 1.1 s.1)**

**(ii) Advising Representative (for firms in advising category):** May act as an adviser in respect of a security that the individual’s sponsoring firm is permitted to advise on (**NI 31-103 s. 2.1(2)(b)) – i.e.** may be advising rep for a portfolio manager.

* All of the advising activates of associate advising reps must be supervised by an advising rep at the firm (**NI 31-103 s.4.2)**

**(iii) Associating Advising Representative (for firms in advising category):** May act as an advisor in respect of a security that the individual’s sponsoring firm is permitted to advise on if the advice has been approved under s. 4.2(1) **(NI 31-103 s. 2.1(2)(c)) – i.e.** may be assoc advising rep for a portfolio manager (**NB:** Associate is “an apprentice category” for those yet to meet education + experience req’s)

* **Must not advise** on securities unless, before giving the advice, **the advice has been approved** by an individual designated by the registered firm under subsection (2) (**s. 4.2(1)**)
* **Must designate,** for an associate advising representative, an advising representative **to review the advice** of the associate advising representative (**s. 4.2(2)**)
* **No later than 7 days** following the date of a designation under (2), a registered adviser must provide the regulator ***with the names*** of the advising representative and the associate advising representative who are the subject of the designation (**s. 4.2(3)**)

**COMPLIANCE POSITIONS:** Every registered firm is required to have a USD and a COO.

**(i) Ultimate Designated Person (UDP):** Must do all of the following (**NI 31-103 s.5.1**):

* **(a) supervise the activities of the firm that are directed towards ensuring compliance** with securities legislation by the firm and each individual acting on the firm’s behalf;
* **(b) promote compliance** by the firm, and individuals acting on its behalf, with securities legislation.

**Who is the UDP? –** Usually the CEO (or someone acting in that capacity) or sole proprietor of the firm (**s.11.2)**

**(ii) Chief Compliance Officer (CCO)**: Must do all of the following (effectively keep policy and compliance) (**NI 31-103 s.5.2**)

* **(a)** Establish and ***maintain policies for assessing compliance*, (b)** ***Monitor and assess compliance*** by the firm **(c)** ***Report to the UDP*** as soon as possible if they become aware of any circ’s indicating that the firm may be in non-compliance. The non-compliance must involve **1.** Risk of harm to client, **2.** Risk of harm to capital markets, **3.** Part of a pattern of non-compliance. **(d)** Submit an annual report**.**

**PERMITTED INDIVIDUALS (NI 33-109):** Reviewed by Exe DIR as part of assessing a firm’s overall fitness for registration.

* **‘Permitted Individual’** - means **(a)** aDIR, CEO, CFO, or COO **(b)** anindividual with beneficial ownership or control over 10% of the voting securities **(c)** A trustee, executor or administrator, legal representative of above (**s.1.1)**

### Individual Registration Requirements

**General:** Individuals must be “fit for registration”, based on criteria in **NI 31-103 Part 3** and **Form 33-109F4.**

* **3 Criteria for assessing an applicant suitability:** **(1) Proficiency** (Have education, training, and experience a reasonable person would consider necessary), **(2) Integrity** (Have an honest character, lack of conflict of interest and do not have regulatory or legal actions against them) **(3) Solvency** (An individual who is insolvent or bankrupt may not be suitable)
* **Form 33-109F4:** Fitness for registration assessed through the forms contents. Must provide: name, address, personal info; jurisdiction registration is sought; proficiency; location of employment; current employment; etc.
* **See above for specific requirements to be a dealer rep, advising rep, UDP or COO.**

## Registrant Obligations

Registrant information is reviewed by the principal regulator (**NI 31-103 s.1.3(2))**

* Investment dealers are subject to additional requirements of IIROC
* Mutual fund dealers are subject to additional requirements of MFDA

Firms registered with IIROC/MFDA are exempt from certain requirements of NI 31-103 as long as they oblige IIROC or MFDA rules

**COMPLIANCE (NI 31-103 s. 11.1):** A registered firm **must establish, maintain and apply policies and procedures that establish a system of controls** and supervision sufficient to

**(a)** **provide reasonable assurance** that the firm and each individual acting on its behalf complies with securities legislation, and

**(b)** **manage the risks** associated with its business in accordance with prudent business practices.

* This done by CCO (**NI 31-103 s. 5.2)**
* CCO must also produce an annual report to UDP (**NI 31-103 s.5.2)**

**BOOKS AND RECORDS:** Required to **maintain records** to accurately record its **business activities, financial affairs**, and **client transactions** for **7 years** (**NI 31-103 s.11.5(2)**)

**FINANCIAL CONDITION:** Must keep "**working capital**" to ensure they can meet their financial obligations when they become due (**NI 31-103 s.12.1**). Maintain a min amount of insurance coverage to protect against property loss (**s.12.3-12.5).**

* Must also **provide financial statements** to the Exe DIR**. Audited annual ones** for all registrants, and **unaudited quarterly ones** for all registrants except exempt market dealers and advisers (**See NI 31-103 12.12-12.14**)

**KNOW YOUR CLIENT + SUITABILITY:**

* **KYC: Know Your Client - A** **registrant must**: establish certain information about the client – the ***client’s ID***, whether the client is ***an insider of any RP***, and the ***client’s creditworthiness*** if the registered firm will be financing the client’s acquisition of a security (**NI 31-103 s.13.2(a)(b)(d)**)
  + Must have **“Sufficient Information”** regarding the following to fulfill **SUITABILITY** (**s.13.2(c))**:
    - **i)** Client’s investment needs and objectives;
    - **ii)** Client’s financial circumstances;
    - **iii)** Client’s risk tolerance.
  + Must take reasonable steps to keep the **information current (s.13.2(4))**
  + **For Corporate Client:** KYC rule entails understanding the company’s biz and identifying whether any SH’s own or control more than 25% of the company’s voting security (**s.13.2(3))**
* **KYP: Know Your Product:**
  + Individual must understand “the ***structure, features and risks*** of each security” (**NI 31-103 s.3.4)**
  + **Registrants Must (“Suitability”):** 
    - Before they make a recommendation to a client, or accept instructions to buy or sell a security, take reasonable steps to ensure that the purchase or sale is suitable for the client (**13.3(1);** ***Re Veerbeek* 2005 OSC** - *the compliance standard is reasonableness or higher*)
    - Advise their client that the security is **not suitable**, and cannot buy or sell in that security **unless client insists** (**s.13.3(2)**)
    - *s. 3.16 exempts dealer representatives from IIROC and MFDA from this section if they follow SRO rules*

**POLICY: *Alternative to Suitability* – “best interest of the client”.** Reforms would include a statutory duty for dealers and their individual registrants or financial advisors to act in their client’s best interest. Advice should be objective, proficient, free from conflicts and focused on what’s best for the investor, and not the advisor

**CONFLICT OF INTEREST:** Registered firms must take reasonable steps to ID and respond to material conflicts of interest b/w the firm (including individual acting on its behalf) and clients. Such conflicts ***may be existing*** or ***reasonably expect to arise*** (**NI 31-103 s.13.4(1)(2)**)

* **Timeliness:** Registered firms and their representatives should disclose conflicts of interest to their clients before or at the time they recommend the transaction or provide the service that gives rise to the conflict (**13.4 CP)**
* **Responses to conflict:** avoidance, control or disclosure (**31-103CP**)
  + Primarily dealt w/ through disclosure. Tell ppl about the conflict and sometimes respond by mitigating the conflict.
    - Registered firms should ensure that their clients are adequately informed about any conflicts of interest that may affect the services the firm provides to them. Including whether it involves any ***connected*** or ***related*** issuers (**s.13.4 CP)**
    - **Disclosure may not be appropriate if a conflict of interest involves confidential or commercially sensitive information, or the information amounts to “inside information”** under insider trading provisions in securities legislation. In these situations, registered firms will need to assess whether there are **other methods** to adequately respond to the conflict of interest. If not, the firm **may have to decline** to provide the service to avoid the conflict of interest (**s.13.4 CP)**
  + If reasonable investor would expect to be informed of a conflict, the registered firm is required to do so (**NI 31-103 s.13.4(3))**
* **“Related Issuer”:** A person or company is a ‘related issuer of another person or company if **(a)** the person or company is an influential securityholder of the other person or company **(b)** The other person or company is an influential securityholder of the person or company, or **(c)** each of them is a related issuer of the same third person or company.
* **“Connected Issuer”:** Issuer distributing securities if the issuer or a related issuer of the issuer has a relationship with any of the following persons: **(a)** Specified firm registrant **(b)** A related issuer of the specified firm registrant **(c)** A director, officer, or partner of the specified firm registrant, **(d)** a director, officer, or partner of a related issuer of the specified firm registrant.

**Registered firms should design their organizational structures, lines of reporting and physical locations to control conflicts of interest effectively. E.g. of Situations:** advisory staff reporting to marketing staff; compliance or internal audit staff reporting to a business unit, and registered representatives and investment banking staff in the same physical location (**13.4**)

**REFERRAL ARRANGEMENTS:** means any arrangement in which a registrant agrees to pay or receive a referral fee (any form of compensation, **direct or indirect**, paid for the referral of a client to or from a registrant) (**NI 31-103 s.13.7)**

* Registrants *can accept or pay a referral fee*, if the referral agreement is **in writing**, **fees are recorded**, and the client **receives disclosure** before the registrant opens and account OR provides services to the client (**s. 13.8**)
* Must take reasonable steps to ensure that a person or company referred to is **appropriately qualified and registered** (**s. 13.9)**

**COMPLAINTS:** Dealers and Advisers must document and respond to every **complaint** made to a registered firm about any product or service offered by the firm or its representative (**s.13.15)**

**ACCOUNT ACTIVITY REPORTING:** Registered firms are required to provide clients with certain transaction reporting (**s.14.12**) and account reporting (**s.14.14**).

