**Securities Framework**

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**Securities Framework**

**Does the *Securities Act* apply?**

**(1) does the transaction involve a “security”?**

* If the answer is no and it’s not a derivative, then it is not within the scope of the Securities Act
* Steps:
  + Go through (e) first to see if it’s a share, bond, etc. that clearly fits into the category (no need to go into the rest of the analysis)
  + “investment contract” is the broad catch-all definition 🡪 anytime it looks like a new instrument, try to fit it into this definition
    - If using this, mention (i) but say that the courts have preferred
  + Also don’t forget about options (d)
* s 1 *SA* “security” includes,
  + (a) any document, instrument or writing *commonly known* as a security
    - Sufficient that it is commonly known among the financial and legal community, not the lay person (*CM Joiner*)
      * *CM Joiner*: Sold leasehold interests, but in substance they were selling the hope of profit (finding oil)
  + (b) any document constituting evidence of title to or interest in the capital, assets, property, profits, earnings or royalties of any person or company
  + (c) any document constituting evidence of an interest in an association of legatees or heirs,
  + (d) any document constituting evidence of an option, subscription or other interest *in* or *to* a security
  + (e) a bond, debenture, note or other evidence of indebtedness or a share, stock, unit, unit certificate, participation certificate, certificate of share or interest, preorganization certificate or subscription **other than**,
    - (i) a *contract of insurance* issued by an insurance company licensed under the Insurance Act, and
    - (ii) evidence of a *deposit issued by a bank* listed in Schedule I, II or III to the Bank Act (Canada), by a credit union or league to which the Credit Unions and Caisses Populaires Act, 1994 applies, by a loan corporation or trust corporation registered under the Loan and Trust Corporations Act or by an association to which the Cooperative Credit Associations Act (Canada) applies,
    - This covers 99% of situations
  + (f) any agreement under which the interest of the purchaser is valued for purposes of conversion or surrender by reference to the value of a proportionate interest in a specified portfolio of assets, **except** a contract issued by an *insurance* company licensed under the Insurance Act which provides for payment at maturity of an amount not less than three quarters of the premiums paid by the purchaser for a benefit payable at maturity,
  + (g) any agreement providing that money received will be repaid or treated as a subscription to shares, stock, units or interests at the option of the recipient or of any person or company,
  + (h) any certificate of share or interest in a trust, estate or association,
    - Big back in 2000’s when tax advantages to trusts – meant to capture this. Not as large anymore
  + (i) any *profit-sharing agreement* or certificate,
    - Although very broad, this is not usually the catch-all category used by the courts (investment contract is)
    - the courts have preferred to fit instruments with uncommon attributes or other attempts to circumvent being caught by securities legislation into the “investment contract” category
  + (j) any certificate of interest in an oil, natural gas or mining lease, claim or royalty voting trust certificate,
  + (k) any oil or natural gas royalties or leases or fractional or other interest therein,
  + (l) any collateral trust certificate,
  + (m) any income or annuity contract **not** issued by an *insurance* company,
  + (n) any **investment contract**,
    - This is the catch-all category
    - *Scotch*: whether a transaction is an investment contract depends on the results of the sale (purpose of the transaction)
      * Facts: Scotch receipts traded through a broker for the purpose of investment in the commodity
      * If the receipts were used to redeem physical scotch, then it is a commercial contract, however, if the same receipt was used for the purpose of investment in the commodity, then it is considered a security
        + e.g. bills of lading or receipts for goods purchased for inventory or consumption purposes fall outside the scope of the Act
    - *Pacific Coast* (SCC test on “investment contract”)
      * Facts: investors bought silver; company did not acquire most of the silver physically; rather bought futures; argued that it is not an investment contract b/c they didn’t do anything to increase value; investors only made money if silver market went up
        + Held: used solvency test; investment contract b/c investors were replying on company to have a sophisticated futures scheme, otherwise they would go bankrupt
      * Overarching question: Is this the kind of transaction that, as a matter of policy, is one that the Securities Act would apply to?
        + Contextual analysis; broader view that takes into account the purpose of the *Securities Act*

Purposes: s 1.1 *SA*: (a) to provide protection to investors from unfair, improper or fraudulent practices; (b) to foster fair and efficient capital markets and confidence in capital markets; and (c) to contribute to the stability of the financial system and the reduction of systemic risk.

*Pacific Coast*: purpose of SA is protection of the investing public through full, true and plain disclosure of all material facts

* + - * + Look to *Howey* and *Hawaii* tests as support (but should not be applied strictly)
      * Important factors the court considered: Significant amount of money and substantial risk involved; Promoters of the enterprise used exaggerated and inflammatory claims to advertise it (favours finding of “investment contract”)
    - Two principal tests for determining whether something is an investment contract: (a) common enterprise, (2) risk capital
    - *Howey* (common enterprise test)
      * Facts: investors bought piece of an orange grove in Florida (real estate); investors could buy 4-tree slice in the grove; investors would need to hire someone to pick up oranges at the correct time and sell it (promoters offered this service); investors did not get a return directly from their oranges, but rather based on the percentage of orange trees they owed in the grove. Held: security
      * Investment contract where:
      * (1) person invests money with an *expectation* of earning a profit
        + The furnishing of initial value was induced by promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind will accrue to the investor as a result of the operation of the enterprise (*Hawaii*)
      * (2) common enterprise
        + Fortunes of investors interwoven with and dependent upon efforts and success of those seeking the investment of third parties (*Glenn*)
        + Common enterprise stage concerns vertical commonality (i.e. reliance of investors on the work of the promoter) – does not concern with horizontal commonality (i.e. reliance of investor on other investors) (*Pacific Coast*)
      * (3) are the promoter’s efforts “undeniably significant” ones? (*Koscot*)
        + the essential managerial efforts which affect the success of the enterprise
    - *Hawaii* (risk capital test)
      * (1) The investor furnishes initial value
      * (2) A portion of the initial value is subject to the risks of the enterprise
      * (3) The furnishing of initial value was induced by promises or representations which give rise to a reasonable understanding that a valuable benefit of some kind will accrue to the investor as a result of the operation of the enterprise
        + Fleshes out “expectation of profit” from *Howey*
      * (4) The investor does *not* receive the right to exercise practical and actual control over managerial decisions of the enterprise
        + Corresponds to efforts of promoter are “undeniably significant efforts” from *Koscott*

Essentially, the investment must be relatively passive on part of the investor

* + - * Nicholls: likely would not lead to a different result from *Howey*
    - *Koscot*: MLM scheme; once you invest you could bring in other investors and get paid a percentage; efforts undeniably those of management b/c it depended on management putting together enticing sales meeting w/ testimonials to convince secondary investors
    - Application: *Universal Settlements*: viatical settlements are securities; efforts of others is truly was determined viatical profitability (admin work, identifying viators, conducting medical exams, collecting documentation); majority focused on that (unlike US judgment)
  + (o) any document constituting evidence of an interest in a scholarship or educational plan or trust, and
  + (p) any commodity futures contract or any commodity futures option that is not traded on a commodity futures exchange registered with or recognized by the Commission under the Commodity Futures Act or the form of which is not accepted by the Director under that Act,

**(2) Is this a transaction a “trade”?**

* “trade” or “trading” includes,
  + (a) any sale or disposition of a security for valuable consideration, whether the terms of payment be on margin, instalment or otherwise, **but does not include** a purchase of a security or, *except as provided in clause (d)*, a transfer, pledge or encumbrance of securities for the purpose of giving *collateral* for a debt made in good faith,
    - Regulating the seller (a sale), not the purchaser
    - Usually not a pledge of securities unless it’s made by a control person – (d) exception
  + (b) any participation as a trader in any transaction in a security through the facilities of any exchange or quotation and trade reporting system,
  + (b.1) entering into a derivative or making a material amendment to, terminating, assigning, selling or otherwise acquiring or disposing of a derivative, or
  + (b.2) a novation of a derivative, other than a novation with a clearing agency,
  + (c) any receipt by a registrant of an order to buy or sell a security,
  + (d) any transfer, pledge or encumbrancing of securities of an issuer from the holdings of any person or company or combination of persons or companies described in clause (c) of the definition of “distribution” for the purpose of giving collateral for a debt made in good faith, and
    - *Pledge* of security **counts** as a trade if a “control person”
    - Refers you to (c) of “distribution” which says a trade of prev issued securities by a control person
  + (e) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the foregoing;
* If not a trade, then it won’t be a distribution, but you are not necessarily out of the scope of the *Securities Act*
  + Under insider trading rules, purchasers are regulated

