

**ALBERTA SECURITIES COMMISSION
NOTICE AND PUBLICATION FOR COMMENT**

***PROPOSED AMENDMENTS TO ALBERTA SECURITIES COMMISSION RULES
(GENERAL) CONSEQUENTIAL TO STATUTORY AMENDMENTS RELATING
TO CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE***

August 2, 2006

Publication for Comment

The Alberta Securities Commission (ASC) is publishing for comment for 30 days, a proposed amendment to the Alberta Securities Commission Rules (General) (the Rules), which is an addition of Part 16.1 “Civil Liability for Secondary Market Disclosure” to the Rules. A complete copy of this proposed addition is attached to this Notice as Appendix A.

Background

On May 24, 2006, the *Securities Amendment Act*, 2006, S.A. 2006, c. 30 (the Amendment Act) received Royal Assent. Section 52 of the Amendment Act established a secondary market civil liability regime through the addition of Part 17.01 “Civil Liability for Secondary Market Disclosure” to the *Securities Act* (Alberta) (the Act). Section 52 is expected to be proclaimed on December 31, 2006 and is reproduced in Appendix B to this Notice.

The proposed consequential amendments to the Rules define key terms used in Part 17.01 and, for the purpose of sub clauses 211.02(b) and (c), prescribe transactions to which Part 17.01 applies.

Further Amendment

Proclamation of section 33 of the Amendment Act, which repeals and replaces certain provisions of the Act relating to take-over bids and issuer bids, will occur concurrently with the implementation of proposed National Instrument 62-104 *Take-Over Bids and Issuer Bids* (the Take-Over Bid Rule). Among other things, section 33 of the Amendment Act contemplates the repeal of sections 161 and 162 of the Act, which sections are referenced in sub clause 192.5(2) in Part 1.1 of the proposed Rule amendment. Accordingly, upon the repeal of section 161 and 162 of the Act, sub clause 192.5(2) of the Rules will require amendment to reflect the relevant provisions of the Take-Over Bid Rule as follows:

192.5(2) Part 17.01 of the Act applies to the acquisition or disposition of an issuer’s security in connection with or pursuant to a take-over bid described in section **5.2, 5.5 or 5.6**¹ of National Instrument 62-104 *Take-Over Bids and Issuer Bids* or an issuer bid described in section **5.9, 5.10, 5.12 or 5.13**² of National Instrument 62-104 *Take-Over Bids and Issuer Bids*, which bids are prescribed for the purposes of section 211.02(c) of the Act.

¹ These section references may change prior to implementation of the Take-Over Bid Rule

² These section references may change prior to implementation of the Take-Over Bid Rule

Effective Date

Staff anticipates making the proposed amendment effective December 31, 2006 and, in any event, concurrently with the proclamation of section 33 of the Amendment Act.

Request for Comment

We are interested in your comments regarding the proposed amendment to the Rules in Appendix A hereto and the consequential amendment to proposed sub clause 192.5(2) of the Rules upon implementation of the Take-Over Bid Rule. Comment letters received on or before September 2, 2006 will be considered. Comment letters can be delivered in hard copy by fax or e-mail and will be placed on a public file forming part of a public record, unless you request confidentiality. If you request confidentiality, freedom of information legislation may still require that the ASC make these comment letters available. Please address your submissions to:

Terry Hutcheon
Corporate Secretary and Senior Legal Counsel
Office of the General Counsel
Alberta Securities Commission
4th Floor, 300-5th Ave SW
Calgary, Alberta, T2P 3C4
Fax: 297-3679
terry.hutcheon@seccom.ab.ca

Appendix A

PROPOSED AMENDMENTS TO ALBERTA SECURITIES COMMISSION RULES (GENERAL)

PART 1 AMENDMENT OF THE ASC RULES (GENERAL)

1.1 Amendment - The following is added after Part 16:

Part 16.1 Civil Liability for Secondary Market Disclosure

192.1 In this Part, “equity security” means any security of an issuer that carries the residual right to participate in

- (a) the earnings of the issuer, and
- (b) the assets of the issuer on the liquidation or the winding-up of the issuer.