**RELATIONSHIP AND COST DISCLOSURE (NI 31-103 s.14) Required to provide clients with info about client’s relationship with the registrant that a reasonable investor would consider important (**Churning, front running and other concerns are dealt with here**) (s.14(2)):**

* Disclose type or nature of client’s accounts **//** general description of registered firms products **//** Relationship w/ investment **//** Fair allocation of investment opportunities **//** transaction charges the client my face **//** Reports to clients

**CHANGE OF REGISTRATION INFORMATION (NI 33-109 s.3.1):** Must notify Exe Dir of any changes to info previously submitted for review: **(1)** Changes must be submitted within 30 days, (**2)** Notice of change must be made using Form 33-109F5, **(4)** Regarding name of agent for service: Changes must take 10 days**, (6)** Notice

# Insider Trading

**Policy: Fairness**

* Risk-free trades are not allowed because they undermine this basic concept
* Therefore, the IT prohibition is based on a theory of “equal access” to information. Insiders should be required to a report if they are in a position to receive or have access to MNPI before it is disclosed and/or are in a position to have control over the issuer

**Critiques:**

* If IT allowed, share prices might more correctly reflect the value of the securities because to some extent would reflect ALL information **//** These arguments have not carried the day in Canada (nor would they go far as a defense)
* ***Why complicated***: How much the fine is depends more on how much money is involved rather than how culpable an individual was (e.g. 9 year sentences); Scalping – easier to go after insider traders than ppl who caused financial crisis; Never person at the top of insider trading who get big sentence, it is the lower down ppl who can be scapegoated; Canada is lenient on insider trading – difficult to prove as use circumstantial E.

**Difference b/w Illegal and Legal IT:** The insider’s (or special relationship person’s) state of knowledge at the time of the impugned activity.

## Legal Insider Trading (Reporting Issuer)

**Criteria**: **1)** Person is an ***insider;* 2)** Does **not have** material non-public information; **3)** If a **“reporting insider**”, files an ***insider trading report***

* **NI 55-102** **→** *prima facie* all insiders must file an “insider profile” on SEDI + an ITR as a signal to the market

**“Insider” (BCSA s.1(1)):**

* A **DIR or OFR** of the issuer (or subsidiaries) (**incls:** Person who lack title but act in a similar capacity)
* A **DIR or OFR of a person that is itself an insider or subsidiary** of the issuer;
  + ***Subsidiary:*** includes all chains of corps under the control of the issuer + control is legal in that the issuer has more than 50% of the other corp’s shares
* A person that has indirect or direct control over, or beneficial ownership of, **more than 10% of voting rights** attached to all the issuer’s outstanding voting securities (***excludes:*** securities held by UW’s during a distribution)
* An **issuer that has purchased, redeemed or otherwise acquired its own securities**; or,
* A person **designated as an insider by the regulator** “in the public interest” under BCSA s. 3.2.

**“Reporting Insider” (NI 55-104) 🡪 Must File ITR’s (below)**

* A **DIR, CEO, CFO or COO** of the RI, of a “major subsidiary” of the reporting issuer, or of a “significant SH” of the RI
  + ***Major subsidiary***: includes a subsidiary which accounts for over 30% of the assets or revenue of the 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; **OR** directly or indirectly exercises, or has ***the ability to exercise, significant power or influence over the biz***, operations, capital or development of the RI

**Insider reporting requirements:** Only ***Reporting Insiders*** must file ITR’s

1. **W/in *10 calendar days of becoming an insider of a RI*, the insider must file an initial Insider Trading Report (ITR)** (**s. 3.2 NI 55-104**; **BCSA 87**).
2. **W/in *5 days of any subsequent change* (e.g. exercising an option, or buying or selling securities of the reporting issuer), the insider must file a new ITR**, disclosing the change (**s. 3.3 NI 55-104**; **BCSA 87**).

**Exemptions to the ITR Requirements (NI 55-104)**

* Automatic Securities Purchase Plan **//** Issuer Events **//** Issuer Grants as Compensation **//** Normal Course Issuer Bids and Publicly Disclosed Transactions **//** Insiders of U.S. Issuers
* ***General Exemptions*: e.g.** If a RI has no beneficial ownership, or control or direction over, any security of the issuer, or any interest in a related financial instrument, that RI has no filing obligation (**NI 55-104 s.9.4)**
* ***Discretionary Exemption:*** under **BCSA 91**, the regulator may grant a discretionary exemption to insiders where it would not be prejudicial to the public interest to do so; insiders may apply for a discretionary exemption.
  + ***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” **// Held: Everyone who fit w/in the definition of “insider” but was not privy to material non-public info was granted an exemption from ITR req’s.**

**Halt Order (BCSA 89(1)):** If the commission thinks there is something sketchy going on, b/c of insider trading, they can cease trade securities. Can do so on emergency basis w/o opportunity to be heard and hold it for 15 days.

**Consequences of failure to file insider reports (BCSA 155):** Issuer has committed an offence and may be liable, under s. 155(2), to a fine of not more than $3 million, or to no more than 3 years imprisonment, or both. The regulator may also make an order for compliance under s. 157(1), or an enforcement order, including a cease trade order, under s. 161.

## Illegal Insider Trading/Tipping/Recommending

**[1] Illegal Insider Trading:** when the persons/companies in a special relationship to the reporting issuer trade with knowledge of a material fact/change that hasn’t been generally disclosed.

For there to be a claim against X for **illegal insider trading** under **BCSA 57.2**, **3 elements must be met (on BofP)**:

1. **Special relationship:** X must be in a special relationship with the RI;
2. **Traded on Material information:** the knowledge on which X purchased or sold the RI’s securities must meet the materiality threshold (**i.e. it must be a material fact, or a material change**); and,
3. **Not generally disclosed:** the info relied on by X in the purchase or sale of the reporting issuer’s securities must not be information that has been generally disclosed.

**[2] Illegal Tipping:** For there to be a claim against *x* for tipping under **BCSA 57.2(3)**, **three elements must be met (BofP):**

1. **The tipper (x) must be in special relationship with the reporting issuer;**
2. **The tipper (x) informs the tippee (y) of a material fact or material change other than in the necessary course of business**
3. **The information has not been generally disclosed**

* A tippee (y) can also be a tipper if she is also in a special relationship with the issuer and passes material undisclosed information along to another person – ***chain can continue indefinitely***
  + Tipper (x) will be guilty even if the recipient doesn't know the tipper is in a special relationship
  + For the tippee (y) to be guilty he must *know that the tipper (x) was in a Special Relationship* **OR** *reasonably ought to have known* about the special relationship
    - **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

**ALSO CONSIDER:**

**Takeover/Business Combo (BCSA 57.2(4)) –** where a person is engaged in a takeover/business combinationwith the issuer and knows of a material fact/change wrt the issuer which has not been generally disclosed, they must not inform another party of that MNPI

* **Exemption**: where that disclosure is part of ordinary course of business
* **E.g.** One way to defend against Hostile takeover is to get another company to buy you and you might have to tell this company material non-public info (“White Knight Defense”)

**Recommending (BCSA 57.2(5)) –** Prevents recommending another to engage in a purchase/trade of issuer’s securities where a person is in a special relationship with the issuer and knows of a material fact/change w/r/t issuer which has not been generally disclosed

* **Recommendee does not receive MNPI and is not liable**
* **E.g.** Just nudging someone and hinting to buy.

### [1]: X must be in a SPECIAL RELATIONSHIP with the reporting issuer (BCSA 3).

**In a Special Relationship:**

* **s.3(a):** **if an “insider”, “affiliate”, or “associate” of:**
  + **(i)** Of the issuer itself; **(ii)** Of a person proposing to make a takeover bid of the issuer’s securities; **OR (iii)** Of a person proposing to become party: to some sort of business combination (takeover, merger, amalgamation, rearrangement) with the issuer, or acquire a substantial portion of its property;
    - **“Insider” (1(1)) 🡪 See above (**under Legal Insider Trading)
    - **“Affiliate”:** issuer is an affiliate if **a)** one is subsidiary of the other **OR b)** each is “controlled” by the same person (**1(2)(a-b)**) (i.e. sister corps or one controlled by the other).
      * **“Controlled” (1(3)) –** Issuer is controlled if **a)** voting securities are held by or for benefit (would cover trusts), **AND** **b)** the voting rights attaches to those voting securities are entitled, to elect maj or DIRs.
        + **“Beneficially Own” (1(4)):** a person beneficially owns securities that are beneficially owned by **(a)** an issuer controlled by that person, **OR (b)** an affiliate of that person or an affiliate of any issuer controlled by that person.
    - **“Associates” (1(1)):** **(a)** **partner** other than LP, **(b)** a trust or estate, **(c)** issue which you own or direct more than 10% of voting rights **OR (d)** a relative (if living in same house) or a spouse.
* **s.3(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 mentioned in **s.3(a)** is in a special relationship (**e.g. Lawyers, accountants, experts etc)**
* **s.3(c): *EEs/DIRs/OFRs of the issuer*** or an EE/DIR/OFR of ***anyone mentioned in s 3(a)-(b)*** (e.g. EE of a person proposing a take-over)
* **s.3(d):** Someone who knows a ***material fact/change*** of the issuer from a **previous relationship** with the issuer such as those enumerated under **s 3(a)-(c)** is in a special relationship (**e.g.** Just quitting your job to trade does not mean you are not in a special relationship if you got that info in that capacity).
* **S 3(e):** **Tippie Liability - Person who knows of a material fact/change,** having acquired the knowledge from another person at the time when **(i)** that person *was in a special relationship with the issuer* **AND** **(ii)** they *knew or reasonably ought to have known* the other person was in a special relationship with the issuer (**Tippee –** is in a special relationship)
  + **NB:** Person who learns if a material fact/change from a tippee is also a tippee.
  + Expands the definition outwards indefinitely through the sharing of information **//** Judged on a “reasonableness” standard

### [2] X traded based on knowledge of MATERIAL INFO

Materiality in IT cases is to be determined objectively, from a reasonable investor’s perspective – requires application of judgment and common sense (***Kapusta***) **//** A question of mixed fact and law that requires a contextual determination that takes into account all of the circumstances (***Re Biovail Corp***).

