June 19, 2006

Re: Civil Liability Regime for Secondary Market Disclosure

Investor protection is of primary importance in the securities industry across Canada. For this reason, the British Columbia government is currently seeking public input to a proposal to bring forward legislation to better protect investors who purchase securities in the secondary market.

Improving investor protection will require amendments to the *Securities Act* to adopt civil liability legislation for the secondary market. This would permit an investor purchasing securities in the secondary market to sue for damages in specified circumstances.

The Canadian Council of Ministers of Securities Regulation identified secondary market civil liability as one of the areas where provinces and territories can enhance investor protection. Under the September 2004 *Provincial-Territorial Memorandum of Understanding Regarding Securities Regulation*, Ministers agreed on core principles for enhancing securities regulation in Canada, including the following: "highest standards of investor protection that are effectively and consistently applied."

Currently, only investors who purchase shares directly from a public issuer or its underwriter (i.e., in the 'primary market') have a statutory right to sue for misleading disclosure in the prospectus. At this time, the British Columbia government is considering amendments to the *Securities Act* to provide investors with a right to sue a public company, its management and other specified persons (i.e., the 'secondary market') for making any public misrepresentation about the company in documents or oral statements, or for failing to make timely disclosure.

You are invited to respond in writing to the five questions attached about the possible implementation of a civil liability regime in British Columbia. For your convenience, we provide historical and background information on this initiative, and outline some key differences between the secondary market civil liability legislation adopted in Ontario and in British Columbia's un-proclaimed 2004 *Securities Act*.

We appreciate your thoughtful comments. Thank you for your participation in this consultation.

Yours faithfully,

Allan P. Seckel
Deputy Attorney General

Attachments: Appendix A: Questions and Instructions for Feedback
Appendix B: Background
Appendix C: Key Differences between British Columbia and Ontario

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APPENDIX A: QUESTIONS AND FEEDBACK

Questions

1. Should British Columbia adopt secondary market civil liability to protect investors and to foster compliance with continuous disclosure obligations among public issuers?

2. What are the costs and benefits of adopting secondary market civil liability?

3. Two options to implement a regime for secondary market civil liability in British Columbia are to:
   - adopt Ontario's secondary market civil liability regime, as Alberta and Manitoba have done, or
   - adapt British Columbia's 2004 *Securities Act* secondary market civil liability regime.

   Which approach is preferable? (See Appendices B and C for more information on these options.)

4. What are the costs and benefits of the Ontario approach compared to the British Columbia approach?

5. If we were to adopt the Ontario remedies, should we include any of the differences from British Columbia's un-proclaimed 2004 *Securities Act*? (See Appendix C for a summary description of key differences between the Ontario remedies and those in the 2004 Act.)

Feedback

Please provide comments electronically **by July 19, 2006** to:

DeputyAttorneyGeneralsOffice@gov.bc.ca

However, if you wish to send comments in paper format, please direct them to:

Financial and Corporate Sector Policy Branch
PO Box 9418 Stn Prov Govt
Victoria BC V8W 9V1

Please note that the Ministry of Attorney General will be sharing comments it receives with the British Columbia Securities Commission and others. Even where confidentiality is requested, freedom of information legislation may require the Ministry to make responses available to those requesting access.

APPENDIX B: BACKGROUNDER

To make their investment decisions, investors rely on information disclosed by public companies in their financial statements, news releases and other documents, or in their public oral statements. Although there are some common law remedies for misrepresentation in these materials, the remedies have practical limitations: sometimes investors have no right to sue, or the requirements for evidence or the procedures they face are too burdensome.

Canada has studied the need for better protection for investors and improved continuous disclosure extensively for over 25 years. Federal proposals made in 1979 were followed by the Ontario Securities Commission 1984 law reform proposals, and a comprehensive study by the Toronto Stock Exchange (the TSE) in the mid-90s. The TSE study included countrywide consultation by a panel of experts, an interim report in 1995, and a final report in 1997.