**(3) is the person making a sale or pledge a “control person”?**

* “control person” means,
  + (a) a person or company who holds a sufficient number of the **voting** rights attached to all outstanding voting securities of an issuer to *affect materially the control of the issuer*, and, if a person or company holds more than **20 per cent** of the **voting** rights attached to all outstanding voting securities of an issuer, the person or company is **deemed**, *in the absence of evidence to the contrary*, to hold a sufficient number of the voting rights to affect materially the control of the issuer, or
    - Test: holds suff # of voting rights to materially affect control of issuer (can be found with less than 20%); and 20%+ of voting rights = deemed (in absence of evidence of the contrary)
  + (b) each person or company in a combination of persons or companies, acting in concert by virtue of an agreement, arrangement, commitment or understanding, which holds in total a sufficient number of the voting rights attached to all outstanding voting securities of an issuer to affect materially the control of the issuer, and, if a combination of persons or companies holds more than 20 per cent of the voting rights attached to all outstanding voting securities of an issuer, the combination of persons or companies is deemed, in the absence of evidence to the contrary, to hold a sufficient number of the voting rights to affect materially the control of the issuer;
    - Catching people acting together that would total suff # of voting rights to materially affect issuer, and 20%+ together deemed, in absence of evidence to the contrary
* If the person is a control person, then there are special regulations (e.g. every time there is a distribution (even for previously issued shares), they must file a prospectus unless they fit into one of the exemptions)

**(3) Is the person making that trade engaged in the business of trading?**

* If answer is yes, they must be registered unless exempt (s 25)
* If not registered, they should be exempt from registration, primarily in NI 31-103

**(4) Is that trade a “distribution”?**

* “distribution”, where used in relation to trading in securities, means,
  + (a) a trade in securities of an issuer that have not been previously issued,
  + (b) a trade by or on behalf of an issuer in previously issued securities of that issuer that have been redeemed or purchased by or donated to that issuer,
  + (c) a trade in previously issued securities of an issuer from the holdings of any *control person*,
  + (d) a trade by or on behalf of an underwriter in securities which were acquired by that underwriter, acting as underwriter, prior to the 15th day of September, 1979 if those securities continued on that date to be owned by or for that underwriter, so acting,
  + (e) a trade by or on behalf of an underwriter in securities which were acquired by that underwriter, acting as underwriter, within eighteen months after the 15th day of September, 1979, if the trade took place during that eighteen months, and
  + (f) any trade that is a distribution under the regulations,
  + and also includes any transaction or series of transactions involving a purchase and sale or a repurchase and resale in the course of or incidental to a distribution and “distribute”, “distributed” and “distributing” have a corresponding meaning;
* Trade in previously unissued securities (usually)
* Or any trade by a control person including a pledge (for purposes of control person only, see trade definition)
* If dealing with a distribution, then s 53 states that you are required to receive a receipt for a preliminary prospectus and (final) prospectus unless you can find an exemption

**Public Offerings – ss 52-63, 65-71, 133, 138 *SA*; NI 44-101**

**Essentials**

* S 53 SA: No person or company shall trade in a security if the trade would be a **distribution** **unless** a **preliminary prospectus** and [final] **prospectus** have been filed and **receipts** issued for them by the Director
  + See definitions of trade (i.e. sell, or pledge for control person), distribution (previously unissued securities)
* S 54 SA: **preliminary prospectus** shall ***substantially* comply w/ Ontario securities law** except reports of the auditor need not be included; can also leave out pricing/number of securities (s 54(2) SA)
* S 55 SA: once preliminary prospectus is filed, receipt shall be issued **forthwith** (right away)
  + Regulator has no discretion with regard to giving a receipt for a preliminary prospectus (only final)
  + Note: can use public interest jurisdiction to make a cease-trade order (s 68) if it does not substantially comply w/ Ontario securities law
* S 56 SA: prospectus shall provide **full, true and plain disclosure** of all material facts relating to the security issued
  + General requirement – regulations have specifics
  + Plain means comprehensible – cannot hide information
* S 57 SA: where **material adverse change** occurs after prospectus receipt but **before distribution ends**, amendment shall be filed **as soon as practicable** and in any event within **10 days**
  + (2.1) shall issue receipt for amendment unless Director refuses in accordance with s 61(2)
* S 58 SA: **certificate by issuer**; must be signed by CEO, CFO, and two directors on behalf of BOD
* S 59 SA: certificate of underwriter
* S 60 SA: prospectus shall contain statement of rights given to purchaser (liability and withdrawal rights)

**Refusal to issue receipt**

* S 61(1) SA: Director shall issue a receipt unless it is not in the public interest to do so
* (2) shall **not** issue a receipt if it appears that:
  + (a) prospectus or any document filed with it
    - (i) does not comply in any **substantial** respect
    - (ii) contains statement that is misleading, false or deceptive
    - (iii) contains a misrepresentation
  + (b) unconscionable consideration has been paid or intended to be paid for any services, promotional purposes, or acquisition of property
  + (c) aggregate of proceeds from the distribution and other resources the issuer has is insufficient to accomplish the purpose of the issue stated in the prospectus
  + (d) cannot reasonably be expected to be financially responsible b/c of financial condition of issuer, director, officer, etc.
  + (e) business may not be conducted with integrity due to the past conduct of the issuer or director, officer, etc.
  + (f) certification unacceptable
  + (g) escrow that Director considers necessary is not entered into
  + (h) adequate arrangements have not been made for the holding in trust of the proceeds payable to the issuer
* (3) hearing – shall not refuse to issue receipt w/o opportunity to be heard

**Waiting Period**

* S 65(1) waiting period = period b/w Director’s issuance of receipt for preliminary prospectus and Director’s issuance of a receipt for a prospectus [final]
* S 65(2) during waiting period, permissible to:
  + (a) communicate with any person identifying the security proposed to be issued
  + (b) distribute the preliminary prospectus
  + (c) solicit expressions of interest from a prospective purchaser if prior to solicitation a copy of the preliminary prospectus was forward to him/her
* S 66 shall send a copy to any prospective purchaser who has shown interest
* S 71(1) required to deliver prospectus to those who bought the security within 2 days
* S 71(2) **withdrawal rights** – once you have received your prospectus, you have **two days** to withdraw from the purchase (no reason necessary)

**Passport System** – MI 11-102 – attempt to nationalize our securities scheme

* Three instances: (basically Ontario reaps all of the rewards but does not incur any of the costs)
* 1: when an issuer files a prospectus, so long as they comply with its principal regulator they can sell to investors in other provinces w/o their approval
* 2: when Ontario is principal regulator, issuer is allowed to sell in all other provinces
* 3: dual prospectus – if approved in a passport jurisdiction and want to sell in Ontario, OSC can decide if they want a second prospectus or if it is sufficient
* S 3.1 Only a specified jurisdiction can act as a principal regulator; Territories or PEI or Newfoundland and Labrador, then you go to a jurisdiction that you have the closest connection

**Underwriting Agreement & Options/Clauses**

* UW agreements
  + Firm commitment agreements
    - UW has agreed to buy securities from the issuer and re-sell them
    - Can still have “out clauses” even though commitment seems absolute – see below
  + Marketed Deals
    - UW goes out and has roadshows after preliminary prospectus filed, gets a sense of whether they can fill the book.
    - In traditional deals, the UW agreement is not signed until immediately before final prospectus is filed –a subset of firm commitment agreements
  + Bought Deals
    - UW agrees to take risk from the beginning – agreement signed at the beginning of the process – also a subset of firm commitment agreements
  + Best Efforts/Agency Agreement
    - UW doesn’t buy shares/take risk, but signs a contract to use best efforts as agent to place the shares with the public
    - This is the most common!
* Clauses/Options
* “green shoe” option
  + Issuer gives the underwriter the option to purchase additional securities at a specified price for up to 15% of the total securities in the offering
  + Intended to protect underwriters who are engaged in market stabilization activities
* Market out clause (also called disaster out clause)
  + Required under IIROC rules
  + Underwriter may terminate their agreement if they make a reasonable determination that they cannot sell the securities
* Material Adverse Change Out
  + if a material adverse change which affects the issuer occurs, the UW can terminate the agreement