* **Material Change**: “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”.
  + Potential acquisition of the reporting issuer by Motorola in ***AiT*;**
  + New drilling and assay results in ***Pezim***;
* **Material Fact: “**a fact that would reasonably be expected to have a significant effect on market price or value of securities”.
  + Potential second financing deal for a reporting issuer in ***Donnini***;
  + Unseasonably warm weather in ***Danier Leather*.**

**Tests for Materiality:**

* **Market Impact Test (legally binding in Canada):** Info is material if it is reasonable to expect that the release of that information would impact the market price of the security. ***This is objective inquiry*** (***Coventree***).
  + **Reasonable Investor Test (used in the US)**: Material fact or change is one that would be important to a reasonable investor in making an investment decision with respect to the relevant security. Must guard against hindsight and reliance on actual mrkt price changes **(*Coventree*).**

**Materiality of Future/Potential Info:**

* **Probability/Magnitude Test (*YBM*):** The materiality of a potential future event depends on **(a)** an assessment of the probability that the event will occur having regard to all the known or ascertainable facts, and **(b)** an assessment of the magnitude or significance of the change, in terms of whether the info would be viewed by reasonable investors as important info for making a decision to buy, sell, or continue to hold their securities (***Donnini –*** *D learned about a second financing deal in a 3-min “hallway” conversation and then traded Kasten stock based on this info* **// OSC Held:**this was material info b/c negotiations for this financing were “sufficiently advanced”).
  + Muddies the water w/ ***Kapusta***and can find something to be material even before a handshake deal.

### [3] The material info relied on was NOT GENERALLY DISCLOSED

**Info cannot be public; two parts to making information public:** **(1)** Disclosure (releasing the info through Continuous Disclosure); **(2)** Dissemination (ensuring the info is distributed broadly enough).

**2 factors to determine whether material info has been Disseminated (NP 51-201 s.3.5(2)):**

1. Disseminated in a manner calculated to effectively reach the marketplace (Consider company’s traditional practices for publicly disclosing information, and how broadly investors and the investment community follow the company), and
2. Investors must have a reasonable amount of time to analyze the information (Consider circumstances, nature and complexity of the information, nature of the market for the company’s securities, manner used to release the information).
   * **Recommend**: A disclosure model centred around news release disclosure of material info, followed by an open and accessible conference call to discuss the info in the release **(s. 3.5(5)).**
   * **NB:** Internet posting is not enough (**s.3.5(6)**)
   * ***Green v Charterhouse*** *–* Dissemination times will shorted w/ advances in tech.

## DEFENSES

1. **Not in a “Special Relationship” (IT and Tipping)**
   * **E.g.** No special relationship if too early to be in “proposing” requirement under the definition of “special relationship” (***Re Donald***– *D is VP. RIM has a private golf event where another VP (Wormald) is sitting next to Donald at dinner. W starts talking about Certicom that is already providing IT services to RIM. D goes out and buys Certicom shares. Months go by, and eventually RIM announces intention to take over Certicom to buy all of its shares (eventually for twice the price that D paid).* **// Held:** This was not insider trading. ONSC could not establish a special relationship either with W or D with Certicom).
2. **Not a Material Fact or Change** 🡪 Look above at cases re: materiality (**E.g. *Donnini; Kapusta*) (IT and Tipping)**
3. **Reasonable Mistake of Fact re: Something being Material non-disclosed information (IT)** 
   * To establish this defence, the onus is on X to prove that he or she had a genuine reasonable belief that the information in question was not material (recall: definition of “material fact” is subjective, not objective, in this context) (***Lewis*)**.
   * Did he believe that this information would have a substantial effect on the company’s share price?
   * Onus on A to show on a BoP that she had a reasonable belief that the information did not constitute a material fact
   * **E.g. Successful: *Lewis v Fingold,* 1999 –** *F worked for Cineplex. F started selling Cineplex shares (he knew the results were not what they meant to be i.e. share price was higher than it should be given the company’s performance). F argued that he had a reasonable belief that he did not have access to material info. He genuinely believed in the owner that everything was going to work out in the end* **// Held:** Found he did have ta mistaken belief
   * **E.g. Unsuccessful: *R v Harper,* 2000 –** *Mining co was conducting geochemical soil survey plus trench digging. Initial results were very favourable, and disclosed immediately by the issuer. Secondary results were much less favourable, were not immediately disclosed, Harper sold 227,600 shares prior to the disclosure in knowledge of the MNPI* **// Held: 1)** the results were a material fact; **2)** he couldn’t demonstrate on a BoP that he didn’t think these were material as demonstrated by the E that he knew + immediately released the good results
4. **Reasonable Belief in General Disclosure (BCSA 57.4(1)(2)) (IT and Tipping)**

* To establish this defence, the onus is on X to prove that he or she had a reasonable belief that the info was “generally disclosed” (***Re Gorrie:*** An honest but unreasonable belief is not sufficient)
* Gossip and Buzz (knowledge in the industry) about a material fact is not general disclosure, but may warrant a reasonable belief in general disclosure (***Baffinland,* ONSC 2014 –** *There were negotiations b/w B and ArcelorMittal. It was seen as an open secret in the mining industry that B was going to be taken over. Waheed traded in the shares***//** A “pretty open” secret in a specialized industry (such as mining) does not count as generally disclosed. BUT only have to establish reasonable belief, the court held that he had a reasonable belief that that the info had beengenerally disclosed (got off)).

1. **Reasonable Belief in Specific Disclosure (BCSA 57.4(1)(2)) (IT and Tipping):** A special relationship person will not be found liable if that person can prove a reasonable belief that the ***other party or the tippee***, respectively, had knowledge of the material information or ought reasonably to have known about it (\*Onus on person in special relationship).
2. **Automatic Dividend or Written Obligations (BCSA 57.4(3)) (IT):** a person does not contravene 57.2(2) (insider trading) 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**.**
3. **Acting without Using the Information (BCSA 57.4(4)) (IT):** A special relationship person will not be found liable for illegal IT if it can prove it acted as an agent for a party who made an unsolicited order to trade OR the trade made as per an automatic plan.
4. **No Knowledge (BCSA 57.4(5)) (IT and Recommending):** Corporate persons do not contravene IT or Recommending if no individual involved has knowledge of material fact/change or MOI or is acting on recommendation/encouragement of someone who does.
5. **Tipping in the “Necessary Course of Business” (Tipping) (NP 51-201 s.3.3)**

* **NP 51-201:** Idea of selective disclosure where a company discloses MNPI to one or more individual companies and not broadly available to the investing public
* Determined on the facts in each case. It is a mixed question of fact and law whether particular disclosure is being made in the necessary course of business. Good to make them sign a confidentiality agreement (per **NP 51-201 3.4)**
  + ***Royal Trust Co*:** Disclosing information to defend against a Take-over bid is not held to be in the necessary course of biz.
  + ***Re George*:** Sharing biz of the firm with analysts to tell others in the industry is not in the necessary course of biz.
  + **Examples** **of necessary course of biz** (**NP 51-201 3.3(2))** - **(a)** Vendors, suppliers, **(b)** EE, OFRs, and board members, **(c)** lenders, legal counsel, auditors, UW’s, financial and other professionals **(d)** parties to negotiations **(e)** labour unions and industry associates, **(f)** Government agencies and non-gov’t regulators **(g)** Credit rating agencies (provided that the info is disclosed for purpose of rating debt securities)
  + **BUT not analysts, institutional investors or other securities market professionals (s**.**3.3(5)**)

1. **Tippee Unaware that Tipper was a Special Relationship Person (Tipping) –** Described above.
2. **“Make them Prove it” 🡪 Look at Evidentiary issues (Below) and could use these hurdles as a “defense.”**

* **E.g. *Walton:*** Inferences and circumstantial E are not enough to successfully convict. They help corroborate E but that is it.

### Evidentiary Issues: Commission must prove each element of IT allegations on BofP (Burden of proof can be on D at times).

* ***Re Suman (2012)****:* ***Inferences may be drawn from circumstantial E*** when the inferences “are reasonably and logically drawn from the facts established by the evidence” and the evidence is “clear, convincing and cogent.”
  + **Impermissible: (1)** Those that necessarily assume facts that have not been proven; **(2)** those that are linked only tenuously or speculatively to the facts that have been proven.
* ***Holtby*:** Three instances in which inferences could be useful: **(1)** as circumstantial E as to motive; **(2)** as circumstantial E as to a certain habit or practice; **(3)** as circumstantial E of after-the-fact conduct that could reflect consciousness of guilt – Must all be analyzed as a whole.
* ***Walton*:** Increased the circumstantial E requirement - The tipper needs to know or intend that it is likely that recipient will act on that info in some way.

## Sanctions for Illegal Insider Trading/Tipping (See Below for More Detail)

The following sanctions may apply if X is found guilty of illegal insider trading or tipping in contravention of **BCSA s. 57.2.**

1. **Administrative Sanctions under the BCSA** (most common) (**BCSA 161)**: The regulator may make various **enforcement orders** when it is in the public interest to do so (e.g. monetary penalties, cease trade orders, denials of exemptions, and prohibitions from acting as a DIR or OFR).
   * **161:** The regulator may make various enforcementorderswhen it is in the public interest to do so.
   * **162**: The regulator may impose fines up to $1 million for each contravention of the Act, if it’s in the public interest to do so.
   * EXAMPLE: The regulator may suspend, restrict, or terminate the X’s registration, exclude X from trading in BC markets, remove X or prohibit X from acting as a director/officer of an issuer, or reprimand X.
2. **Quasi-Criminal Sanctions under BCSA 155(5):** The maximum penalty for a contravention of **57.2** is a fine not more than the greater of $3 million and an amount equal to triple any profit made by X thanks to the contravention, or imprisonment for not more than 3 years, or both.
3. **Statutory Civil Liability (IT, Tipping or Recommending) (BCSA 136):** A P may recover losses against X. The amount payable by X would be the less of the losses incurred by the P or an amount determined in accordance to the regulation (but a change in market price unrelated to the material information is not attributable to damages).