192.2 For the purposes of Part 17.01 of the Act, “market capitalization” means, in respect of an issuer, the amount determined as follows:

- (a) for each class of equity securities for which there is a published market, determine the sum of the number of outstanding securities of the class at the close of trading on each of the 10 trading days before the day on which the misrepresentation was made or the failure to make timely disclosure first occurred;
- (b) divide the sum determined under clause (a) by 10;
- (c) multiply the quotient determined under clause (b) for each class by the trading price of the securities of the class on the principal market for the securities for the 10 trading days before the day on which the misrepresentation was made or the failure to make timely disclosure first occurred;
- (d) add the amounts determined under clause (c) for each class of equity securities for which there is a published market;
- (e) for each class of equity securities not traded on a published market, determine the fair market value of the outstanding securities of that class as of the day on which the misrepresentation was made or the failure to make timely disclosure first occurred;

- (f) add the amounts determined under clause (e) for each class of equity securities not traded on a published market; and
- (g) add the amount determined under clause (d) to the amount determined under clause (f) to determine the market capitalization of the issuer.

192.3 For the purposes of Part 17.01 of the Act, “principal market” means, in respect of a class of securities of a responsible issuer,

- (a) the published market in Canada on which the greatest volume of trading in securities of that class occurred during the 10 trading days before the day on which the misrepresentation was made or the failure to make timely disclosure first occurred, or
- (b) the published market on which the greatest volume of trading in securities of that class occurred during the 10 trading days before the day on which the misrepresentation was made or the failure to make timely disclosure first occurred, if securities of that class are not traded during those 10 trading days on a published market in Canada.

192.4 For the purposes of Part 17.01 of the Act, “trading price” means, in respect of a security of a class of securities for which there is a published market, the amount determined under the following rules:

- (a) subject to clauses (b) and (c), the trading price of the security is the volume weighted average price of securities of that class on the published market during the period for which the trading price is to be determined;
- (b) subject to clause (c), if there was trading in the securities of that class in the published market on fewer than half of the trading days during the period for which the trading price of the securities is to be determined, the trading price of the security is determined as follows:
 - (i) calculate the sum of the average of the highest bid and lowest ask prices for each trading day in the period on which there were no trades in securities of that class in the published market,
 - (ii) divide the amount determined under subclause (i) by the number of trading days on which there were no trades in securities of that class in the published market,
 - (iii) add to the amount determined under subclause (ii) the volume weighted average price of securities of that class on the published

market for those trading days on which securities of that class were traded,

- (iv) divide by two the amount determined under subclause (iii);
- (c) if there were no trades of securities of that class in the published market during the period for which the trading price is to be determined, the trading price of the security is the fair market value of the security.

192.5(1) Part 17.01 of the Act applies to the acquisition of an issuer's security pursuant to an exemption from section 110 of the Act that is set out in clause 2.8 of National Instrument 45-102 *Resale of Securities*, which exemption is prescribed for the purposes of section 211.02 (b) of the Act.

(2) Part 17.01 of the Act applies to the acquisition or disposition of an issuer's security in connection with or pursuant to a take-over bid described in section 161 (1) (a), (b) or (e) of the Act or an issuer bid described in section 162 (e), (f) or (h) of the Act, which bids are prescribed for the purposes of section 211.02 (c) of the Act.

PART 2 EFFECTIVE DATE

2.1 Effective date - The amendment in section 1.1 is effective [*], 2006.

Appendix B

52 The following is added after Part 17:

Part 17.01 Civil Liability for Secondary Market Disclosure

Definitions

211.01 In this Part,

- (a) “compensation” means compensation received during the 12-month period immediately preceding the day on which the misrepresentation was made or on which the failure to make timely disclosure first occurred, together with the fair market value of all deferred compensation including, without limitation, options, pension benefits and stock appreciation rights, granted during the same period, valued as of the date that such compensation is awarded;
- (b) “core document” means,
 - (i) where used in relation to
 - (A) a director of a responsible issuer who is not also an officer of the responsible issuer,
 - (B) an influential person, other than an officer of the responsible issuer or an investment fund manager where the responsible issuer is an investment fund, or
 - (C) a director or officer of an influential person who is not also an officer of the responsible issuer, other than an officer of an investment fund manager,