The Canadian Securities Administrators (CSA) expressed public support for the TSE's final report and, in 1998, they published draft legislation for comment that followed closely the report's legislative recommendations. The CSA published revised proposed legislation in November 2000 that included changes based on the comments received. At the time, the CSA said that some of its members would recommend adoption of this legislation to their governments.

The CSA have significantly improved and harmonized issuers' continuous disclosure requirements and bolstered their programs to monitor how issuers comply with their continuous disclosure obligations. Giving investors the statutory right to sue for public misrepresentation in documents and oral statements, and for failing to make timely disclosure, would complement the existing compliance and enforcement activities of securities regulators.

The underlying policy goal of the secondary market civil liability regime is to deter misleading issuer disclosure by providing an opportunity for injured investors to obtain some measure of compensation for financial losses suffered because of disclosure violations. The regime would also provide fair protection for issuers, their directors and officers and experts to ensure that they are not subject to abusive litigation.

Ontario brought into force secondary market civil liability at the end of 2005. Ontario based its regime on the draft legislation the CSA published in 2000. Alberta and Manitoba have also enacted legislation adopting secondary market civil liability, but the amendments are not yet in force. Both Alberta and Manitoba based their provisions on the Ontario regime. Other provinces are now considering introducing legislation to implement secondary market civil liability in Fall 2006 or Spring 2007.

British Columbia adopted similar remedies in its un-proclaimed 2004 *Securities Act*. The regime in the 2004 Act is different from the regime adopted in Ontario in a number of ways, as explained in Appendix C.

APPENDIX C: KEY DIFFERENCES BETWEEN BRITISH COLUMBIA'S AND ONTARIO'S APPROACHES TO CIVIL LIABILITY FOR SECONDARY MARKET DISCLOSURE

1. *Liability for primary and secondary markets*
   - The Ontario legislation contains stand-alone remedies for investors who purchase in the secondary market, separate from the remedies for investors who purchase in the primary market. British Columbia's un-proclaimed 2004 *Securities Act* integrates the primary and secondary market liability regimes.

2. *Liability in relation to type of document*
   - In Ontario, the liability standard varies according to the type of document that contains a misrepresentation. For example, in the case of "non-core documents" and oral statements, the investor must prove that the defendant had knowledge of the misrepresentation, deliberately avoided acquiring knowledge of the misrepresentation or was guilty of gross misconduct.
   - This is not the case under the 2004 Act. Instead, the 2004 Act contains a defence that is not available in Ontario or in the current legislation for misrepresentation in a prospectus. The defence is based on having a reasonable system in place to ensure compliance with the legislation and a process to monitor the effectiveness of the system. This defence is available only to the issuer and its directors.

3. *Liability of Directors for failure to make timely disclosure*
   - In Ontario, a director is liable for failure to make timely disclosure only if the director authorized, permitted or acquiesced in the failure. In the 2004 Act, all directors are liable for failure to make timely disclosure, but they can rely on the reasonable system's defence, which is not available in Ontario (see above).

4. *Defence for experts*
   - The 2004 Act includes a defence for experts, which is not available in Ontario or under the current prospectus liability provisions. An expert who makes a misrepresentation has a defence if the misrepresentation was based on information provided to the expert, and it was reasonable for the expert to rely on the information.

5. *Nature of the test for court approval to proceed*
   - In Ontario, a court must grant leave to proceed only if there is a reasonable possibility that the action will be resolved in favour of the plaintiff. In the 2004 Act, the court may grant leave only if it is satisfied the action has a reasonable prospect of success.

6. *Damages formula*
   - In Ontario, there are detailed provisions on the calculation of damages. In the 2004 Act, the calculation of damages is left to the courts.

7. *Cap for experts*
   - In the Ontario legislation, the cap for experts is the greater of $1 million or the amount the expert received from the issuer and its affiliates in the last year. In the 2004 Act, the only limit is the amount the expert received from the issuer and its affiliates in the last year.

8. *Loser-pay costs provision*

Class action legislation in British Columbia does not contain a loser-pay costs provision as Ontario's legislation does.