**Forms of Prospectus**

* **Long Form Prospectus** – NI 41-101
* **Short Form Prospectus** – NI 44-101
  + Available for reporting issuers to issue more shares (already did long form prospectus earlier)
    - It’s a shorter document, shorter time frames, etc.
    - S 3.1 Deemed incorporation by reference: incorporates all other public documents into short form prospectus
    - S 4.2 sets out required documents for filing short form prospectus
  + S 2.2 **Criteria**:
    - (a) Electronic filer under NI 13-101 (admin requirement)
    - (b) **Reporting issuer** in at least one jurisdiction in Canada
    - (c) Issuer has filed in each jurisdiction in which it is a reporting issuer all periodic and timely disclosure documents that it is required to have filed
    - (d) Issuer has, in at least one jurisdiction in which it is a reporting issuer, current financial statements and a current AIF
    - (e) Issuer’s equity securities are listed and posted for trading on a short form eligible exchange and the issuer is not an issuer (i) whose operations have ceased or (ii) whose principal asset is cash, cash equivalents, or its exchange listing
* **Base Shelf Prospectus** – NI 44-102
  + S 2.2 **Criteria**: must be eligible to file a short form prospectus to file a base shelf prospectus
  + S 2.2(3) Securities must be filed within **25 months**
  + Similar to a short form prospectus but without the instrument/price (only done later when you go to market) (s 5.5, 5.6 (info that may be omitted))
    - Saves you time from having lengthy negotiations w/ OSC beforehand
  + S 5.4 Must disclose in the shelf how much you expect to reasonable raise (genuine expectation)
  + Shelf prospectus can qualify more than one type of security
* **PREP Prospectus** – NI 44-103
  + S 3.5 Base PREP you get **90 days to file**
  + Differences b/w PREP and Shelf Prospectus
    - Any issuer can do it (not limited to those eligible to a short-form prospectus)
    - You can only qualify one type of security
    - The time that your receipt lasts is shorter (90 days instead of 25 months)
* **SPAC (special purpose acquisition corporation) – TSX** (see this in summary)
  + Meant for an acquisition
  + Must be TSX company
  + Must raise at least $30M
  + Within 36 months
  + “qualifying transaction” 🡪 must use up to 80% of the funds n buying the business
  + At least 300 shareholders who hold shares
  + At least 90% of the funds they raise have to be held in escrow
  + Shareholder vote
* **CPC (capital pool company) – TSX-V** (see this in summary)
  + Capital pool company for TSX-V (junior stock exchange)
  + One of requirements if that **no business has been identified**
    - Essentially investing in a person or firm rather than a business
  + $200k; 24 months; shareholder vote

**Civil Liability For Misrepresentation in Prospectus**

* S 130 **statutory civil liability** for misrepresentations in a prospectus
  + This is in addition to common law remedies that a shareholder may have
    - E.g. tort of deceit, fraudulent misrepresentation, negligent misrepresentation
  + Does not require reliance and allows shareholders to sue directors/officers personally
  + Not for secondary market; only for purchases made under prospectus (during distribution)
* S 1(1) “misrepresentation” means,
  + (a) an **untrue statement** of *material* fact, or
  + (b) an **omission to state** a material fact that is required to be stated or that is necessary to make a statement not misleading in the light of the circumstances in which it was made;
* S 1(1) “material fact” when used in relation to securities issued or proposed to be issued, means a fact that would *reasonably* be expected to have a **significant** effect on the market price or value of the securities [*market impact test*]
* 130(1) Where a prospectus contains a **misrepresentation**, a purchaser who purchases a security offered by the prospectus during the period of distribution has, **without** regard to whether the purchaser **relied** on the misrepresentation, **a right of action for damages** against,
  + (a) the issuer or a selling security holder on whose behalf the distribution is made;
    - Strict liability; no due diligence defence (unlike other parties)
  + (b) each underwriter of the securities who is required to sign the certificate required by section 59;
  + (c) every **director** of the issuer at the time the prospectus or the amendment to the prospectus was filed;
  + (d) every person or company whose consent to disclosure of information in the prospectus has been filed pursuant to a requirement of the regulations *but only with respect to reports, opinions or statements* that have been made by them; and [*experts*]
  + (e) every person or company who signed the prospectus or the amendment to the prospectus other than the persons or companies included in clauses (a) to (d), [*CEO/CFO; officers who sign; promoters*]
* or, where the purchaser purchased the security from a person or company referred to in clause (a) or (b) or from another underwriter of the securities, the purchaser **may elect to exercise a right of rescission** against such person, company or underwriter, in which case the purchaser shall have *no right of action for damages* against such person, company or underwriter.

**Defences**

* side note: s 132 standard of reasonableness shall be that required of a prudent person in the circumstances of the particular case
* **Purchased w/ Knowledge** – s 130(2)
  + 130(2) Not liable if purchaser purchased securities w/ knowledge of misrepresentation (onus on person claiming that purchaser had knowledge – e.g. issuer)
* **Series of defences** – s 130(3) – **do *not* apply to issuer/selling security holder**
  + (a) that the prospectus was filed **without his, her or its knowledge or consent**, and that, on becoming aware of its filing, he/she forthwith gave reasonable general notice that it was so filed
  + (b) that **before purchase of securities by purchaser**, on becoming aware of any misrepresentation in the prospectus he/she **withdrew the consent** thereto and gave reasonable general notice of such withdrawal and the reason therefor
  + (c) that, with respect to any part of the prospectus purporting to be made on the authority of an expert or purporting to be a copy of or an extract from a report, opinion or statement of an expert, he/she had no reasonable grounds to believe and did not believe that there had been a misrepresentation or that such part of the prospectus did not fairly represent the report, opinion or statement of the expert
    - **Defence for non-experts** for misrepresentation in the **“expertised” portion** of the prospectus
  + (d) that, with respect to any part of the prospectus purporting to be made on **his/her *own* authority as an expert** or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert but that contains a misrepresentation attributable to **failure to represent fairly his/her report**, opinion or statement as an expert,
    - (i) the person or company had, after reasonable investigation, reasonable grounds to believe and did believe that such part of the prospectus fairly represented his, her or its report, opinion or statement, **or**
    - (ii) on becoming aware that such part of the prospectus did not fairly represent his/her report, opinion or statement as an expert, he/she forthwith advised the Commission and gave reasonable general notice that such use had been made and that he, she or it would not be responsible for that part of the prospectus
    - **Defence for experts** for misrepresentation **by virtue of failing to represent his/her report fairly** in the prospectus
      * Must fall into (i) or (ii) too; the fact that it wasn’t fairly represented is not enough to establish the defence
* **Expert defence if expert’s opinion itself contains a misrepresentation** – s 130(4) – does ***not*** apply to issuer
  + 130(4) **No person** or company, other than the issuer or selling security holder, **is liable** with respect to any part of the prospectus purporting to be made on his/her own authority as an expert or purporting to be a copy of or an extract from his, her or its own report, opinion or statement as an expert **unless** he, she or it,
    - (a) failed to conduct such reasonable investigation as to provide reasonable grounds for a belief that there had been no misrepresentation; **or**
    - (b) believed there had been a misrepresentation.
  + The way this is written, if you fail *either* (a) or (b) you are liable
* **Non-expert’s defence if expert’s opinion itself contains a misrepresentation** – s 130(5) – does ***not*** apply to issuer
  + Same thing as previous except for other parties that are not experts involved (e.g. directors)
* **Defence for forward-looking information** – s 132.1
  + S 132.1 A person or company is not liable in an action under section 130, 130.1 or 131 for a misrepresentation in forward-looking information **if** the person or company proves all of the following things:
    - 1. The document containing the forward-looking information contained, *proximate to that information*,
      * i. **reasonable cautionary language** identifying the forward-looking information as such, and identifying **material factors that could cause actual results to differ** materially from a conclusion, forecast or projection in the forward-looking information, and
      * ii. a statement of the **material factors or assumptions** that were applied in drawing a conclusion or making a forecast or projection set out in the forward-looking information.
    - 2. The person or company had a **reasonable basis for drawing the conclusions** or making the forecasts and projections set out in the forward-looking information.
  + No defence for IPO – 132.1(2) Subsection (1) does **not** relieve a person or company of liability respecting forward-looking information in a financial statement or forward-looking information in a document released **in connection with an initial public offering**
* *Kerr v Danier*
  + **When** a prospectus contains no misrepresentation on the date the document is filed, but information that amounts to a material fact but ***not*** a material change arises ***subsequently***, it **CANNOT support an action under s 130**
    - Once a final prospectus receipt issued; only need to disclose material changes
    - This is consistent with s 57
  + This case concerned a forward-looking statement regarding sales and an unusually warm season that caused a decline in coat sales