* **s.136.2 Due Diligence Defence**: A person is not liable under section 136 or 136.1 **(1)** if, after a reasonable investigation occurring before the person **(a)** entered into the transaction, **(b)** informed another person of the material fact or material change, or **(c)** recommended or encouraged a transaction, the person had no reasonable grounds to believe that the material fact or material change had not been generally disclosed.

1. **Civil Court Proceedings (BCSA 157):** The regulator may apply to the BCSC for an order that X has contravened a provision in the act, an order that X pay the regulator any amount obtained, directly or indirectly, as a result of the contravention, an order setting aside a trade, or an on order that X otherwise rectify the contravention to the extent that rectification is possible.

# Take-Over Bids

* Occur when a **bidder (“Offeror”)** corp makes an offer to purchase outstanding shares of **target** corporation **(“Offeree”)**
  + **Hostile bids** occur when target mgmt/DIRs do not invite and are not generally in favour of the bid
  + **Friendly bids** occur when target mgmt. approves of the takeover and cooperates with the bidder in selling the bid to target shareholders
* Takeover bid occurs with making of an offer, not with completion of transaction

**Purpose of TOB Regs (NP 62-202 s.3(2)): 1)** the protection of bona fide interests of the SH’s of the target company; **2)** to provide a regulatory framework within which take-over bids may proceed in an open and even-handed environment

## Definition

**“Takeover Bid” (BCSA 92) –** Direct or indirect offer to acquire a security that is **(a)** made by a person other than the issuer of the security, and **(b)** within a ***prescribed class of offers*** to acquire.

* **NI 62-104 s.1.1:** An offer to acquire outstanding voting securities or equity securities (i.e. not debt securities) of a class made to 1+ persons, any of whom is in the local jurisdiction (i.e. Province), 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 of that *class* of securities.** 
  + If own 10% of company and buy another 10% 🡪 this would be a takeover bid.
  + Does not matter whether you succeed or not, simply if offering to acquire enough securities to get to 20%.
  + **Offer:** can be both direct and indirect (tries to prevent the application of TOB regs by the use of intermediaries)
  + **20% threshold may be met by the aggregate holdings of multiple parties acting “jointly and in concert”**
    - **Acting “Jointly & in Concert” (s.1.9(1) of NI 62-104):** It is a **question of fact** as to whether a person is acting jointly with an offeror. Includes making a formal or informal agreement, commitment or understanding by **(a)** ***acquiring or offering to acquire securities of the same class*** as those under the TOB; or **(b)** ***intending to exercise voting rights attached to the target’s securities*** jointly or in concert with the offeror (or anyone acting jointly or in concert with offeror) (***Re Arthur-Jones*)**
* **TOB does not include (s.1.1)**: an offer to acquire if it is a step in an amalgamation, merger, reorganization or arrangement that requires approval in a vote of security holders **🡪** Anything subject to SH vote under corporate law is not a takeover bid.

## Exemptions from “formal” takeover bid requirements (NI 62-104; PART 4 – DIV 1) (Catch-then-exclude)

**[1] Normal Course Purchase Exemption (4.1):** Offeror may acquire up to 5% of the outstanding securities of a given class over a 12-month period w/o triggering TOB regulation.

* Target securities must be listed or quoted for trading on a published market.
* **Value** of the consideration paid **cannot exceed the market price** of the target securities at the date of acquisition,
  + ***Market Price =*** simple average of the closing price over the past 20 biz days (**s.1.11(1)**)

**[2] Private agreement exemption (4.2):** Whereby purchaser may enter single or separate agreements with up to 5 vendors – cannot be made to security holders generally and value of consideration paid may not exceed 115%, incl broker fees and commissions, of market price at date of bid (e.g. 5 target SH’s may control 80% of shares)

* Often used to purchase securities from a control block person

**[3] Non-reporting Issuer Exemption (4.3):** TOB exempt **if target** **(1)** Is not a reporting issuer **(2)** No published market for its securities **(3)** Max of 50 securityholders (excluding employees).

**[4] Foreign take-over bid exemption (4.4):** 90% of offerees are outside of Canada, offeror reasonably believed that Canada residents beneficially **own less than 10%, published market with greatest volume outside Canada**.

**[5] De Minimis Exemption (4.5):** TOB is exempt from regulation w/in a jurisdiction (i.e. a province or territory) if only a minimal portion of the bid occurs in the jurisdiction. **Factors:**

* Maximum 49 beneficial holders of target securities in jurisdiction;
* Who hold less than 2% of the outstanding shares of the class in the aggregate;
* Security holders in the jurisdiction are entitled to participate in the takeover bid on terms at least as favourable as those that apply to general body of security holders of the same class;
* Takeover bid materials must be filed on SEDAR and sent to security holders in the jurisdiction.

**[6] Discretionary Exemption (BCSA 114):** On application of an interested person or on own motion, may be exempt from TOB req’s if not prejudicial to the public interest.

## TOB Procedures

A person must not make a take over bid, whether alone or acting jointly or in concert with one or more persons, except in accordance with the regulations (**BCSA 98**)

* ***BCE* decision** – there is a fiduciary obligation to consider best interests of the corp **BUT under** **NI 62-202** what is supposed to be considered is the *bone fide* interests of the shareholders of the target company **🡪** **This is an unresolved problem b/w securities regulation and corporate law.**

**[A] Early Warning System:** Persons to **disclose** their holdings of a company’s securities at certain thresholds – prevents creeping take-overs.

* **When 10%+ of a class, must “promptly” issue and file a news release.** W/in 2 days, must file a formal report with the Commission – includes name, address and security holdings, consideration offered, person’s purpose (**62-104 s 5.2(1)(a); 62-103 s. 3.1(1)).**
* **Every 2% increase or decrease, must do this again** (only if still above 10%) – Must disclose any change in any material fact set out in a previous report.
* The person is restricted from trading in securities of the class while the info is being disclosed and disseminated (**5.2(3)**) – from filing, one biz day.
* **Four major exemptions from Early Warning:**
  + **(a) Passive Investors -** Mutual funds or other “eligible institutional investors” who make use of **an alternative monthly reporting system** (**NI 62-103 ss 3.3, 4.1-4.8**).;
  + **(b)** When share redemptions or distributions from the treasury change a person’s security holdings (**62-103 ss.6.1**);
  + **(c)** An UW who owns the securities only as an UW and has made certain disclosure by new release (**62-103, 7.1**);
  + **(d)** Commissions have the discretion to grant exemptions (**“Public Interest”)** (**62-103, 11.1**).

**[B] The Offer:**

**(1) To Whom:** A TOB must be made to all in the class in the jurisdiction **(62-104, 2.8).**

* **50% Minimum Tender Requirement** – Bids will be subject to a mandatory minimum tender requirement of more than 50% of the outstanding securities of the class that are subject to the bid, excluding those beneficially owned, or over which control or direction is exercised, by the bidder and its joint actors (**2.29.1)**

**(2) Commencing the Bid: Two ways:**

* **(i)** Delivering the bid to the offerees (**62-104, 2.9(1)(b)**);
* **(ii)** Publishing an ad with a brief summary of the bid in a “major daily newspaper of general and regular paid circulation” in each jurisdiction in which offerees reside (**2.9(1)(a)).** **Conditions:**
  + **(1)** TOB must be filed and delivered to target issuer’s principal office on or before the date on which the ad is first published;
  + **(2)** Offeror must request a list from the target issuer of its securityholders in the jurisdiction on or before the date of publication;
  + **(3)** Offeror must deliver the TOB to the offerees within 2 business-days of receiving the list (**62-104, 2.10(2)**).

**(3) Minimum Deposit Period:** TOB must allow offerees **105 days** to decide whether to accept the bid and deposit their securities under the terms of the TOB **(62-104, 2.28.1).**

* **Exceptions:**
  + **2.28.2 –**  target issuer’s board of directors may issue a “deposit period news release” in respect of a proposed or commenced take-over bid providing for an initial bid period that is shorter than 105 days but not less than 35 days
  + **2.28.3 - Alternative transaction (Issuer issues a news release that it is doing this) – E.g.** trying to use defensive tactic (e.g. White Knight) then bid period can only be 35 days.

**(4) Consideration:** Cash, securities, other, or a combo – if cash, must be ready to go **(62-104, 2.27(1)).**

* **A class must receive identical consideration** (**2.23(1)**) – even if buys some then ups the offer, must reimburse all – this includes up to 90 days before the TOB.
  + **Exemption**: Normal course trades in a published market, as long as no unreasonable fee or commission, nor any solicitation by the seller or purchaser (**s.2.6)**
* **Prohibition Against Collateral Agreements (2.24) -** If a person makes or intends to make a take-over bid, the person or any person acting jointly or in concert with that person 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***.
  + **Exception (2.25) –** 2.24 does not apply to employment compensation arrangement, severance arrangement or other employment benefit if certain conditions are met.

**[C] Supplemental Warning System:** Operates after a TOB is launched. A person acquiring an aggregate of 5%+ of the securities subject to the bid must issue a news release before the next business day (**62-104, 5.3**). Every 2%+, must do the same.

**[D] Offeror’s TOB Circular:**

* TOB circular must be concurrent with the bid (**62-104, 2.10(1)(a)**). **BCSA 98** – must not make a bid except in accordance w/ regs.
* **Info needed to be included (62-104F1):** Name/description of usual activities **//** Class/number of section subject to TOB **//** Dates on which TOB will commence & expire **//** Offeree’s withdrawal rights **//** Purpose of TOB **//** Material facts that would impact offeree’s decision **//** Signed certificate that circular contains no untrue statement of material fact/omission.
* **Change in Info:** Must keep offerees informed of any info that “would reasonably be expected to affect” their decisions (**62-104, 2.11(1)**).
* **Variations:** The offeror must promptly inform offerees of any variations in the TOB terms (**s.2.12**)
* **A TOB cannot expire before 10 days after the date of the variation notice** (**s.2.12(3)(4)**)
* **File:** Must be filed with the Commission, but does not need to be vetted (**62-104, 2.10(4)**).