a prospectus, a take-over bid circular, an issuer bid circular, a directors’ circular, a rights offering circular, management’s discussion and analysis, an annual information form, an information circular, annual financial statements and interim financial statements of the responsible issuer;
 - (ii) where used in relation to
 - (A) a responsible issuer or an officer of the responsible issuer,
 - (B) an investment fund manager where the responsible issuer is an investment fund, or
 - (C) an officer of an investment fund manager where the responsible issuer is an investment fund,

a prospectus, a take-over bid circular, an issuer bid circular, a directors’ circular, a rights offering circular, management’s discussion and analysis, an annual information form, an information circular, annual financial statements, interim financial statements and a material change report required under section 146 of the responsible issuer, and
 - (iii) such other documents as may be prescribed by regulation for the purposes of this definition;
- (c) “document” means any written communication, including a communication prepared and transmitted only in electronic form,
 - (i) that is required to be filed with the Commission, or

- (ii) that is not required to be filed with the Commission and
 - (A) that is filed with the Commission,
 - (B) that is filed or required to be filed with a government or an agency of a government under applicable securities or corporate law or with any exchange or quotation and trade reporting system under its bylaws, rules or regulations, or
 - (C) that is any other communication the content of which would reasonably be expected to affect the market price or value of a security of the responsible issuer;
- (d) “expert” means a person or company whose profession gives authority to a statement made in a professional capacity by the person or company, including, without limitation, an accountant, actuary, appraiser, auditor, engineer, financial analyst, geologist or lawyer but not including an entity that is an approved rating organization;
- (e) “failure to make timely disclosure” means a failure to disclose a material change in the manner and at the time required under this Act;
- (f) “influential person” means, in respect of a responsible issuer,
 - (i) a control person,
 - (ii) a promoter,
 - (iii) an insider who is not a director or officer of the responsible issuer, or
 - (iv) an investment fund manager, if the responsible issuer is an investment fund;
- (g) “issuer’s security” means a security of a responsible issuer and includes a security
 - (i) the market price or value of which, or payment obligations under which, are derived from or based on a security of the responsible issuer, and
 - (ii) that is created by a person or company on behalf of the responsible issuer or is guaranteed by the responsible issuer;
- (h) “liability limit” means,
 - (i) in the case of a responsible issuer, the greater of
 - (A) 5% of its market capitalization as defined in the regulations, and
 - (B) \$1 000 000,
 - (ii) in the case of a director or officer of a responsible issuer, the greater of
 - (A) \$25 000, and
 - (B) 50% of the aggregate of the director’s or officer’s compensation from the responsible issuer and its affiliates,
 - (iii) in the case of an influential person who is not an individual, the greater of
 - (A) 5% of its market capitalization as defined in the regulations, and
 - (B) \$1 000 000,
 - (iv) in the case of an influential person who is an individual, the greater of

- (A) \$25 000, and
 - (B) 50% of the aggregate of the influential person's compensation from the responsible issuer and its affiliates,
- (v) in the case of a director or officer of an influential person, the greater of
- (A) \$25 000, and
 - (B) 50% of the aggregate of the director's or officer's compensation from the influential person and its affiliates,
- (vi) in the case of an expert, the greater of
- (A) \$1 000 000, and
 - (B) the revenue that the expert and the affiliates of the expert have earned from the responsible issuer and its affiliates during the 12 months preceding the misrepresentation,
- and
- (vii) in the case of each person who made a public oral statement, other than an individual referred to in subclause (iv), (v) or (vi), the greater of
- (A) \$25 000, and
 - (B) 50% of the aggregate of the person's compensation from the responsible issuer and its affiliates;
- (i) "management's discussion and analysis" means the section of an annual information form, annual report or other document that contains management's discussion and analysis of the financial condition and results of operations of a responsible issuer as required under Alberta securities laws;
- (j) "public oral statement" means an oral statement made in circumstances in which a reasonable person would believe that information contained in the statement will become generally disclosed;
- (k) "release" means, with respect to information or a document, to file with the Commission or any other securities regulatory authority in Canada or an exchange or to otherwise make available to the public;
- (l) "responsible issuer" means
- (i) a reporting issuer, or
 - (ii) any other issuer with a real and substantial connection to Alberta, any of whose securities are publicly traded;
- (m) "trading day" means a day during which the principal market as defined in the regulations for the security is open for trading.