**Limitations on Liability**

* S 130(6) Limitation for underwriters: not liable for more than total public offering price represented by their portion of the distribution underwritten
* S 130(7) not liable for damages that the D proves do not represent the depreciation in value from the security as a result of the misrepresentation
* S 130(9) in no case shall amount recoverable exceed the price at which the securities were offered to the public (strictly compensatory – no punitive damages)
* **Limitation period**
  + S 138 no action shall be commenced more than
    - (a) in case of action for **recession**, 180 days after the date of the transaction that gave rise to the cause of action
    - (b) in the case of any action **other than an action for rescission**, the earlier of
      * (i) 180 days after the P first had knowledge of the facts giving rise to the cause of action, or [*basic limitation period*]
      * (ii) three years after the date of the transaction that gave rise to the cause of action [*complete limitation period*]

**Exempt Market – *SA*, NI 45-106**

* Exempt from filing a prospectus if you fall into one of the exemptions
* Onus is on the person claiming the exemption to prove they fit in it
* **Nature of Security Exemptions** (note: only debt securities)
  + s 73.1 SA: debt securities issued by **government of Canada**
  + s 73.1 SA: debt securities issued by **certain banks**
    - schedule 1: large banks
    - schedule 2: typically subsidiaries of a foreign bank
    - schedule 3: bank of Canada
  + s 2.34(2)(b) NI 45-106: debt security issued by a **government in a foreign jurisdiction** **if** the debt security has a **designated rating** from a designated rating organization or its DRO affiliate
    - “designated rating” has the same meaning as in paragraph (b) of the definition of designated rating in NI 81-102
      * Go to NI 81-102 and find definition of “designated rating” and see the designated rating organizations and their respective ratings – **page 2794**
  + see s 73/73.1 for other exemptions for nature of the security (specifics)
* **Nature of Purchaser/Facilitating Capital Raising Exemptions**
  + **Accredited investor** (subject to restricted period – appendix D 45-102)
    - Strangely technical exemption
    - S 73.3 SA has states certain people are accredited investors, but then it also states “such other persons as maybe prescribed by the regulations” and regulations that do not have “except in Ontario” are therefore in force in Ontario (**SEE THE ACTUAL LEGISLATION – page 51, 1501, 1509**)
    - S 73.3 SA: accredited investor means
      * Certain banks, registered as dealer/adviser, gov’t (incl provinces, municipalities, public boards, school boards, etc. and foreign governments), pension fund, someone designated by Commission as accredited, anything else prescribed by regulations
    - S 1.1 NI 45-106: accreditor investor means
      * Note: “financial assets” means cash, securities, contract of insurance, a deposit that is not a security (cannot include real estate in this!)
      * (j) individual who, either alone or with a spouse, owns **financial assets** having an aggregate realizable value that, before taxes but net of any related liabilities, exceeds **$1M**
      * (k) individual whose net income before taxes exceeded **$200k** in each of the **2 most recent years** (or **$300k w/o spouse**), ***and*** who reasonably expects to exceed that net income level in the current calendar year \*\*
      * (l) individual who either alone or with a spouse has net assets of at least **$5M** (this includes real estate – can include your house here)
      * Banks, financial institutions, governments, etc. are also listed a accreditor investors (see both s 73.3 and s 1 NI 45-106 for definitions)
    - **Actual exemption**: S 73.3(2) SA: Accredited investors exempt so long as they are buying the security as a principal
  + **Private Issuer** (subject to seasoning period – appendix E 45-102)
    - 73.4(2) SA: private issuers as defined in regulations that buy as a principal are exempt
    - s 2.4 NI 45-106: “private issuer” means
      * (a) not a reporting issuer
      * (b)(i) securities are subject to **restrictions** on transfer (that are contained in constating documents) [restrictions can be anything]
      * (b)(ii) securities are beneficially owned by not more than 50 persons, not including employees/former employees who acquired shares during the course of their employment
      * (c) has distributed its securities only to persons described in (2)
      * (2.1) see the list of people on **page 1510!!!**
        + Note controversial one: “a person who is not the public”
  + **Family, friends, and business associates** (subject to restricted period – appendix D 45-102)
    - S 2.5, 2.6.1 NI 45-106 – page **1510-11**
    - Requires risk acknowledgement form to be filled out
  + Affiliate exemption – s 2.8 (subject to restricted period – appendix D 45-102)
    - S 2.8 prospectus requirement does not apply to a distribution by an issuer of a security of its own issue to an affiliate of the issuer that is purchasing as principal
  + **Offering memorandum** (subject to restricted period – appendix D 45-102)
    - **See page 1512-1514!!**
    - S 2.9(2.1) NI 45-106 in Ontario prospectus requirement does not apply if:
      * (a) Purchaser purchases security as a principal
    - (b) Acquisition cost of all securities acquired by purchaser who is an *individual* [Corporations not subject to the same limits, but note (3.0.01)] in the preceding 12 months does not exceed the following amounts:
      * + Ineligible investor: $10k
        + Eligible investor: $30k
        + Eligible investor that receives advice from portfolio manager, investment dealer or exempt market dealer: $100k
      * (c) delivers offering memo in compliance with (5)-(13)
        + And Obtains signed risk acknowledgement
    - 2.9(3.0.1) corporation cannot be created *solely* for the purpose of circumventing 2.9(2.1)(b) – though if a corporation existed already as a holding corp it’s probably okay
  + **Minimum investment amount** (subject to restricted period – appendix D 45-102)
    - S 2.10(1) NI 45-106: prospectus req does not apply if:
      * Person not an individual
      * Person purchases as principal
      * Acquisition cost of security is not less than $150k
    - (2) But it does not apply if corporation created solely to purchase or hold securities in reliance on the exemption
* **Transaction Exemptions** (**page 1516**)
  + Business combinations/reorganization s 2.11
  + Asset acquisition s 2.12
  + Take-over bid s 2.16
  + Stock dividend 2.31
  + Convertible and exchangeable s 2.42
    - Convertible = securities that may be converted into another type of share w/ the same corporation
    - Exchangeable = security can be exchanged for a share of a *different issuer*
* **Miscellaneous: isolated distribution by issuer** (subject to restricted period – appendix D 45-102)
  + S 2.30 NI 45-106 If distribution is an isolated distribution and is **not** made in the course of continued or successive transactions of a like nature and is **not** made by a person whose usual business is trading in securities
  + Only used if an unsophisticated party screws up; never *rely* on this exemption
* **Control person exemption to be able to sell w/o prospectus is in *Resale of Securities* (below)**

**Resale of Securities** – NI 45-102 – page 1472

* When you are allowed to resell securities to the public w/o a prospectus that was bought under an exemption
  + **Framework**: is this is a seasoning period or restricted period exemption?
    - (a) determine what exemption the share was acquired under, (b) determine if that exemption falls in appendix D or E of NI 45-102
    - Then go into the requirements for the relevant period
    - If it is **not** in Appendix D/E, then it is **not** a distribution, *unless* it is an underwriter (in which case it is *always* a distribution)
* S 2.3 🡪 if security on Appendix D, then s 2.5 applies (restricted period)
* S 2.4 🡪 if security on Appendix E, then s 2.6 applies (seasoning period)
* S 2.5 **Restricted Period** (securities on appendix D – page 1477-78)
  + At least four months have elapsed from distribution date \*\* (the diff b/w restricted and seasoning period)
  + Reporting issuer for at least 4 months preceding the sale
  + Trade is not a control distribution
  + No unusual effort made to prepare market or to create demand for the security
  + No extraordinary commission or consideration paid in respect of the security
  + If selling security holder an insider or officer, selling security holder has no reasonable grounds to believe that the issuer is in default of the securities legislation
* S 2.6 **Seasoning Period** (securities on appendix E page 1481)
  + Reporting issuer for at least 4 months preceding the sale
  + Trade is not a control distribution
  + No unusual effort made to prepare market or to create demand for the security
  + No extraordinary commission or consideration paid in respect of the security
  + If selling security holder an insider or officer, selling security holder has no reasonable grounds to believe that the issuer is in default of the securities legislation
* S 2.8 **Exemption for Control Person** – NI 45-102 s 2.8 – page 1474
  + Reporting issuer for at least 4 months preceding the sale
  + Selling security holders has held the security for four months
  + No unusual effort made to prepare market or to create demand for the security
  + No extraordinary commission or consideration paid in respect of the security
  + Selling security holder has no reasonable grounds to believe that the issuer is in default of securities legislation
  + Must sign a form stating that they did nothing wrong