**[E] DIR’s Circular (issued by DIR’s of Target):**

* Must prepare and send a DIRs’ circular no **more than 15 days after the date of the bid** (and TOB Circular) (**62-104 s.2.17**)
* **MUST MAKE: 1)** **Recommendation to securityholders to accept or reject the bid**, together with reasons for that recommendation; **2)** Advise they cannot make recommendation with reasons; **3)** Advise they are still considering but will advise later.
  + **E.g. of Required Information (62-104F3):** Names of offeror and target DIR’s **//** The interests of the target’s DIRs and OFRs in any material transactions w/ offeror **//** A signed certificate stating the circular contains no untrue statement of material fact or omission of material fact.
* **BCSA 99 – DIRs MUST (a)** determine to recommend acceptance or rejection of the TOB or determine not to make a recommendation, and **(b)** make the ***recommendation, or a statement that they are not making a recommendation***.
  + **Accept =** Friendly; **Reject =** Hostile.
  + **Best practice**: is to set up a special committee of independent DIRs, and they have a job to figure out in the 105 day period whether or not it is in the best interest of the corp to be taken over and its SHs. They hire their own counsel, accountants, and have access to all the needed info to determine if the bid is good or not.
  + Usually, the first DIR’s circular just states a special committee is made, and then after will recommend if bid should be expected or not.
  + **If there are particular DIR’s that disagree, they can issue their own information circular! (should do this for liability reasons)**

## Defenses

**Target Company, through its DIR’s, may want to defend against a hostile TOB:** Need Board to Set up a Special Committee.

* ***3 Major reasons for defenses:*** **1)** Compensation is inadequate; **2)** Don’t like the idea of the offer; **3)** Selfish Reasons.

**[1] White Knight:** A different offeror, brought in by the target’s DIR’s to make a competing TOB.

* Usually have to “sweeten the deal” to induce a White Knight to takeover company.
* **Break Fee**: Promise that if the White Knight doesn’t succeed in taking over the company than the target co must pay the White Knight. This would hollow out the value of the company (if the white knight does not work) and would improve the value of the competitor (e.g. 3-5% of the value of the company).

**[2] Issuer Bid:** If target co cannot find a white knight, they may cause the target itself to make a bid for its securityholders securities.

* **“Issuer Bid” (BCSA 92) –** Issuer buying back their own securities.
* Bid period is 35 days’ b/c if issuer is doing the bidding don’t need time to fight their own bid.
* Will get competing bids b/w Issuer bidding to buy and the take-over bid.

**[3] Sale of the Crown Jewel:** Agreement with third party to sell a significant asset to make the company a less attractive take-over target (**E.g.** Sell interest in land or sell a division of the company).

* As the Board of DIRs need to say, in keeping w/ Fiduciary duty, it is better to sell crown jewel than be taken over. This sale can be contested in court.

**[4] Lock-Up Option:** Option granted to a party to acquire a large block of securities or a substantial percentage of the target’s assets if a “trigger event” – e.g. a hostile bidder acquiring 20% of the targets voting securities – occurs.

**[5] Showstopper:** This is litigation **//** Can also delay

* Can be an effective defensive tactic in delaying takeovers, through court-ordered injunctions or otherwise
* May involve challenges to disclosure provided in hostile takeover bid circular

**[6] Golden Parachute:** Compensation package given to DIRs and OFR’s that include generous severance payments or pensions that are triggered if their employment is terminated after a hostile TOB.

**[5] Poison Pill (Shareholders Rights Plan):**

* Can be adopted prior to OR during a takeover bid
* Typically, a rights offering, offered by the target company to its securityholders, entitling them to purchase more voting shares at a heavily discounted price on the occurrence of a “triggering event.”
  + **The “trigger”**: may be the acquisition by a party of a certain % of the shares or the launching of a TOB.
* May be a permanent feature of a corps articles or may be implemented when a company realizes it may become a target in the future.
  + **Best way to do this is to get SH approval** – agree that it is necessary.
  + **If no SH approval** – it is a tactical SRP. It has less credibility if the target company SH’s have not voted for it. This suggests that mgt and DIR’s of target company are to put the poison pill to SH’s it may only exist to entrench the DIR’s in their position.
* **Result:** Makes a TOB considerable more expensive for the offeror, since it will need to purchase the newly issues securities + will extend the bid period giving the target more time to explore other options (e.g. bringing in a white knight).

***Royal Host* (TEST):** DIR’s cannot use SRP’s to “just say no” to a TOB in perpetuity (at some point the SRP will be cease traded).

* **WHEN TO *CEASE TRADE* SRP’s: At some point, it will be cease traded -** Need to find balance between permitting board to fulfill fiduciary duty and protecting the rights of SHs to tender shares as they see fit
  + There is no “holy grail” to determine when a “pill must go” (longest (before changes in law) was 120 days)
  + Starting point for the analysis is **NP 62-202, *Take-Over Bids – Defensive Tactics***
* **Factors to consider (*Royal Host*):**
  + **Whether SH approval (“vote”) of the rights plan was obtained (vs. a tactical decision by the board).**
  + **When the plan was adopted (e.g. if been in place a long time);**
  + Whether there is broad *SH 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 SH’s;
  + The likelihood that, if given further time, the target company will be able to find a better bid or transaction (**e.g.** Market conditions – there may not be another bidder out there);
  + **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.

## Commission + Court Powers: Regulatory Responsibilities vs Court Powers

**“Interested person”** (**BCSA 92**) - an offeree issues; and OFR; DIR or securityholder of an offeree issues; an offeror; the DIR; or any person that the Commission considers to be a “proper person” to apply.

**APPLICATION TO THE COMMISSION (BCSA 114) (**Commission is faster, has expertise, better suited to short timeframes)

* **114(1):** On app of an “**interested person**,” if a Commission has determined a contravention (has to consider – not on BofP or Rules of E), may order **(a)** Restraining the distribution of any record used or issued in connection with a TOB, **(b)** Requiring ***an amendment to or variation of any record used or issued in connection with a TOB*** and require it to be distributed **(c)** Directing any person to comply with a req’t under this part **(d) *Retrain someone from contravening* (e)** Direct the DIRs and OFRs of any person to cause the person to comply.
* **114(2):** The Commissions have the discretion to exempt parties from any of the TOB or IB requirements, where doing so is ***not contrary to the public interest.***

**NB:** Nothing about K law, fiduciary duties, DIRs remedies or derivatives or oppression remedies (BUT see court powers (below))

**APPLICATIONS TO THE BCSC (BCSA 115) –** On application of an “**interested person,”** if the SC has determined a contravention (must be satisfied a person has not complied – need E, etc), it may order **(a)** ***Compensating any interested person*** who is a party to the appl for damages suffered as a result of a contravention of a requirement, **(b)** ***Rescinding a transaction*** with any interested person**, (c)** Requiring any person to ***dispose of any securities acquired through the TOB*** **(d)** Prohibit any person from ***exercising voting rights*** **(e)** Require the trial of an issue.

## Emerging Issues

**Derivatives can be used to uncouple legal voting rights and economic exposure.**

* “**Empty voting**” refers to situations where an investor has voting rights but no net economic exposure to the shares being voted.
* “**Negative voting**” refers to situations where an investor has voting rights and negative net economic exposure to the shares being voted – that is, the investor has an interest in the share price decreasing. This can help to avoid certain disclosure obligations, helping to hide a voting interest until ready.

**Hidden ownership**: The investor has economic exposure to the shares but no voting rights. An investor might be able to convert its interest into voting rights (just in time to vote in a TOB).

* The investor avoids disclosure obligations, concealing its economic interest in the issuer. In the context of TOBs, hidden ownership **undermines the early warning regime**, as the investor technically does not have ownership or control.

# Enforcement

Every securities act in Canada has a number of provisions dealing with enforcement falling into three broad categories of enforcement: **Criminal** (true criminal from *CCC* and quasi-criminal powers in securities regs) **// Civil** **//** **Administrative** - most widely used.

## Investigative Provisions (Part 17 BCSA, ss 141-144)

* **Forced Disclosure (141):** Exe DIRs may require certain persons to disclose records or documents during a formal investigation.
* **Compliance review for SRO or exchange (141.1) // Compliance review of registrant or custodian (141.2) // Compliance review of reporting issuer (141.3) // Compliance review of other market participants (141.4)**
* **Warrants for Private Residence (141.5)**: Apply to the Court and have reasonable and probable grounds, as long as **a)** Reasonable and probable evidence/records is on the premises, **b)** entry is necessary, and **c)** You have been refused entry or you believe on reasonable grounds you will be denied entry.
* **Appointing Investigators (142)**: allows BCSCn to appoint a person to make investigations the commission considers expedient:
  + For the administration of the BCSA,
  + the regulation of securities in another province,
  + in respect of matters regarding securities traded in BC/another jurisdiction
    - **Powers (143):** Broad powers for the investigator. No evidentiary threshold.
* **Enforcement Powers (144)**: **(1)** Power to summon a witness, make them swear on oath, produce records and things and classes of records of things; **(2)** A failure of a witness to do (the above) makes the W, on application to BCSC, liable to be committed for contempt.

## Option 1: Administrative Sanctions

Most frequent used sanctions. Use BofP standard, making the burden on the Commission less onerous than in quasi-criminal or criminal matters (***Re Holtby*).**

### ENFORCEMENT ORDERS (BCSA 160-164):

**In the Public Interest Standard:** The Commission can, after a hearing, make one of more of these orders if it concludes that such orders are in **the public interest**.

