



Ontario
Securities
Commission

Commission des
valeurs mobilières
de l'Ontario

P.O. Box 55, 19th Floor
20 Queen Street West
Toronto ON M5H 3S8

CP 55, 19^e étage
20, rue queen ouest
Toronto ON M5H 3S8

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EXECUTIVE SUMMARY

Five Year Review Committee Final Report: *Reviewing the Securities Act (Ontario)*

Priority Areas for Legislative Reform identified by OSC Chair, David A. Brown, Q.C., in his Statement dated August 18, 2004

The Five Year Review Committee's recommendations cover a wide range of topics and issues relating to securities regulation in Ontario and across Canada. Some of these require legislative or other Government action, while others are being implemented by the OSC of its own accord. The OSC welcomes all of the 95 recommendations of the Five Year Review Committee. These recommendations address matters that will further strengthen the OSC's ability to protect investors and to foster the integrity of and confidence in Ontario's capital markets and address areas in which a well-functioning system can be made even better.

The need for a single securities regulator was identified by the Five Year Review Committee as "the most pressing securities regulation issue in Ontario and across Canada."¹ We believe strongly that a single securities regulator for Canada is essential in order to effectively protect investors and foster integrity and confidence in our capital markets in an increasingly global marketplace. A single securities regulator will maximize efficiency, take advantage of scale and scope, ensure a level national playing field, and encourage Canadian competitiveness.

The Five Year Review Committee also recommended that securities regulators continue to harmonize securities regulation across Canada.² The OSC fully supports the Uniform Securities Legislation project of the Canadian Securities Administrators (CSA). Uniform legislation would represent significant progress towards streamlining and harmonizing Canadian securities regulation. While the Uniform Securities Legislation project is a positive step forward, it is no permanent substitute for a single securities regulator.

A number of the recommendations of the Five Year Review Committee are for legislative amendment or reform. The summary below elaborates on those recommendations of the Committee which fall within the four priority areas identified by OSC Chair, David Brown, in his presentation to the Standing Committee on Finance and Economic Affairs on August 18, 2004.

1. "Civil Liability Package"

In December 2002, the Government enacted amendments to the *Securities Act*. These amendments:

¹ Five Year Review Committee: *Reviewing the Securities Act (Ontario)*, Final Report, March 21, 2003, at p. 41.

² See recommendation 2 in the Final Report, at p. 41.

- create a statutory right of action for investors in the secondary market to sue companies and other responsible persons for misrepresentations (written or oral) or for a failure to make timely disclosure.³ (This is also referred to as “civil liability for secondary market disclosure”); and
- create express prohibitions against fraud, market manipulation and making misleading or untrue statements.⁴

These legislative amendments, contained in Bill 198, *The Keeping the Promise for a Strong Economy Act (Budget Measures), 2002*, have not yet been proclaimed into force. Certain technical amendments are required before these provisions should be proclaimed. These technical amendments were contained in Bill 41, *The Right Choices Act (Budget Measures) 2003*. Bill 41 received only first reading before the Legislature adjourned for the summer and the Government subsequently changed.

- ***Investors’ right to sue – Civil liability for secondary market disclosure***

Investors are entitled to meaningful private rights of action to hold public companies accountable for disclosure violations and market participants are expecting the proclamation of the civil liability regime.

We urge the Standing Committee to recommend the re-introduction and passage of the Bill 41 technical amendments, and the subsequent proclamation of the outstanding Bill 198 provisions, together with those technical amendments.

Five Year Review Committee Recommendation #40: “We support the CSA proposal to create a statutory civil liability regime for continuous disclosure and urge the Government of Ontario to move forward as soon as possible to proclaim the legislation in force. We also encourage the governments of the other CSA jurisdictions to adopt the same regime.”⁵

- ***Prohibition against fraud and market manipulation and making misleading or untrue statements***

When Ontario investors become the victims of capital market fraud, market manipulation or public company misrepresentations in the marketplace, the OSC has no specific authority under the *Securities Act* to prosecute the perpetrators. The OSC to date has relied only on its general authority to pursue this type of conduct under its “public interest” jurisdiction under section 127 of the *Securities Act*. The OSC needs more powerful means to directly combat fraud, market manipulation and misrepresentations in the marketplace. In its Draft Report, the Five Year Review Committee recommended that the *Securities Act* be amended to expressly prohibit fraud and market manipulation because the prohibition “is so fundamental that it should be enshrined in the Act”.⁶ The Committee also recommended that the Act be amended to include a prohibition against making misrepresentations, similar to existing provisions in other Canadian jurisdictions.⁷

³ See Part XXIII.1 of the *Securities Act*.

⁴ See sections 126.1 and 126.2 of the *Securities Act*.

⁵ Final Report, at p. 133.

⁶ Draft Report, at p. 143.