**Civil Liability for Misrepresentation in Offering Memorandum** – s 130.1 SA

* Offering memorandum is not limited to the document given for the offering memorandum exemption! It may apply in any exemption! (but only for exemptions)
* S 1(1) “**offering memorandum**” means a document, together with any amendments to that document, purporting to **describe the business and affairs of an issuer** that has been **prepared primarily for delivery to and review by a prospective purchaser** so as to **assist the prospective purchaser to make an investment decision** in respect of securities being sold in a distribution to which section 53 would apply *but for the availability of one or more of the exemptions* contained in Ontario securities law, **but does not** include a document setting out current information about an issuer for the benefit of a prospective *purchaser familiar with the issuer* **through prior investment or business contacts**
* S 130.1(1) Where an offering memorandum contains a **misrepresentation**, a purchaser who purchases a security offered by the offering memorandum during the period of distribution has, **without regard to whether the purchaser relied on the misrepresentation**, the following rights:
  + 1. The purchaser has a **right of action for damages** against the issuer and a selling security holder on whose behalf the distribution is made.
  + 2. the purchaser may elect to exercise a **right of rescission**. If the purchaser exercises this right, the purchaser *ceases to have a right of action for damages*
* **Defences:**
  + S 130.1(2) **No** person or company is **liable** under subsection (1) if he/she proves that the **purchaser purchased the securities** **with knowledge** of the misrepresentation
    - Onus is on the seller of the securities
  + (5) issuer not liable where it is not receiving any proceeds from the distribution and the misrepresentation was not based on information provided by the issuer unless the misrepresentation: (a) was based on information that was previously publicly disclosed by the issuer, (b) was a misrepresentation at the time of its previous public disclosure, and (c) was not subsequently publicly corrected or superseded by the issuer prior to the completion of the distribution being distributed
* **Limitation on damages:**
  + (3) not liable for any portion of damages that the D proves do not represent the depreciation in value of the security as a result of the misrepresentation
  + (6) in no case shall the amount recoverable exceed the price at which the securities were offered
* (7) in addition to any rights at law (common law rights still in tact)
* (8) only applies for exempt distributions of s 53
* BUT, THIS RIGHT OF ACTION DOES **NOT** APPLY TO CERTAIN FINANCIAL INSTITUTIONS IF RELIED ON ACCREDITED INVESTOR EXEMPTION
  + OSC rule 45-501 s 5.2(2) Despite (1) the s.130.1 rights do not apply in respect of an offering memorandum delivered to a prospective purchaser in connection with a distribution made **in reliance on the NI 45-106 s. 2.3 Accredited Investor Exemption** if the prospective purchaser is
    - (a) a Canadian financial institution or Schedule III bank,
    - (b) the Business Development Bank of Canada…, or
    - (c) [a subsidiary of (a) or (b)].
  + They may still use common law remedies though

**Continuous Disclosure – ss 75-83.1 SA, NI 51-102**

* Two types of continuous disclosure: Periodic and timely disclosure
* **Note**: parts of Act are effectively *superseded* by NI 51-102 (OSC Rule 51-801 CP; “reporting issuers should therefore refer to NI 51-102 in place of the [continuous disclosure] requirements … except for sections 76 (prohibited insider trading) and 87 (voting where proxies))
* **Timely Disclosure**
  + S 1.1 NI 51-102 “material change” means,
    - (i) a change in the **business, operations or capital** of the issuer that would reasonably be expected to have a ***significant*** effect on the market price or value of any of the securities of the issuer, *or*
    - (ii) a decision to implement a change referred to in subclause (i) made *by the board of directors* **or** other persons acting in a similar capacity or by *senior management* of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is **probable**
    - **Do NOT need to disclose when a material fact occurs – only material change** (*Kerr v Danier Leather*)
    - *AiT*: in the context of merger negotiations, material change occurs “where there is sufficient commitment from both the parties to proceed and substantial likelihood that the transaction would be completed”
      * Non-binding letter of intent generally does not constitute material change
      * When board passed resolution to recommend deal to AiT’s shareholders but only provided that an investment bank provides a fairness opinion, still not material change (b/c it’s contingent on fairness opinion)
      * Disclosure must not be made too early (would be misleading and disrupt market) – careful balance required
    - Theratechnologies: no material change when FDA mentioned side effects that were previously provided in results of their clinical trials – disclosure requirement not triggered
  + s 7.1(1) NI 51-102: Subject to subsection (3), where a material change occurs in the affairs of a reporting issuer, it *shall*
    - (a) **immediately issue and file a news release** authorized by a senior officer disclosing the *nature* and *substance* of the change.
    - (b) shall file report (diff than news release) of such material change **as soon as practicable** and in any event within **10 days**
  + (2) **Unduly detrimental exception** – provided the reporting issuer marked it as confidential and provided its written reasons for non-disclosure, subsection (1) does not apply **IF**
    - (a) the reporting issuer reasonably believes that a disclosure required under subsection (1) would be **unduly detrimental** to its interests; or
    - (b) the material change consists of a decision made by the senior management of the reporting issuer to implement a change and the senior management,
      * (i) believes that confirmation by the board of directors of the decision to implement the change is probable, and
      * (ii) has no reason to believe that any person or company with knowledge of the material change has purchased or sold the reporting issuer’s securities or traded a related derivative.
  + (5) “**renew” confidentiality every 10 days** – where report filed under (2), the reporting issuer shall advise the Commission in writing where it believes the report should continue to remain confidential within ten days of the date of filing of the initial report and **every ten days** thereafter until the material change is generally disclosed
  + (7) where report filed under (2), issuer **shall promptly disclose** the material change **if** the reporting issuer becomes aware *or* has reasonable grounds to believe that a person or company **having knowledge of the material change is purchasing or selling securities** of the reporting issuer
  + National Policy 51-102 for disclosure standards
* **Periodic Disclosure**
  + **Annual financial statements** – s 4.1 NI 51-102
    - (1) Include statement of comprehensive income, statement of changes in equity, and statement of cash flows, statement of financial position, notes to financials for previous year and year preceding that
    - (2) Must be audited
    - **Timing** – 4.2
      * On or before 90th day after end of financial year (4.2(a))
      * Venture issuers: on or before 120th day after end of financial year
    - Must be delivered to securityholder (other than debt securities) upon request (4.6) – within 10 days of request
  + **Interim Financial Report**
    - “interim” means every quarter (every 3 months) (s 1.1)
    - (2) must include:
      * Statement of financial position as at end of interim period and at end of immediately preceding financial year
      * Statement of comprehensive income, statement of changes in equity, and statement of cash flows for year-to-date interim period, and for corresponding interim period of preceding year
      * (other than first quarter) statement of comprehensive income for the quarter, and comparative financial information for the corresponding period of preceding year
      * In some cases, a statement of financial position as at the beginning of the immediately preceding financial year
      * Notes to the interim financial report
    - **Does not have to be audited** – unlike annual financial statements
    - **Timing** – 4.4
      * Generally, on or before 45th day after end of interim period
      * For venture issuers, on or before 60th day after end of interim period
    - Must be delivered to securityholder (other than debt securities) upon request (4.6) – within 10 days of request
  + **Management Discussion and Analysis** (MD&A)
    - “A narrative explanation, through the eyes of management, of how your company performed during the period covered by the financial statements, and of your company’s financial condition and future prospects.” (Form 51-102F1, Part 1(a))
    - Required to be filed – s 5.1(1)
    - Must be sent to beneficial owners or securities if they request it (s 5.6)
    - Must send, at the same time as MD&A, annual/interim statements (s 5.6(4))
  + **Annual Information Form** (AIF)
    - Must be filed by reporting issuers other than “venture issuers” (s 6.1)
    - Generally to be filed on or before 90th day after end of financial year (s 6.2)
  + Management Proxy circulars (managers required to solicit proxies for the annual meeting) (Part 9, NI 51-102)
  + CEO + CFO must **personally certify** accuracy of annual and interim filings (NI 52-109, s 2.1, Parts 4 (annual) and part 5 (interim))
    - Representations of fair representation (52-109 CP, s. 4.1)
      * Not qualified by in accordance with GAAP (could mean more)
    - Where certificate contains a misrepresentation, certifying officer “potentially could be subject to quasi-criminal, administrative or civil proceedings under securities law” (52-109CP, s. 18.1)
    - Venture issuers do not need to certify, but should include note to reader that it is not certified
  + Disclosure of Corporate Governance Practices NI 58-101
    - “comply or explain” regime
* Failure to comply: NP 12-203: regulator may issue cease-trade order (or management cease-trade order – so it doesn’t hurt the rest of the investors) (MI 11-103)