* Commission should consider ‘the protection of investors and the efficiency of, and public confidence in capital markets generally’ (***Asbestos Minority SH).*** Sanctions are preventative and prospective, not punitive or remedial**.** General deterrence is legitimate to consider (***Re Cartaway)***
* **5 Factors to Consider when determining appropriate admin sanctions to impose (*Siddiqi*): 1)** The seriousness of the misconduct (and the respondent’s recognition), **2)** The harm to investors and the capital market, and any benefits given to the respondent, **3)** Risk to investors and the capital market from future misconduct by the respondent or similar misconduct by others (deterrence both specifically and generally), **4)** The respondents characteristics, including past conduct or reputation in the community; **5)** Mitigating Factors; **6)** Orders made by the Commission in similar circumstances.
* **“Residual Power”:** Regulators can use their public interest powers to **impose sanctions even when they find no specific violations of securities legislation** (***Re Canadian Tire*). Power should not be lightly used.**
  + To meet the **“residual public interest test”**, the conduct or transactions must clearly be demonstrated to be abusive of shareholders in particular and capital markets in general (***Canadian Tire*).**

**s.161 Sanctions:** Standard is “in the public interest”:

1. **Sanctions Against Registrants (161(1)(f)):** Commission may suspend, restrict, terminate or impose terms and conditions on a person’s registration or recognition **(Powerful Tool:** Registration is a key method of regulating the securities industry. **NB:** Does not apply to those exempt from registration).
2. **Cease Trade Order (161(1)(b)):** Order that says trading in (or purchasing, sometimes) of securities be ceased temporarily or permanently (Because so blunt, the Commission may have a hard time justifying this one).
3. **Denials of Exemptions (161(1)(c)):** Affects those who have exemptions to distribute. Can be permanent or temporary.
4. **Reviews of and Changes to Practices and Procedures (161(1)(h)):** Commission can order a review of, and direct changes to, a market participant’s practices and procedures (extensive supervision with low expenditures).
5. **Orders to Provide, Not to Provide or to Amend any Document (161(1)(e)):** Where the Commission is satisfied that securities laws have not been complied with, it has broad powers to make orders regarding any document.
6. **Reprimands (161(1)(j)):** This sanction is useful where the Commission believes some sanction is warranted, but where other sanctions would be too harsh.
7. **Orders to Resign as DIR or OFR, Prohibitions on Becoming or Acting as a DIR or OFRs (161(1)(d)(i), (ii)): Two different sanctions:** A forced resignation and a ban on positions for a specified time or permanently, the two achieve the same goal in practice. **Goal:** Is to ensure undesirable people are not in the position to repeat undesirable behaviour.
8. **Prohibitions on Becoming or Acting as a Registrant or Promoter (161(1)(d)(iii))**
9. **Prohibition against Acting in a Management or Consultative Capacity or Engaging in Investor Relations Activities (161(1)(d)(v)):** More powerful than preventing a registrant from their status. BCSA allows the Commission to prohibit a person from engaging in ‘investor relations activities’ which means activities or communications that promote the purchase or sale of securities to the issuer (**s 1.1**)
   * **Thwarts indirect attempts to influence or control an entity of a person prohibited from acting as DIR or OFR.**
10. **Disgorgement (161(1)(g)):** This power is intended to prevent a person or company from retaining financial benefits that were received by contravening securities laws.The legislative provisions refer to ‘amounts obtained’. Relevant amount is what a respondent obtained through misconduct, not what the respondent retained or spent inappropriately.
11. **Restitution (Not explicit provision to allow this):** But, the BCSCn and the OSC have the authority to direct money to third parties from financial payments made by respondents under administrative penalty and disgorgement (**s.15.1**). In BC, Commission must notify the public, and people have three years to file a claim to reclaim money.
12. **Compliance (161(1)(a)):** BCSA allows the commission to order compliance.
13. **Reciprocal Orders:** A Commission order only applies in the jurisdiction where it’s made. Various Commissions, however, have been empowered to make enforcement orders based on proceedings from another jurisdiction called ‘reciprocal’ orders, and they usually mirror the bans given in the original jurisdiction

**Administrative Penalties (BCSA 162):** Are ‘administrative’ not ‘penal’ and, as always, must fit in with the public interest and the goals of sanctioning. Cannot be awarded ***w/o a violation of a securities law***. Amount to be determined in combination with other sanctions imposed in the circumstances. You need the sanction to be in the public interest and heard by the commission (***Re Cartaway*)**.

* **Maximum = $1,000,000**

**Costs (BCSA 160):** After conducting a hearing, a Commission may order a party to pay the investigation or hearing costs (or both).

* **Includes:** Reasonable amounts paid to non-Commission staff appointed in the investigative process; preliminary matters; time spent by Commission staff; fees paid to witnesses and legal costs.
* Commissions may not order costs against Commission staff (no “loser pays” - problematic).

**Failure to Comply with Filing Requirements (BCSA 164):** Cease trade order without hearing.

### Court Remedies

**BCSA s.157(1):** Commission is able to apply to court for a declaration that a person has not complied with provincial securities laws. Once this happens, court has jurisdiction to command any orders is has the powers to do (**BofP)**

* **Ex:** Forcing compliance, ordering transactions be rescinded, financial statements be produced, appoints of OFRs or DIRs, compensation or restitution, or ANY other order it considers appropriate.

## Option 2: Quasi-Criminal Provisions

**General** – They are not criminal provisions b/c not in CC but they use **BARD burden of proof**. They may be initially investigated by securities commission staff; at some point they decide its serious enough to give to Provincial Crown. This has not been great b/c relationship b/w Crown + Securities Commission is not great.

**[1] General Offences (BCSA 155(1)):** provides quasi-criminal offences which must be proven BARD:

**a)** fails ***to file, provide, deliver or send a record that*** **i)** is required **or ii)** is required … within the time required under this Act;

**b)** **contravenes any of section of s**. **34** (**registration**) … **57.2** (**Insider trading**) … **61** (**Prospectus**), **85(b)** (**Timely Disclosure**) …

**c)** fails to comply with a decision made under this Act;

**d)** contravenes any of the provisions of the regulations that are specified by regulation for the purpose of this paragraph;

**e)** contravenes any of the provisions of the commission rules that are specified by regulation for the purpose of this paragraph.

* **DEFENSES:** **1)** **Due Diligence** – the A must prove he or she did everything reasonably possible to avoid committing the offence; **2)** Where the allegation is that a required thing was not done, the burden is on the A to prove that it was done.

**[2] DIR/OFR permitting an Offence (155(4)):** DIRs/OFRs who authorize, permit or acquiesce (i.e. willful blindness) in the commission of a general offence are liable for the offence, regardless of whether their corporation or firm has been charged or found guilty.

* Prosecution must prove that the DIR or PFR ***knew a general offence was committed.***
* **DEFENSE: Limited to Due-Diligence Defense.**

**PENALTIES:**

**General (155(2)):** Liable to a fine of not more than $3million or to imprisonment for not more than 3 years, or both (Charter has never been successfully argued here though).

* Failure to do periodic disclosure is not an offence under this.

**Special Set of Penalties for IT if contravene 57.2 (155(5)): (a)** can’t be penalized less than the profit you made (bottom end); **(b)** the top end is not more than $3 million **OR** triple any profit made by all persons.

**Additional Remedies (155.1):** If the court finds that a person has committed an offence under section 155, the court may make an order that **(a)** the person compensate or make restitution to another person, or **(b)** the person pay to the commission any amount obtained, or payment or loss avoided, directly or indirectly, as a result of the offence.

## Option 3: Criminal

# Statutory Civil Liability and Due Diligence

**Statutory Civil Liability applies in 5 Contexts: 1)** Prospectus Misrepresentation; **2)** Offering Memorandum misrepresentation; **3)** Circular Misrepresentation; **4)** Trading and Tipping while in possession of undisclosed material facts or changes about the issues; **4)** Misrepresentation in continuous disclosure docs **(secondary market SCL).**

### Procedural Matters

**STANDING:** For **1)** Prospectus, **2)** Offering Memorandum, and **3)** Circular misrepresentations, the document’s recipient has standing (i.e. purchaser for first two (**BCSA, 131(1), 132.1**), any securityholder for (**BCSA, 132(1))).**

* Person on **the other side of the trade** has standing against an inside trader or tipper (**BCSA 136(1)-(3)**).
* Also, a reporting issuer has standing for an accountability action.
* The Commission and other securityholders have a cause of action against the RI if it doesn’t pursue its cause of action.
* The amount lost is what you can recover.
* **For standing against a party for misrepresentations in secondary market SCL,** see 4 grounds under s.140.3 below.

**CLASS ACTION CERTIFICATION:** Court must certify class actions before they can proceed (guard against “strike suits”)

* **NB:** See also ***Theratechnologies* & s.140.8 under Secondary Market Liability.**

**1. There must be an Identifiable class;**

**2. Common issues** **of fact and law** - ***Class Proceedings Act* s.4(c)**

* **Note**: There is significant divergence in the following court decisions, and further clarification is needed by the SCC. The total effect is that even if reliance must be proven, certification for other issues will still advance the litigation, allowing many of the issues to be dealt with together with individual trials for reliance and damages ***Green v CIBC.***
* ***Carom v Bre-X Minerals Ltd****:* **The issues need not be absolutely identical** between class members, so common law Negligent Misrepresentation can be pursued under a class even though reliance is always factually specific (this is because of the goal of promoting access to justice and judicial economy; principles not served by being overly nice in technicalities).

**3. Preferable Method:** A class action is the preferable method for resolving the common issues ***Class Proceedings Act* s.4(d)**

* **Note**: *Ragoonanan:* The Court denied certification because **no evidence was presented as to how many claimants would be involved**: therefore it was difficult to know if a class proceeding was the preferable method.

**4. Representative P:** There is a representative P who fairly and adequately represents the interests of the class. ***Class Proceedings Act* s.4(e)**

**JURISDICTION:** Generally, residency of the investor or where the impugned conduct occurred. Only a court has jurisdiction to hear SCL claims and award damages (**BCSA 140.8-140.92**).

* ***Pearson v Boliden*** *-* **For distributions** it is always where the distribution occurred (residency of the investor)
* ***Abdula v. Canadian Solar -*****For the secondary market**, it is likely where the investor purchased the security, but the issuer must have “a real and substantial connection” (*s.1 BCSA* “responsible issuer”, which is term used in part 16.1) to that jurisdiction.

**LIMITATION PERIOD:**

**Primary Market Limitation periods**:

* ***Rescission*** = 180 days from the date of the transaction **(BCSA, 140(a)**).
* ***Others (damages)*** = **(1)** three years from the date of the transaction; **(2)** 180 days after the P first had knowledge of the facts underlying the cause of action (**BCSA 140(b)**).