Application

211.02 This Part does not apply to

- (a) the purchase of a security offered by a prospectus during the period of distribution,

- (b) the acquisition of an issuer's security pursuant to a distribution that is exempt from section 110, except as may be prescribed by regulation,
- (c) the acquisition or disposition of an issuer's security in connection with or pursuant to a take-over bid or issuer bid, except as may be prescribed by regulation, or
- (d) such other transactions or class of transactions as may be prescribed by regulation.

Liability for secondary market disclosure

211.03(1) Where a responsible issuer or a person or company with actual, implied or apparent authority to act on behalf of a responsible issuer releases a document that contains a misrepresentation, a person or company who acquires or disposes of the issuer's security during the period between the time when the document was released and the time when the misrepresentation contained in the document was publicly corrected has, without regard to whether the person or company relied on the misrepresentation, a right of action for damages against

- (a) the responsible issuer,
- (b) each director of the responsible issuer at the time the document was released,
- (c) each officer of the responsible issuer who authorized, permitted or acquiesced in the release of the document,
- (d) each influential person, and each director and officer of an influential person, who knowingly influenced
 - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer to release the document, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the release of the document,

and

- (e) each expert where
 - (i) the misrepresentation is also contained in a report, statement or opinion made by the expert,
 - (ii) the document includes, summarizes or quotes from the report, statement or opinion of the expert, and
 - (iii) if the document was released by a person or company other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document.

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

- (a) the responsible issuer,
- (b) the person who made the public oral statement,

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

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

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

- (iii) if the document was released or the public oral statement was made by a person other than the expert, the expert consented in writing to the use of the report, statement or opinion in the document or public oral statement.
- (4) Where a responsible issuer fails to make a timely disclosure, a person or company who acquires or disposes of the issuer's security between the time when the material change was required to be disclosed in the manner required under this Act and the subsequent disclosure of the material change has, without regard to whether the person or company relied on the responsible issuer having complied with its disclosure requirements, a right of action for damages against
- (a) the responsible issuer,
 - (b) each director and officer of the responsible issuer who authorized, permitted or acquiesced in the failure to make timely disclosure, and
 - (c) each influential person, and each director and officer of an influential person, who knowingly influenced
 - (i) the responsible issuer or any person or company acting on behalf of the responsible issuer in the failure to make timely disclosure, or
 - (ii) a director or officer of the responsible issuer to authorize, permit or acquiesce in the failure to make timely disclosure.
- (5) In an action under this section, a person who is a director or officer of an influential person is not liable in that capacity if the person is liable as a director or officer of the responsible issuer.
- (6) In an action under this section,
- (a) multiple misrepresentations having common subject-matter or content may, in the discretion of the court, be treated as a single misrepresentation, and
 - (b) multiple instances of failure to make timely disclosure of a material change or material changes concerning common subject-matter may, in the discretion of the court, be treated as a single failure to make timely disclosure.
- (7) In an action under subsection (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.

Burden of Proof and Defences

Non-core documents and public oral statements

211.04(1) In an action under section 211.03 in relation to a misrepresentation in a document that is not a core document or a misrepresentation in a public oral statement, a person or company is not liable, subject to subsection (2), unless the plaintiff proves that the person or company

- (a) knew, at the time that the document was released or the public oral statement was made, that the document or public oral statement contained the misrepresentation,
- (b) at or before the time that the document was released or the public oral statement was made, deliberately avoided acquiring knowledge that the document or public oral statement contained the misrepresentation, or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the release of the document or the making of the public oral statement that contained the misrepresentation.

(2) A plaintiff is not required to prove any of the matters set out in subsection (1) in an action under section 211.03 in relation to an expert.

(3) In an action under section 211.03 in relation to a failure to make timely disclosure, a person or company is not liable, subject to subsection (4), unless the plaintiff proves that the person or company

(a) knew, at the time that the failure to make timely disclosure first occurred, of the change and that the change was a material change,

(b) at the time or before the failure to make timely disclosure first occurred, deliberately avoided acquiring knowledge of the change or that the change was a material change, or

(c) was, through action or failure to act, guilty of gross misconduct in connection with the failure to make timely disclosure.