**Insider Reporting and Insider Trading**

* **Insider Reporting Framework**: (s 107 SA)
  + (1) are they a “reporting insider”? (“reporting insider” referred to in s 107 SA but defined in NI 55-104 s 1(1)
    - See the definition in NI 55-104 s 1(1) – page 2470
    - Reason it is “reporting insider” and not “insider” as stated in s 107 is b/c s 9.2 and definition of “insider reporting requirement” in NI 55-104 provide that non-reporting insiders are exempt from the requirement
  + (2) if so, must comply with requirements (ss 106-109 SA)
    - **Initial Report** – S 107(1) SA: within **10 days** of becoming a *reporting* (explained above) insider, person shall file a report disclosing (1) any beneficial ownership of securities or any interest in a related financial instrument
      * The manner in which the report is to be made is prescribed – NI-55-104
    - **Subsequent Report** – S 107(2) SA: within 5 days (5 b/c s 3.3 NI 55-104 prescribes it) of any change re beneficial ownership of security or interest in a related financial instrument, reporting insider shall file a subsequent report
* **Prohibited Insider Trading**
  + “**insider**” means,
    - **Director/officer** of reporting issuer
    - **Director/officer** of company that is itself an **insider** or subsidiary of reporting issuer
    - Person that has beneficial ownership/control over securities of a reporting issuer carrying more than **10% of voting rights**, excluding underwriter
    - Reporting issuer that has purchased, redeemed or acquired a security of its own issue
  + “person or company in a **special relationship** with an issuer” means,
    - (a) person that is an **insider, affiliate, or associate** of
      * (i) Issuer
      * (ii) person considering making take-over bid; (iii) person considering corporate reorganization/merger/etc.
    - (b) person engaged or considering whether to engage in biz/professional activity if the activity is,
      * With issuer
      * With person described in (a)(ii) or (a)(iii)
    - (c) person who is a **director, officer, or employee** of issuer, subsidiary of issuer, person that controls issuer directly or indirectly, person in (a)(ii)(iii) or (b)
    - (d) a person or company that learned of the material fact or material change with respect to the issuer while the person or company was a person or company described in clause (a), (b) or (c),
      * Covering people that leave and then would have been technically excluded
    - (e) a person or company that learns of a material fact or material change with respect to the issuer from any other person or company described in this subsection, *including a person or company described in this clause* [covers sub-tippees], **and** *knows* **or** *ought reasonably* to have known that the other person or company is a person or company in such a relationship
      * **IMPORTANT!!!!**
      * *Finkelstein* (sub-tippee liability case)
        + Two types of connections required:
        + (1) information connection

Did they know something material that was not generally disclosed?

look at what defendant knew about the company and compare it to what was generally disclosed

easier part

* + - * + (2) person connection

How did they get the information?

Conceded that neither Chang/Miller *knew* about the source of the information

The part argued was “ought reasonably to have known”

**factors informing if they ought reasonably to have known:**

(a) What is the relationship between the tipper and tippee? Are they close friends? Do they also have a professional relationship? Does the tippee know of the trading patterns of the tipper, successes and failures?

(b) What is the professional qualification and standing of the tipper? Is he a lawyer, businessman, accountant, banker, investment adviser? Does the tipper have a position which puts him in a milieu where transactions are discussed?

(c) What is the professional qualification of the tippee? Is he an investment adviser, investment banker, lawyer, businessman, accountant, etc.? Does his profession or position put him in a position to know he cannot take advantage of confidential information and therefore a higher standard of alertness is expected of him than from a member of the general public?

(d) How detailed and specific is the MNPI? Is it general such as X Co. is “in play”? Or is it more detailed in that the MNPI includes information that a takeover is occurring and/or information about price, structure and timing?

(e) How long after he receives the MNPI does he trade? Does a very short period of time give rise to the inference that the MNPI is more likely to have originated from a knowledgeable person?

(f) What intermediate steps before trading does the tippee take, if any, to verify the information received? Does the absence of any independent verification suggest a belief on the part of the tippee that the MNPI originated with a knowledgeable person?

(g) Has the tippee ever owned the particular stock before?

(h) Was the trade a significant one given the size of his portfolio?

Nicholls strongly disagrees with (e) and (f) – these are all evidence that the person subjectively had a belief, but it does not go to the objective test of whether they ought reasonably to have known (has nothing to do with that)

Chang/Miller liable in this case

* + 76(1) **No** person or company in a **special relationship** with an issuer shall purchase or sell securities of the issuer **with the knowledge of a material fact or material change** with respect to the issuer that has **not been generally disclosed**
  + (2) **tipping prohibited** – no person in a special relationship shall inform *other than in the necessary course of business* of a material fact or change that has not generally been disclosed
  + (3) no party that is considering or evaluating whether to make a take-over bid, biz reorganization, acquire substantial portion of property, shall inform another person of a material fact or change before it has been generally disclosed
  + (3.1) **recommendation prohibited** – no person in a special relationship and no person that is considering actions in (3) shall recommend or encourage another person to purchase/sell securities w/ knowledge of the material fact/change not generally disclosed
  + (4) **defence** – if person proves that they reasonably believed that the material fact or change had been generally disclosed (subjective and objective component)
* **Civil Liability for Prohibited Insider Trading**
  + Not civil but closely related: 122.1(4) if convicted under s 122, court can order restitution to the victim
  + **Liability for damages**: s 134(1). Also (2) covers tipping
  + **Accountability for gain**: s 134(4)
  + **Derivative action by shareholder on behalf of corporation**: s 135(1) – upon application
  + Recall limitation periods s 138

**Registration – s 25-33 *SA*, NI 31-103**

* **Required to be registered** if “**business trigger**” is engaged
* S 25(1) SA: Unless exempt, person shall not engage in the business of trading in securities unless they are a registered dealer
* (2) same, underwriters
* (3) same, advisers
* (4) same, investment fund manager
* (5) same, ultimate designated person
* (6) same, chief compliance officer
* S 26(2) SA: Dealer categories:
  + Investment dealer (broadest power), mutual fund dealer, scholarship plan dealer, exempt market dealer, restricted dealer, such other category prescribed by regulations
* s 26(6) SA: adviser categories:
  + portfolio manager, restricted portfolio manager, any other category prescribed by regulations
* s 32(1) broad duty to comply with Ontario securities law – refers to regulations for more detail
* **Categories of registration for individuals**: Part 2 NI 31-103 (page 667) and s 25 SA
* **Basic Requirements For Individuals**
  + **Proficiency requirement**: s 3.4 NI 31-103 (page 669)
    - Necessary education, training, and experience to perform activity competently
    - **Know your product** – understanding of the structure, features, and risks of each security the person recommends
    - CCO must not perform activities under s 5.2 unless individual has the necessary education, training, and experience to perform activity competently
  + **Responsibilities of UDP and CCO**: s 5.1/5.2 NI 31-103 (page 671)
* **Basic Requirements For Individuals *and* Firms**
  + **Know your client**: s 13.2 NI 31-103 (page 689)
    - See the actual *steps* that they must undertake
  + **Suitability**: s 13.3 NI 31-103 (page 689)
  + **Act fairly, honestly and in good faith with its clients**: s 2.1 OSC Rule 31-505 (note the different rule! – page 864)
* **Membership in Self-Regulatory Organization**
  + Investment dealer – IIROC: s 9.1 NI 31-103 (page 681)
  + Mutual fund dealer – MFDA: s 0.2 NI 31-103 (page 681)
* **Basic Requirements for Firms**
  + Establish compliance system – s 11.1 NI 31-103 (page 684)
  + Designate UDP (ultimate designated person) – s 11.2 NI 31-103 (page 684)
  + Designate CCO (chief compliance officer) – s 11.3 NI 31-103 (page 684)
  + Solvency Requirements, insurance, etc. – s 12.1 NI 31-103 (page 686)

**Exemptions From Registration**

* **Adviser exemption – Advice not tailored**
  + s 34(1) SA: exempt if:
    - 1. person engages in the business of providing advice **that are not purported to be tailored to the needs of anyone receiving the advice**
    - 2. or others in the regulations
  + (3) adviser described in para 1 of (1) must **disclose any financial or other interest**, directly or indirectly, that the following people have in the advice given: (i) the adviser, (ii) partner/director/officer of adviser, or (iii) person or company that would be an insider of the adviser fi the adviser were a reporting issuer
* **Dealer exemption – Debt securities issued by government**
  + S 35(1) SA: debt securities issued by gov’t of Canada or province/territory
  + Debt securities issued by a municipality or secured by taxes levied under law of province
* **Registration exemption – financial institutions that limit their activities to those authorized by their governing legislation**
  + S 35(1) schedule I, II, III bank, etc.
* Other exemptions in Part 8 NI 31-103 (page 661)