**Secondary Market Limitation Periods (140.94):**

* **Damages:** it is the earlier of:
  + **1)** 3 years from the date the impugned conduct occurred; and
  + **2)** 6 months after the issuance of a news release disclosing that the Ps have obtained leave to commence a secondary market SCL action
* Remember, to pursue secondary market SCL plaintiff’s need leave of the Court under **BCSA s.140.8**
* **Note**: Applying for leave suspends the 3 year limitation period (***Green v CIBC***)

## Common Law

* **K:** If misrepresentation in the prospectus you can sue for breach of K (for innocent misrepresentation) and then you can get rescission of the K and not damages. If can establish negligent or fraudulent misrep can get damages.
* **Tort**: **Negligent Misrepresentation** (***Headley; Queen v Cognos*) 🡪 DIFFICULT TO PROVE**
  + **5 req’s (*Cognos*)**: **1)** Was there a duty of care (special relationship such that the duty is not to mislead); **2)** The representation must be a misrepresentation (untrue); **3)** Establish negligence; **4)** Reliance; and **5)** Demonstrate Damages.
    - ***Reliance is hard***. Must have relied specifically on something in the prospectus to buy the securities. Especially hard if you are talking about class actions.

## Primary Market Liability

**“Misrepresentation”** (**BCSA 1(1)),** means:

* **(a) *Untrue statement*** of **material fact (material changes can be material facts);** OR
* **(b)** An ***omissions*** to state a material fact that is: **(i)** required to be stated, **or (ii)** necessary to prevent a statement that is made from being false or misleading in the circumstances which it was made.
  + **REMEMBER:** Facts are broader than changes; omissions are as bad as saying something.
  + **Liability for misrepresentation (131(a)) –** Takes the hard reliance part out.
  + These SCL provisions are in addition to common law remedies.

**3 TYPES OF MISREPS LIABLE FOR:** In each case, the investor is ***effectively deemed to rely on the misrepresentation*** (**131(1)(a), 132(1), 132.1(1)(a)**)

* **[a] Prospectus Liability (131):** Liability is triggered when a purchaser buys a security under a prospectus during the period of distribution, if the documents contained a misrepresentation, or if a misrepresentation resulted from a material change that was not properly disclosed.
  + **No liability springs from events that take place after closing date, as that is the date the distribution period is over.**
* **[b] TOB Doc Liability (132):** Is for a misrepresentation in a take over bid circular, issuer bid circular, notice of change, or notice of variation. Triggered when such a document is sent to securityholders (**132(1))**.
* **[c] Offering Memorandum Liability (132.1):** Liability is triggered when a purchaser buys a security under an OM, if the documents contained a misrepresentation, or if a misrepresentation resulted from a material change that was not properly disclosed.

**[a] PROSPECTUS MISREP:**

**Prospectus investor** has a right of action against:

**(1)** The issuer or selling securityholder (rescission or damages) (**131(1)(b)(i)**).

**(2)** Any UW who signed the prospectus certificate (rescission or damages) (**131(1)(b)(ii)**).

**(3)** Any DIR of the issuer when the prospectus was filed (damages) (**131(1)(b)(iii)**).

**(4)** Any person who consented to any part of the prospectus (damages – for that person’s part) (**131(1)(b)(iv)**).

**(5)** Any other person who signed the prospectus (damages) (**131(1)(b)(v)**).

* **P has to show: 1)** Bought prospectus during distribution; **2)** There is a misrepresentation**; 3)** Figure out who they are going to sue.
* A person referred to in (1)(b)(iv) is liable only with respect to a misrepresentation contained in a report, opinion or statement made by the person **(131(2))**

**BCSA 131(11)**: The liability of all these people is joint and several, except for UWs, whose liability is limited to the portion of the distribution underwritten by it (**(9)**).

**[b] TOB DOC MISREP:** Liability arises against the following people (**BCSA 132(1)):**

* **(a)** The offeror (Rescission)
* **(b)** **i**) Anyone who signed the document (Damages)

**ii)** Every DIR of the offeror when it was signed (Damages)

**iii)** Anyone whose consent has been filed as prescribed (Damages)

**iv)** The offeror (Damages)

**[c] OFFERING MEMORANDUM MISREP:** OM investor can get rescission or damages against (**BCSA 132.1(1),(2)**):

**(i)** the issuer (textbook also says selling securityholder) (damages + rescission)

**(ii)** every DIR of the issuer at the date of the disclosure document (damages), and

**(iii)** every person who signed the disclosure document (damages).

### Defenses

**Onus of Proof:** is on the party claiming the defense **// STD of Reasonableness (BCSA 133):** The standard for determining "reasonable investigation" and "reasonable grounds" is that of "**a prudent person in the circumstances**"

**[1] Knowledge of the Misrepresentation (131(4) –** Prosp.; **132(4) –** TOB; **132.1(4) -** OM**):** Available to issuer or selling security holder. Liability is defeated if the ***investor knew*** of the misrepresentation at the time of purchase.

**[2] Impugned Party had No Knowledge (131(5)(a) –** Prosp; **132(5)(a) –** TOB; **132.1(4)(a) –** OM**):** An impugned party has a defence if the documents were sent without his or her consent (e.g. prospectus filed w/o D’s consent) Must also have given “reasonable general notice” of this lack of knowledge or consent upon finding out.

* **NB:** Doesn’t apply to the issuer or selling securityholder (**131(8)**)

**[3] Withdrawal of Consent (131(5)(b) –** Prosp.**; 132(5)(b) -** TOB**, 132.1(4)(b) -** OM**):** Liability is defeated if the person withdrew consent to a prospectus, OM, or TOB doc when the person became aware of a misrepresentation after it was filed or sent, and gave “reasonable genera; notice” of the withdrawal or reason.

* **NB:** Doesn’t apply to the issuer or selling securityholder (**131(8)**)

**[4] Reliance on Expert:**

* **Defendant: Reliance on an Expert:** (**131(5)(c)** – Prosp; **132(5)(c)** - TOB document, **132.1(4)(c) –** OM): Defense exists where the D did not believe there was a misrepresentation and had **no reasonable grounds** to believe it.
* **Expert Defendant: Unfair Representation (131(5)(d)** – Prosp; **132(5)(d)** – TOB): If the prospectus did not fairly represent D’s expert report, opinion, or statement, no liability. To rely on this, D must have **reasonable grounds** to believe that the relevant part of the prospectus did fairly represent their report, opinion or statement, OR advised the regulator as soon as practicable upon becoming aware of the misrepresentation, and gave reasonable notice that they were withdrawing their expertise.
  + **NB**: not available under OM provisions.
* **“Reasonable Grounds” =** that of a prudent person in the circumstances (**s.133)**
* Doesn’t apply to the issuer or selling securityholder (**131(8)**)

**[5] \*Due Diligence:** A D is **not liable** ***unless he or she failed to conduct*** such reasonable investigation as to provide reasonable grounds for believing there was no misrepresentation OR unless he or she believed there has been a misrepresentation (**131(6)(7)** – Prosp**; 132(6)(7)** - TOB**; 132.1(5) –** OM)

* **(6)** **An expert has a due diligence defence**; **(7)** **A broader due diligence defence** **(non-experts)** – e.g. an UW or an outside DIR
* **“Reasonable Investigation” & “Reasonable Grounds” =** that of a prudent person in the circumstances (**s.133)**

**Cases:**

* **Degree of Liability Depends on who you are –** The auditor is only liable for misrepresentations in FS’s. Sr. OFRs – it does not matter if you didn’t read or understand the prospectus, if you signed it you are liable. Also OFR cannot rely on experts if have not checked the facts in some degree themselves (e.g. cannot give all authority to UW). Legal counsel was liable b/c did not do any due diligence (***Escott v Barchris,* NY 1968 -** *No defense to Executives re: language barrier*)
* If Sr. OFR or Inside DIR, going to be held to a high due diligence standard (***Kerr v Danier Leathet* (trial)).**
* **Subjective/Objective Approach (For DIR’s OFR’s + UW’s):** 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 (***YBM Magnex,* ONSC 2003)** 
  + **DIRS/OFRs:** Different DIRs can be held to different standards based on their ability, experience, and involvement.
    - If no reason for suspicion can rely on outside advisors.
  + **UW’s:** Must avoid automatic reliance and challenge the disclosure the issuer proposes to make to the public.

### Damages

**A P can seek two types of relief:**

1. **Damages:** These are calculated based on the difference between the price paid for the securities and their value once the misrepresentation was disclosed, ***limited to the depreciation caused by depreciation*** (**131(10), 132(11), 132.1(7)**). This is limited by **131(13)**, which states that a P can’t recover more than the price they paid for the securities.
   * Liability for misrepresentation is joint and several – any party is liable to pay all of the damages.
2. **Rescission (131(3), 132(1)(a), 132.1(2)):** This is only available against the issuer, or the UW in the case of a bought-deal agreement. This involves the return of the shares to the issuer in return for the money paid by the P and the right of action under (1) disappears.
   * Rescission is available as a remedy if the purchaser still holds the securities, and only available against issuer and UW (but if things are really bad, issuer is broke anyways)
   * Rescission voids the Ks and puts parties back to square one (may mean returning the purchase price of securities)

***Kerr v Danier Leather*:** An issuer is not required to disclose any material facts that arise later and call into question the reasonableness of the forecast, though it must disclose material changes.

## Secondary Market Liability

**Two triggers for remedies: 1) Public material misrepresentation; 2) Failure to comply with continuous disclosure requirements (i.e 85(b))**

* **Need Leave from Court to Proceed w/ Action under 140.3** **(BCSA 140.8)** – The Court may grant leave where it is satisfied that: **(a)** the action is being brought in good faith, and **(b)** there is a reasonable possibility that the action will be resolved at trial in favour of the P.
  + **“Reasonable chance of success”** (***Theratechnologies,* SCC 2015**: **1)** P has to provide a plausible analysis of why they have a claim; **2)** Adduce some credible evidence of the claim).
* **Application (140.2):** This part only applies to secondary markets, not purchase of a security after a prospectus, etc.