(4) A plaintiff is not required to prove any of the matters set out in subsection (3) in an action under section 211.03 in relation to

(a) a responsible issuer,

(b) an officer of a responsible issuer,

(c) an investment fund manager, or

(d) an officer of an investment fund manager.

(5) A person or company is not liable in an action under section 211.03 in relation to a misrepresentation or a failure to make timely disclosure if that person or company proves that the plaintiff acquired or disposed of the issuer's security

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

(b) with knowledge of the material change.

(6) A person or company is not liable in an action under section 211.03 in relation to

(a) a misrepresentation if that person or company proves that,

(i) before the release of the document or the making of the public oral statement containing the misrepresentation, the person or company conducted or caused to be conducted a reasonable investigation, and

(ii) at the time of the release of the document or the making of the public oral statement, the person or company had no reasonable grounds to believe that the document or public oral statement contained the misrepresentation,

or

(b) a failure to make timely disclosure if that person or company proves that

(i) before the failure to make timely disclosure first occurred, the person or company conducted or caused to be conducted a reasonable investigation, and

- (ii) the person or company had no reasonable grounds to believe that the failure to make timely disclosure would occur.

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

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

(8) A person or company is not liable in an action under section 211.03 in respect of a failure to make timely disclosure if

- (a) the person or company proves that the material change was disclosed by the responsible issuer in a report filed on a confidential basis with the Commission under section 146,
- (b) the responsible issuer had a reasonable basis for making the disclosure on a confidential basis,
- (c) where the information contained in the report filed on a confidential basis remains material, disclosure of the material change was made public promptly when the basis for confidentiality ceased to exist,
- (d) the person or company or responsible issuer did not release a document or make a public oral statement that, due to the undisclosed material change, contained a misrepresentation, and

- (e) where the material change became publicly known in a manner other than the manner required under this Act, the responsible issuer promptly disclosed the material change in the manner required under this Act.

(9) A person or company is not liable in an action under section 211.03 for a misrepresentation in forward-looking information if the person or company proves all of the following:

- (a) the document or public oral statement 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;
- (b) 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.

(10) A person or company is deemed to have satisfied the requirements of subsection (9)(a) with respect to a public oral statement containing forward-looking information if the person who made the public oral statement

- (a) made a cautionary statement that the oral statement contains forward-looking information,
 - (b) stated that
 - (i) the actual results could differ materially from a conclusion, forecast or projection in the forward-looking information, and
 - (ii) certain material factors or assumptions were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information,
- and
- (c) stated that additional information about
 - (i) the material factors that could cause actual results to differ materially from the conclusion, forecast or projection in the forward-looking information, and
 - (ii) the material factors or assumptions that were applied in drawing a conclusion or making a forecast or projection as reflected in the forward-looking information,

is contained in a readily available document or in a portion of such a document and has identified that document or that portion of the document.

(11) For the purposes of subsection (10)(c), a document filed with the Commission or otherwise generally disclosed is deemed to be readily available.

(12) Subsection (9) does not relieve a person or company of liability respecting forward-looking information in a financial statement required to be filed under this Act or forward-looking information in a document released in connection with an initial public offering.

(13) A person or company, other than an expert, is not liable in an action under section 211.03 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert in respect of which the responsible issuer

obtained the written consent of the expert to the use of the report, statement or opinion if the consent had not been withdrawn in writing before the document was released or the public oral statement was made, if the person or company proves that

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

(14) An expert is not liable in an action under section 211.03 with respect to any part of a document or public oral statement that includes, summarizes or quotes from a report, statement or opinion made by the expert if the expert proves that the written consent previously provided was withdrawn in writing before the document was released or the public oral statement was made.

(15) A person or company is not liable in an action under section 211.03 in respect of a misrepresentation in a document, other than a document required to be filed with the Commission, if the person or company proves that, at the time of release of the document, the person or company did not know and had no reasonable grounds to believe that the document would be released.