**Proxy Solicitations and Proxy Contests** – s 84-88 SA, NI 51-102 s 9.1

* S 84 SA: “Solicitation” includes any request for proxy, any request to execute/not execute a request for proxy or revoke proxy, sending of communication under circumstances reasonably calculated to result in procurement, withholding or revocation of proxy
  + *Brown v Dudy*
    - Solicitation of proxies requires certain disclosures
    - found to be soliciting because, *although they weren’t asking for their vote, but they asked for them not to sign a proxy by the directors, which falls within solicitation*
    - Court rejected remedy of injunction because they stated it is an extraordinary remedy and they are likely to provide the information necessary
* **Sending Solicitation, Information Circular Required**
  + 9.1(1) NI 51-102: if management gives notice of meeting, must at the same time or before give a form of proxy to any securityholder entitled to vote
  + (2)(a) management: must send information circular
  + (2)(b) dissident: must send information circular concurrent with solicitation
* **Exemptions From Sending Information Circular**
  + 9.2(2) NI 51-102: does not apply if **15 or less** proxyholders solicited
* Content of proxy is on page 1805
* **Content of Information Circular Basics**
  + S 9.3.1(b) NI 41-102 – must provide sufficient information so reasonable person can make a reasoned judgment
  + Reasonable investor test (different than the market impact test)!!
  + *TSC Northway*
    - It is important that investors are not buried in an avalanche of information that is not good for decision-making
    - Only give them the information that they need to make an informed decision
  + *Sharbern Holding*
    - Information is material if there is a substantial likelihood that it *would* (not could!) have been considered important by a reasonable investor in making his or her decision to invest
* Proxy must include option to vote “for” or “withhold” – only one vote necessary to be elected
  + This is to prevent a situation where no directors are elected
* *Pacifica*: proxies are always revocable
* *Patheon*: (not too sure how this is relevant but here it is) – whose proxy solicitation is this? Turned on acquiesce
  + Can’t be said to acquiesce when nothing you could do could have stopped them
  + Merely having knowledge of something is not acquiescence
  + Therefore solicitation did not contravene s 150 CBCA
* Again not too sure how this is relevant but here it is:
  + Advanced notice by-laws: If you want to elect certain directors, must provide advanced notice
  + This is to prevent some stealthy shareholders from providing proxies and showing up at the meeting and having a proxy contest (that way management can respond to the proxy contest more effectively)
  + *Melnyk*: mgmt. in terms of implementing by-laws mgmt can’t make major changes to biz between time of proxy circulation and the meeting
  + *Melnyk*:
    - **it is never possible for directors to amend a by-law unless they have enough time to put it into a circular, despite what the Act says**
    - because they must be able to put it to vote in the next meeting

**Takeover Bids – NI 62-104, NP 62-203**

**3 objectives of takeover bids**

* **Adequate time** for target company shareholders
* **Adequate information** for target company shareholders
* **Equal treatment** of target company shareholders
* Newly added: maintain an open and even-handed bid process

**Pre-bid: early warning system** (see NI 62-104 (page 2651) for specifics of the fair warning system, but provisions below are from NI 62-104)

5.2(1) When an acquiror acquires **10%+ of a class of shares**, must:

* 5.2(1)(a) Promptly (latest by opening of trading of next business day) file and issue a news release
* 5.2(1)(b) Promptly (latest 2 business days after acquisition) file report
* 5.2(2) acquiror required to make disclosure under (1) must make **further disclosure** when they buy/sell **2%** of that class of shares
* 5.2(3) file news release if falls below 10%
* 5.3(1) **moratorium period** – cannot acquire more shares beginning when the event in respect of which a report is required to be filed and ending on the expiry of the first business day
  + E.g. bought shares on Aug 1, report filed Aug 3, can only acquire more on Aug 5

**Takeover bids** (everything except for voting securities is from NI 62-104)

* 1.1 NI 62-104 “offer to acquire” means (a) an offer to purchase, or a solicitation of an offer to sell, securities, (b) an acceptance of an offer to sell securities, whether or not the offer has been solicited, or (c) any combination of the above [*attempts to catch everything*]
  + 1.10 includes direct and indirect offers
* 1.1 “**take-over bid**” means an offer to acquire outstanding voting securities or equity securities of a class made to one or more persons, any of whom is in the local jurisdiction or whose last address as shown on the books of the offeree issuer is in the local jurisdiction, where the securities subject to the offer to acquire, *together with the offeror’s securities*, constitute in the aggregate **20% or more** of the outstanding securities of that class of securities at the date of the offer to acquire **but does not** include an offer to acquire if the offer to acquire is a step in an amalgamation, merger, reorganization or arrangement that requires approval in a vote of security holders.
* S 1(1) SA: Voting securities = any security other than a debt security carrying a voting right
* 1.1 Equity securities = have *residual* right to participate in earnings and on liquidation or winding up
* 1.8 deemed beneficial owner of share that is convertible within 60 days (for purposes of counting 20% threshold) – and deemed outstanding under (2)
* 1.9 acting jointly or in concert covered too – deemed vs presumed situations (page 2640)
* **If they fall into the definition of take-over bid, then they are subject to the regulations unless they fall into an exemption**

**Restrictions**

* 2.2(1) **Restrictions on acquisitions during takeover bid** – offeror must not acquire shares during bid (except for (3) or exemptions)
  + (3) can acquire on **3rd biz day** following bid if ALL of the following conditions satisfied:
    - (a) intention of the offeror to acquire shares (i) stated in bid circular or (ii) stated in news release issued min 1 biz day before making such purchases,
    - (b) shares don’t exceed 5% of outstanding shares for that class
      * Purchases of securities convertible into target securities included in 5% (s 2.2(4))
    - (c) purchases made in normal course on published market
    - (d) offeror issues news release after close of biz on each day they acquire shares
    - (e) no broker performs beyond customary broker’s functions
    - (f) no broker receives more than usual fees/commissions
    - + 2 more
* 2.4(1) **Restrictions on acquisitions before takeover bid** – if offeror acquires shares within 90 days before bid, offeror must offer either identical terms or cash equivalent (except (2) and 2.6)
  + (2) doesn’t apply if (a) security had not been previously issued, (b) on behalf of an issuer in prev issued security
* 2.5 **Restrictions on acquisitions after takeover bid** – cannot acquire until **20 biz days** after expiry of take-over bid except on identical terms
* 2.6 **Exceptions** – 2.4(1) and 2.5 don’t apply if purchase made by offeror in normal course on a published market and if all conditions satisfied:
  + (a) no broker performs beyond customary broker’s functions
  + (b) no broker receives more than usual fees/commissions
  + +2 more
* 2.7 offeror cannot sell securities from date when intention declared until expiry of bid
* 5.4(1) **Restrictions on acquisitions during bid** – during takeover bid if acquiror acquires 5%+ of shares, must file news release
  + 5.4(2) And each 2% thereafter
  + BUT – see rule 2.2 – not allowed to buy over 5%

**Making a Bid**

* 2.8 must make bid to **all security holders**
* 2.9 may **commence bid by** (a) publishing advertisement in newspapers or (b) sending bid to all security holders
* 2.10(1) must prepare and send take-over bid circular
* 2.10(2)(a) **on or before date of advertisement**, must **file circular** and send it to offeree’s issuer, and (b) not later than **2 biz days** after receipt of list of security holders, must send bid circular to all security holders
* 2.11-2.12: change in info/variation of terms

**Offeree issuer’s obligations** (target)

* 2.17(1) BOD must prepare and send not later than **15 days** after date of bid, directors’ circular to all security holders
  + (2) in directors’ circular, must include (a) **recommendation** to accept or reject the bid and reasons for it, (b) advise security holders that they are unable to make a recommendation and reasons for it, or (c) advise security holders that they are considering whether to make a recommendation, and must state reasons for not giving recommendation in circular
* Notice of change + individual director’s circular allowed – 2.18-2.20

**Offeror’s obligations**

* 2.23(1) all security holders must be offered **identical consideration**
  + (2) may offer identical choice of consideration
  + (3) if offeror decides to increase consideration, increased consideration must be offered to each person whose securities were taken up under the bid
* 2.24 no collateral (side) agreements allowed for different terms – everyone is equal
* 2.26.1 **proportionate take up and payment** – if greater # of securities is deposited than the offeror is bound or willing to acquire under partial takeover bid, offeror must take up and pay for the securities proportionately according to # of securities deposited by each holder

**Bid Mechanics**

* 2.28.1 offeror must allow securities to be deposited under take-over bid for at least **105 days**
* 2.28 but may be reduced by issuer to **35 days** (bare minimum)
* 2.82.2 if you shorten time for one, you must shorten it for all
* 2.29.1 offeror must not take up bids deposited until (a) bid period is up, (b) all terms and conditions of bid have been complied w/ or waived, and (c) more than 50% of securities subject to the bid have been deposited and not withdrawn
* 2.30 securityholder may **withdraw** securities (a) any time before taken up by offeror, (b) before expiration of 10 days from notice of change or variation, or (c) if securities not paid for **3 biz days** after being taken up
* 2.31.1 mandatory 10-day extension period if successful take-over bid (during which more security holders may deposit bids); issue news release
* 2.32.1(1) must immediately take up securities deposited after expiry of initial deposit period (w/o extension)
  + (2) pay for any securities taken up **ASAP** and in any event not later than **3 biz days**
* 2.33 return of deposited securities if they know they will not take up securities and file news release