### Who Can Bring the Action? (140.3(1-4))

**[1]** A person who buys or sells a security b/w the **time of the misrepresentation was made** and the **time when the misrepresentation was publicly corrected (140.3(1-3)**); **OR**

**[2]** A person acquires or disposes of the issuer's security b/w the **time when the material change was required to be disclosed** in the manner required and **the subsequent disclosure of the material change (140.3(4))**

### Definitions

* **“Document” (140.1):** Any written communication that **a)** is required to be filed with the commission, **b)** that is not required to be filed with the commission and
  + i) is filed with the commission
  + ii) That is filed or required to be filed with a government, exchange, or quotation and trade reporting system
  + iii) Any communication the content of which would reasonably be expected to affect the market price or value of the security
* **"Influential person"** (**140.1):** means, in respect of a responsible issuer, **(a)** a control person, **(b)** a promoter, **(c)** an insider (who is not a DIR or OFR of the responsible issuer.
* **“Release” (140.1):** to file with the commission, SRO, or exchange, or to otherwise make available to the public
* **“Responsible Issuer” (140.1): a)** Reporting Issuer (see s. 1 def), **b)** Or any other issuer with a real and substantial connection to BC with publicly traded securities
* “**Public oral statement”** (**140.1**): Oral statement made in circumstances in which a reasonable person would believe the information contained in the statement will become generally disclosed.

**“Misrepresentation”** (**BCSA 1(1)),** means:

* **(a) *Untrue statement*** of **material fact (material changes can be material facts);** OR
* **(b)** An ***omissions*** to state a material fact that is: **(i)** required to be stated, **or (ii)** necessary to prevent a statement that is made from being false or misleading in the circumstances which it was made.

### Liability (BCSA 140.3)

**[1] Issuer Documentary Misrepresentation (140.3(1)):** Liability arises when: **1)** a **“responsible issuer”** or a person with ***actual, implied, or apparent authority*** to act on the responsible issuer’s behalf **2)** **“Releases” a “document”** containing a misrepresentation.

**Who is Liable:**

* **a)** The ***Responsible Issuer;***
* **b)** Each ***DIR of the Responsible Issuer*** at the time the doc was released;
* **c)** Each ***OFR of the Responsible issuer*** who “authorized, permitted or acquiesced” in the release;
* **d)** ***Each “influential person***” (and its DIRs and OFR’s) who "knowingly influenced" the responsible issuer (or the person or company with authority) to release the document (or knowingly influenced a DIR or OFR of the responsible issuer to release the document).
* **e)** and each "expert", where misrepresentations from the expert's report, statement or opinion are used in the document with the expert's consent in writing.

**[2] Issuer Public Oral Statement (140.3(2)): 1)** A person with ***actual, implied, or apparent authority*** to speak on the responsible issuer’s behalf **2)** Makes **a “public oral statement”** that **relates to the business or affairs** of responsible issuer and that contains a misrepresentation.

**Who is Liable:**

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

**[3] Influential Person Document/Oral Misrep (140.3(3)):** Liability arises when: **1)** **An influential person**, or **person with actual, implied or apparent authority** to act or speak on behalf of the influential person**; 2)** **Releases a document** that relates to a responsible issuer and contains a misrepresentation **OR Makes a public oral statement** that relates to a responsible issuer and contains a misrepresentation.

**Who is Liable:**

* **(a)** the ***responsible issuer*** **IF** a DIR or OFR of the responsible issuer, “authorized, permitted or acquiesced” in the release of the document or the making of the public oral statement,
* **(b)** the ***person who made the public oral statement*** **(talker);**
* **(c)** each DIR and OFR of the responsible issuer who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement,
* **(d)** ***the influential person,***
* **(e)** ***each DIR and OFR of the influential person*** who authorized, permitted or acquiesced in the release of the document or the making of the public oral statement, and
* **(f)** **each expert where**
  + (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
  + (ii) the document or public oral statement includes, summarizes or quotes from the report, statement or opinion of the expert, and
  + (iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.

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| **140.3(7) –** In an action under (2) or (3), **if the person who made the public oral statement had apparent authority**, **but not implied or actual authority, to speak on behalf of the issuer**, no other person is liable with respect to any of the responsible issuer's securities that were acquired or disposed of before that other person became, or should reasonably have become, aware of the misrepresentation. |

**[4] Responsible Issuer Fails to Make Timely Disclosure (140.3(4)):** 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 (**NB:** **Timely disclosure is needed under BCSA 85(b))**

**Who is Liable:**

* **(a)** **the responsible issuer,**
* **(b)** **each DIR** (Someone on Board of DIRs) **and OFR** (e.g. CEO, COO, etc) of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure,
* **(c)** each influential person, and each DIR and OFR of an influential person, who knowingly influenced
  + (i) the responsible issuer or any person acting on behalf of the responsible issuer in the failure to make timely disclosure, or
  + (ii) a DIR or OFR of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.

### Burden of Proof: Which can act as “defenses”

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| **Core Documents** | **Non-Core Documents + Public Oral Statements** |
| **Core documents include (140.1):**   * **Suing DIR or Influential Person**: Core Docs = Prospectus, OM, TOB, Issuer Bid, Periodic Disclosure Docs * **Suing Issuer or OFR:** Core Docs = all above + docs required under 85(b), press releases, and material change reports.   **The burden of proof:** is simply the existence of a misrepresentation – P doesn’t need to prove that D knew or should’ve known about it (**140.3(1)**) | **Non-core documents** **(140.1)** include new releases, investor presentations, etc.  **The burden of proof:** P must prove that the D (**except a D expert**) 1) knew of the misrepresentation; 2) deliberately avoiding discovering that there was a misrepresentation; or 3) was guilty of gross misconduct (**140.4(1)**) |

**\*Failure to Make Timely Disclosure:** Onus is on the P to prove that the D (**except a responsible issuer or an OFR of a responsible issue**): **1)** knew of the change and that it was material; **2)** deliberately avoided discerning that there was a change or that it was material; or **3)** was guilty of gross misconduct (**BCSA 140.4(3),(4))**

* **(4) –** Can’t use the “defense” if it’s an action against a responsible issuer **OR** OFR of a responsible issuer (**e.g.** CEO, COO, etc).

### Defenses – Onus on D

**[1]** D is not liable for misrep or failure to make timely disclosure if D establishes that the **P bought or sold with knowledge that the document or public oral statement contained a misrepresentation or with knowledge of the material change** (**140.4(5)) (Both)**

**[2]** **D not liable for failure to make timely disclosure if** (**140.4(8)):**

* **(a)** the person proves that the material change was disclosed by the responsible issuer in a report filed on a confidential basis with the commission under **85(b),**
* **(b)** the responsible issuer had a reasonable basis for making the disclosure on a confidential basis,
* **(c)** in the case where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist,
* **(d)** the person or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation, and
* **(e)** where the material change became publicly known in a manner other than the manner required under this Act, the responsible issuer promptly disclosed the material change in the manner required under this Act.Likerl

**[3]** The **misrepresentation was reasonably disclosed forward-looking info,** with appropriate cautionary language **(“safe harbor”)(140.4(9))**

**[4]** The **D relied on an expert, with no reasonable grounds for believing there was a misrepresentation (140.4(13))**

**[5] Due Diligence Defense (for Misrep + Timely Disclosure):** The D made a “reasonable investigation” and had no “reasonable grounds” to believe there was a misrepresentation or that timely disclosure would not be made (**i.e**. conducted due diligence) (**140.4(6)**)

* **List of things to determine if investigation was reasonable under 140.4(6)** (**140.4(7)**)
  + The knowledge, experience, and function of D
  + The office held by D (if D was an officer)
  + The presence or absence of another relationship with the responsible issuer (ie: OFR, EE, SH), if D is a DIR
  + The existence of any system designed to ensure that the responsible issuer’s disclosure compliance system and on the responsible issuer’s officers, employees and others whose duties would ordinarily have given them knowledge of relevant fact
  + For experts reports, what professional standards are applicable to expert D in preparing and releasing the document, making the public oral statement or ascertaining the facts contained in the document or public oral statement
  + In the case of failure to make timely disclosure, the role and responsibility of D involved in the decision not to disclose the material change.

### Damages (BCSA Division 3)

Focus is to deter, not to compensate **//** Investors are unlikely to receive full compensation.

**Damages for acquisition or disposal after the misrepresentation/failure to make disclosure (140.5):**

* **1) Securities disposed of on/before 10 days after correction**: Damages = difference b/w average price paid and price received on disposition.
* **2)** **Securities disposed of after 10th trading day**: Damages are the lesser of 🡪 The difference between average price paid and price received on disposition **OR** the difference between average price paid and the average price over the 10 trading days after public correction or disclosure.
* **3) Where securities are not disposed:** Damages are difference between average price paid and average trading price over 10 days after public correction
  + **Note:** for disposals of security, just reverse price paid and received

**Liability is proportionate**, not joint and several (**140.6**) 🡪 **Note:** if a D, other than a responsible issuer, **authorized, permitted, or acquiesced,** the whole amount may be recovered from him, and **it is joint and several** between such D’s.

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| Recoverable Damages: Liability Caps (140.7(1)) | |
| Responsible Issuer | The greater of 5% of its market cap (the number of common shares outstanding, multiplied by the market price per share) or $1 million. |
| DIRs and OFR (or someone else who made a public oral statement) | The greater of 50% of the aggregate of D’s compensation from the issuer and its affiliates or $25,000. |
| Experts | The greater of the revenue that the expert and its affiliates earned from the issuer and its affiliates during the 12 months preceding the misrepresentation or $1 million (greater limit b/c insurance). |
| Cap does not apply to a person, other than the responsible issuer, if the P proves that the person authorized, permitted or acquiesced in the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure, or influenced the making of the misrepresentation or the failure to make timely disclosure while knowing that it was a misrepresentation or a failure to make timely disclosure (140.7(2)) | |