(16) A person or company is not liable in an action under section 211.03 for a misrepresentation in a document or a public oral statement if the person or company proves that

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

(17) A person or company, other than the responsible issuer, is not liable in an action under section 211.03 if the misrepresentation or failure to make timely disclosure was made without the knowledge or consent of the person or company and if, after the person or company became aware of the misrepresentation before it was corrected, or the failure to make timely disclosure before it was disclosed in the manner required under this Act,

- (a) the person or company promptly notified the directors of the responsible issuer or other persons acting in a similar capacity of the misrepresentation or the failure to make timely disclosure, and
- (b) if no correction of the misrepresentation or no subsequent disclosure of the material change in the manner required under this Act was made by the responsible issuer within 2 business days after the notification under clause (a), the person or company, unless prohibited by law or by professional confidentiality rules, promptly and in writing notified the Commission of the misrepresentation or failure to make timely disclosure.

Damages

Assessment of damages

211.05(1) Damages shall be assessed in favour of a person or company that acquired an issuer's securities after the release of a document or the making of a public oral statement containing a misrepresentation or after a failure to make timely disclosure as follows:

- (a) in respect of any of the securities of the responsible issuer that the person or company subsequently disposed of on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the difference between the average price paid for those securities, including any commissions paid in respect of them, and the price received on the disposition of those securities, without deducting any commissions paid in respect of the disposition, calculated taking into account the result of hedging or other risk limitation transactions;
 - (b) in respect of any of the securities of the responsible issuer that the person or company subsequently disposed of after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the lesser of
 - (i) an amount equal to the difference between the average price paid for those securities, including any commissions paid in respect of them, and the price received on the disposition of those securities, without deducting any commissions paid in respect of the disposition, calculated taking into account the result of hedging or other risk limitation transactions, and
 - (ii) an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security paid for those securities, including any commissions paid in respect of that disposition determined on a per security basis, and
 - (A) if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market (as those terms are defined in the regulations) for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - (B) if there is no published market, the amount that the court considers just;
 - (c) in respect of any of the securities of the responsible issuer that the person or company has not disposed of, assessed damages shall equal the number of securities acquired, multiplied by the difference between the average price per security paid for those securities, including any commissions paid in respect thereof determined on a per security basis, and
 - (i) if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market as defined in the regulations for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - (ii) if there is no published market, the amount that the court considers just.
- (2)** Damages shall be assessed in favour of a person or company that disposed of securities after a document was released or a public oral statement made containing a misrepresentation or after a failure to make timely disclosure as follows:
- (a) in respect of any of the securities of the responsible issuer that the person or company subsequently acquired on or before the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this

Act, assessed damages shall equal the difference between the average price received on the disposition of those securities, deducting any commissions paid in respect of the disposition and the price paid for those securities, without including any commissions paid in respect of them, calculated taking into account the result of hedging or other risk limitation transactions;

- (b) in respect of any of the securities of the responsible issuer that the person or company subsequently acquired after the 10th trading day after the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, assessed damages shall equal the lesser of
 - (i) an amount equal to the difference between the average price received on the disposition of those securities, deducting any commissions paid in respect of the disposition and the price paid for those securities, without including any commissions paid in respect of them, calculated taking into account the result of hedging or other risk limitation transactions, and
 - (ii) an amount equal to the number of securities that the person disposed of, multiplied by the difference between the average price per security received on the disposition of those securities, deducting any commissions paid in respect of the disposition determined on a per security basis, and
 - (A) if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market as defined in the regulations for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - (B) if there is no published market, the amount that the court considers just;
 - (c) in respect of any of the securities of the responsible issuer that the person or company has not acquired, assessed damages shall equal the number of securities that the person or company disposed of, multiplied by the difference between the average price per security received on the disposition of those securities, deducting any commissions paid in respect of the disposition determined on a per security basis, and
 - (i) if the issuer's securities trade on a published market, the trading price of the issuer's securities on the principal market as defined in the regulations for the 10 trading days following the public correction of the misrepresentation or the disclosure of the material change in the manner required under this Act, or
 - (ii) if there is no published market, the amount that the court considers just.
- (3) Notwithstanding subsections (1) and (2), assessed damages shall not include any amount that the defendant proves is attributable to a change in the market price of securities that is unrelated to the misrepresentation or the failure to make timely disclosure.