**Exemptions**

* 4.1 **normal course purchase exemption** – exempt if all of the following satisfied:
  + (a) bid for **not more than 5%** of outstanding securities
  + (b) aggregate # of securities acquired in reliance of exemption in 12-month period does not exceed 5%) (can’t keep relying on this exemption for 5%, 5%, etc. until it totals more)
  + (c) there is a published market for the class of securities, and
  + (d) **value of consideration paid for is not in excess of the market price** plus reasonable brokerage fees or commissions paid
* 4.2 **private agreement exemption** – exempt if all of the following satisfied:
  + (a) purchase made from **not more than 5 persons**
  + (b) not generally made to security holders; must be more than 5 security holders in class, and
  + (c) value of consideration paid is not greater than **115% of market price** (15% premium)
* 4.3 **non-reporting issuer exemption** – exempt if all of the following satisfied:
  + (a) offeree issuer is not a reporting issuer (essentially private company)
  + (b) no published market for the securities
  + (c) total # of security holders is not more than 50 excluding employees & former employees of issuer/affiliate that received shares during the course of their employment
* 4.4 **foreign take-over bid exemption** – exempt if all of the following satisfied:
  + (a) **less than 10%** security holders in **Canada** (last-known address shown on books)
  + (b) offeror reasonably believes there are less than 10% security holders in Canada
  + (c) published market on which greatest volume of trades happened during 12 months prior to bid was not Canada
  + (d) security holders in Canada entitled to participate in bid on **terms at least as favourable** as the terms that apply to general body of security holders
* 4.5 **de minimus exemption** – exempt if all of the following satisfied: (i.e. limited number of Ontario shareholders of Target)
  + # of beneficial owners subject to bid *in the local jurisdiction* is **fewer than 50**
  + Securities held by beneficial owners *in local jurisdiction* constitute in **aggregate less than 2% of outstanding securities of that class**
  + Security holders in the local jurisdiction entitled to participate in the bid on **terms at least as favourable** as the terms that apply to general body of security holders in the same class

**Business Combinations** – how to force shareholders out who did not tender their shares during the take-over bid

**Compulsory Acquisition** – s 206 CBCA, s 188 CBCA

* This is the cheaper and most effective way – best way, but it requires very high approval
* **90% accept take-over bid w/o counting shares already held by offeror** –
  + S 206(2) CBCA: If within *120 days* **after** the date of a take-over bid the **bid is accepted** by the holders of not less than **90%** of the shares of any class of shares to which the take-over bid relates, ***other than*** *shares held at the date of the take-over bid by or on behalf of the offeror or an affiliate or associate of the offeror*, the offeror is entitled, on complying with this section, to acquire the shares held by the dissenting offerees.
    - Note: 120 days after take-over bid beings; meaning 15 days after bid period ends unless it is decreased
* **Two options** – (3) offeror may acquire shares by sending notice to dissenting offeree; (c) dissenting offeree is required to elect (i) transfer his shares on terms of take-over bid, or (ii) demand payment of fair market value
* (5.1) if dissenting offeree does not notify offeror, deemed to have elected to transfer share on same terms of take-over bid

**Business Combinations – Second Step Going Private Transaction** – MI 61-101 – page 2592

* Business combination is an amalgamation works like this:
  + Bidder incorporates acquisition co, purchases 67% of shares from target, then uses those votes to amalgamate those two and the bidder receives shares in the amalgamated corporation in exchange for shares in acquisition corporation, while the other shareholders receive cash for their shares (via redeemable preferred shares)
* “business combination” means an amalgamation, arrangement, consolidation, etc.
  + Any transaction as a consequence of which the interest of a holder of an equity security may be terminated without the holder’s consent
  + But doesn’t include compulsory acquisition
* **Requires Formal Valuation** (s 4.3) **and Minority Approval** (s 4.5)
* **Formal Valuation Exemptions**
  + S 4.4(d): do not have to conduct formal valuation if conditions are satisfied for a second step gong private transaction (aka in relation to a bid) (**page 2602**)
    - SEE THESE IN BOOK
* **Minority Approval**
  + Part 8 – **page 2609**
  + 8.1(2) in determining “minority approval”, issuer shall exclude votes attached to shares that are beneficially owned by the issuer or an interested party (note caveat below)
  + 8.2 **BUT they MAY include securities that they acquired under the bid to vote in favour** of the business combination provided that they met certain steps
  + Therefore it is easy tog et this approval

**Enforcement**

* 3 main branches:
* **Criminal Code**
  + Serious securities offences (e.g. insider trading, issuing fake prospectus, market manipulation, etc.) – not as relevant for us
* **Self-regulatory organizations** (subordinate regulators) (IIROC and MFDA)
  + Won’t focus on it much here as well
* **Securities Act/Regulator**
  + This is what we’re concerned with

**Securities Act Enforcement**

* **S 122: Quasi-criminal** (page 67)
  + Burden of proof is beyond a reasonable doubt
  + Tried in Superior Court of Justice
  + S 122(1): every person that does one of the following is guilty of an offence and is liable to a fine of not more than **$5M** or imprisonment of a term not more than **5 years** less a day, or both (note: insider trading fines can be higher, see below)
    - (a) materially misleading/false statement to Commission
    - (b) materially misleading statement in prospectus, take-over circular, financial report, etc.
    - (c) **contravenes Ontario securities law.** – broadest provision
  + (2) **defence** – not guilty of (1)(a) or (b) if the person or company did not know and in the exercise of reasonable diligence could not have known that the statement was misleading or untrue or that it omitted to state a fact that was required to be stated or that was necessary to make the statement not misleading in light of the circumstances in which it was made
  + (3) **directors and officers** – director/officer who authorizes, permits, or acquiesces in the commission of an offence under (1) is guilty as well
    - *Patheon*: acquiesce means more than have knowledge; must have ability to effect change
  + (4) **insider trading fine** – min fine is the profit made or loss avoided; max fine is the greater of $5M or 3x the profit made or loss avoided
  + 122.1(1) **compensation** – court may order in addition to any penalty that the convicted person make restitution or pay compensation to an aggrieved person or company
    - (7) civil remedies protected
  + 126.1 fraud and market manipulation
  + 126.2 misleading or untrue statements

**S 127: Public interest jurisdiction** (page 70)

* + Does not require contravening an offence
    - E.g. if you violate the “spirit” of the law but not the law itself, they can still make an order in the public interest (all that there needs to be is in the public interest to make the order)
    - **Note:** the bottom three **require contravening Ontario securities law** (but not others such as a cease-trade order)
  + Burden of proof is a balance of probabilities
  + Tried by the Commission
  + Use the purposes of the Act (also means of achieving them) in determining if it’s in the public interest! (page 13)
  + 127(1) The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:
    - 1. Registration suspended/stricted/terminated
    - 2. Cease-trade order.
    - 2.1 person can’t acquire securities.
    - 3. Order that exemptions don’t apply.
    - 4. market participant submit to a review of his conduct.
    - 5. *If the Commission is satisfied that Ontario securities law has not been complied with*, an order that a document (expansive definition) be provided, not be provided, or be amended
    - 6. Reprimanded
    - 7. Director/officer of issuer resign
    - 8. Prohibited from becoming director/officer of issuer
    - 8.1 resign as director/officer of registrant.
    - 8.2 Prohibited from becoming director/officer of registrant.
    - 8.3 resign as director/officer of investment fund manager.
    - 8.4 prohibited from becoming director/officer of investment fund manager.
    - 8.5 prohibited from becoming registrant, investment fund manager or promoter.
    - 9. *If a person or company has not complied with Ontario securities law*, an order requiring the person or company to pay an **administrative penalty** of not more than **$1 million for *each failure* to comply**.
    - 10. *If a person or company has not complied with Ontario securities law*, an order **requiring the person or company to disgorge** to the Commission any amounts obtained as a result of the non-compliance.
* S 128 Securities Act – Civil Proceedings
  + **128(1) Applications to Court** – The Commission may apply to the Superior Court of Justice for a declaration that a person or company has not complied with or is not complying with Ontario securities laws
  + **Not very frequently used**! They usually use the public interest jurisdiction