⁷ The Committee noted that securities legislation in British Columbia, Alberta, Saskatchewan and Manitoba contains provisions that prohibit the making of misrepresentations or misleading statements.

As with the right of investors to sue, we similarly urge the Standing Committee to recommend the re-introduction and passage of the Bill 41 technical amendments, and the subsequent proclamation of the outstanding Bill 198 provisions, together with those technical amendments.

2. Delegation and Mutual Recognition

We agree with the Five Year Review Committee that there is an urgent need for a single Canadian securities regulator. We also endorse the Uniform Securities Legislation project of the CSA as a positive step in improving the efficiency of the current system. In the meantime, we urge the Standing Committee to endorse the Committee's recommendations as to the most efficient interim solution: inter-provincial delegation and mutual recognition. These recommendations contemplate that each Canadian jurisdiction would amend their legislation to:

- (i) give each regulator the authority to delegate their powers, functions and responsibilities to another securities regulator in Canada; and
- (ii) provide for mutual recognition, so that the rules of the jurisdiction having the closest connection to a transaction or market participant will govern that transaction or market participant, and other affected jurisdictions will recognize and allow those rules to be applied in place of their own.

The inclusion of delegation and mutual recognition provisions in the *Securities Act* would assist in simplifying the current regulatory regime and would put the OSC in a position to be better able to work within a coordinated system of one window access for market participants to the securities regulatory system.

Five Year Review Committee Recommendation #2: "We recommend that securities regulators be given the authority to delegate any power, duty, function or responsibility conferred on them to another securities regulatory authority within Canada, and that they actively engage in delegation among themselves. We therefore recommend the Act be amended to give the Commission this delegation authority, and that the necessary consequential amendments to the immunity provisions in the Act be made.

*We recommend that securities legislation across the country be amended to provide for "mutual recognition" so that the rules of the jurisdiction having the closest connection to a transaction or market participant will govern that transaction or market participant, and other affected jurisdictions will recognize and allow those rules to be applied in place of their own."*⁸

3. Reduce Regulatory Burden – Blanket Exemptions

Market participants need the OSC to be able to respond quickly to new situations that have not been expressly provided for in existing rules. Sometimes new situations are caught by prohibitions in rules that were not contemplated at the time the rules were made. Amending the rule to provide an exemption takes anywhere from nine to 18 months, depending on whether the rule is an Ontario only rule or part of a national initiative. In the meantime, market participants must apply to the Commission each and every time for an exemption. This creates a burden for both the regulator and for market participants. It can be time-consuming and costly for the

⁸ Final Report, at p. 41.

market participants and increases the OSC's workload. Other CSA jurisdictions are able to issue "blanket" rulings to alleviate this burden but the OSC does not have the authority to do so. This undermines our efficiency and responsiveness. It also hampers our ability to take a common CSA approach to issues as they arise. For these reasons, we strongly support the Five Year Review Committee's recommendation that authority to issue blanket rulings and orders for exemptive relief be re-introduced in the Act.

Five Year Review Committee Recommendation #21: "We recommend that the Act be amended to allow the Commission to issue blanket rulings and orders that provide exemptive relief only."⁹

4. Modernize Ontario's Commercial Law - Transfer and Pledging of Securities

There is a clear need to modernize Ontario's commercial laws dealing with the transfer and pledging of securities. Canada lags behind the United States and the European Union in this area. The Five Year Review Committee recognized the need for a nationally harmonized commercial property law framework for these purposes and encouraged the OSC and CSA to continue to develop draft legislation. The Committee also urged governments across Canada to ensure that such legislation is adopted on a uniform basis as soon as possible.

On May 28, 2004 a Task Force of the CSA published for comment a revised proposal to modernize our commercial laws. This proposal, called the *Uniform Securities Transfer Act* (USTA), has been developed by the CSA as a joint project with the Uniform Law Conference of Canada. The USTA deals with narrow commercial law issues and provides a modern legal foundation governing transfers and pledges of securities. It will not force changes to existing practices or agreements. The objectives of the USTA are to provide legal certainty, reduce risk, reduce transaction costs, and preserve the competitiveness of Canadian securities markets.

The CSA Task Force has proactively consulted with a wide range of stakeholder groups, including industry and professional associations, lawyers, academics and federal and provincial government officials. Members of the CSA Task Force have also participated in international harmonization efforts in this area of law. Stakeholders have expressed very strong support for the USTA and its prompt, uniform implementation.

We urge the Standing Committee to recommend that Ontario play a leadership role with regard to this important legislation to better serve Ontario investors.

Five Year Review Committee Recommendation #5: "We strongly encourage the Commission and the CSA to continue developing securities transfer legislation modeled on revised Article 8 of the Uniform Commercial Code in the U.S. and we urge governments across Canada to ensure that such legislation is adopted on a uniform basis as soon as possible."¹⁰

⁹ Final Report, at p. 85.

¹⁰ Final Report, at p. 50.