Proportionate liability

211.06(1) In an action under section 211.03, the court shall determine, in respect of each defendant found liable in the action, the defendant's responsibility for the damages assessed in favour of all plaintiffs in the action, and each such defendant is liable, subject to the limits set out in section 211.07(1), to the plaintiffs for only that portion of the aggregate amount of damages assessed in favour of the plaintiffs that corresponds to that defendant's responsibility for the damages.

(2) Notwithstanding subsection (1), where, in an action under section 211.03 in respect of a misrepresentation or a failure to make timely disclosure, a court determines that a particular defendant, other than the responsible issuer, authorized, permitted or acquiesced in the making of

the misrepresentation or the failure to make timely disclosure while knowing it to be a misrepresentation or a failure to make timely disclosure, the whole amount of the damages assessed in the action may be recovered from that defendant.

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

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

Limits on damages

211.07(1) Notwithstanding section 211.05, the damages payable by a person or company in an action under section 211.03 is the lesser of

- (a) the aggregate damages assessed against the person or company in the action, and
- (b) the liability limit for the person or company less the aggregate of all damages assessed after appeals, if any, against the person or company in all other actions brought under section 211.03, and under comparable legislation in other provinces or territories in Canada in respect of that misrepresentation or failure to make timely disclosure, and less any amount paid in settlement of any such actions.

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

Procedural Matters

Leave to proceed

211.08(1) No action may be commenced under section 211.03 without leave of the court granted on motion with notice to each defendant.

(2) The court shall grant leave only where it is satisfied that

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

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

(4) The maker of such an affidavit may be examined on it in accordance with the *Alberta Rules of Court*.

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

Notice

211.09 A person or company that has been granted leave to commence an action under section 211.03 shall

- (a) promptly issue a news release disclosing that leave has been granted to commence an action under section 211.03,

- (b) send a written notice to the Commission within 7 days of leave being granted, together with a copy of the news release, and
- (c) send a copy of the statement of claim or other originating document to the Commission when filed.

Restriction on discontinuation, etc. of action

211.091 An action under section 211.03 shall not be discontinued, abandoned or settled without the approval of the court given on such terms as the court thinks fit including, without limitation, terms as to costs, and in determining whether to approve the settlement of the action, the court shall consider, among other things, whether there are any other actions outstanding under section 211.03 or under comparable legislation in other provinces or territories in Canada in respect of the same misrepresentation or failure to make timely disclosure.

Costs

211.092 Notwithstanding the *Court of Queen's Bench Act* and the *Class Proceedings Act*, the prevailing party in an action under section 211.03 is entitled to costs determined by a court in accordance with the Alberta Rules of Court.

Power of the Commission

211.093 The Commission may intervene in an action under section 211.03 and in an application for leave under section 211.08.

No derogation from other rights

211.094 The right of action for damages and the defences to an action under section 211.03 are in addition to and without derogation from any other rights or defences the plaintiff or defendant may have in an action brought otherwise than under this Part.

Limitation period

211.095 No action shall be commenced under section 211.03,

- (a) in the case of misrepresentation in a document, later than the earlier of
 - (i) 3 years after the date on which the document containing the misrepresentation was first released, and
 - (ii) 6 months after the issuance of a news release disclosing that leave has been granted to commence an action under section 211.03 or under comparable legislation in the other provinces or territories in Canada in respect of the same misrepresentation;
 - (b) in the case of a misrepresentation in a public oral statement, later than the earlier of
 - (i) 3 years after the date on which the public oral statement containing the misrepresentation was made, and
 - (ii) 6 months after the issuance of a news release disclosing that leave has been granted to commence an action under section 211.03 or under comparable legislation in another province or territory of Canada in respect of the same misrepresentation,
- and
- (c) in the case of a failure to make timely disclosure, later than the earlier of
 - (i) 3 years after the date on which the requisite disclosure was required to be made, and
 - (ii) 6 months after the issuance of a news release disclosing that leave has been granted to commence an action under section 211.03 or under comparable legislation in another province or territory of Canada in respect of the same failure to make timely disclosure.