

Recent Developments for Public Mining Companies

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Overview

1. Certification of Results
2. Certification of Disclosure Controls
3. Liability for Continuous Disclosure
4. Use of Confidentiality Agreements



Financial Results

- Result of Enron, Worldcom
- Impose obligation on CEOs & CFOs
- Financial statutes in accordance with GAAP
- Must “fairly present in all material respects, the financial condition, results of operations and cash flows of the issuer”
- Acknowledgement that GAAP may not give full picture



Financial Results (Cont'd)

- CEO & CFO have personal liability
- Many companies have developed up the line reporting with units certifying results
- Mining companies must ensure that there is a clear flow of information with respect to operations and status of development properties



Disclosure Controls

- Added in 2005
- Need to certify that “disclosure controls” and “internal control over financial reporting” (as of June 30, 2006) are in place
- May develop disclosure policy
- Identify who can speak for company
- What level of approval needed for disclosure



Disclosure Controls (Cont'd)

- Important to not impose too high a standard
- Must be one that can be met
- More relevant given liability for continuous disclosure

Liability for Continuous Disclosure

What is it?

- Liability to individual investors for misleading disclosure or failure to make timely disclosure
- Expands liability of issuers and their key personnel beyond liability in the primary market (through formal disclosure documents and offering documents) to include liability for trades made in secondary markets when there is a disclosure violation in ongoing disclosure



Legislative Initiatives

- Ontario: Bill 149
- BC has proposed similar but different legislation
- There is a concern over forum shopping



Ontario (Bill 149)

- November 22, 2004: Bill 149 (*Budget Measures Act*) reintroduces civil liability provisions with amendments (mostly technical)
- Received Royal Assent on December 16, 2004
- Effective December 31, 2005
- Alberta has introduced similar legislation
- All TSX listed companies are reporting issuers in Ontario
- All TSX-V listed companies are reporting issuers in Alberta



Bill 149

- Amends Ontario *Securities Act* and adds Part XXIII.1 *Civil Liability for Secondary Market Disclosure*
- Applies to public issuers with a real and substantial connection to Ontario
- Similar to SEC Rule 10b-5 (a few significant differences as well)



Key Concepts

- Secondary Market investors will have right of action for:
 - misrepresentations made in public documents and oral statements
 - failure to provide timely disclosure of material information

(collectively “disclosure violations”)
- Investors to not have to show reliance



Key Concepts (cont'd)

- Any investors who trades:
 - between the time the misrepresentation was made public and the time it was corrected; and
 - between the time material information was required to be disclosed and the time it was actually disclosed,

has a statutory right of action against the issuer and the directors, officers, and other key persons



What is a Misrepresentation?

- an untrue statement of material fact, or an omission to state a material fact that is required to be stated or is necessary to make a statement not misleading.
- “Core documents” are:
 - formal disclosure documents, directors circulars, MD&A’s, AIF’s, information circulars, annual and interim financial statements and, in respect of issuers and officers only, material change reports



What is a Misrepresentation? (Cont'd)

- Person has no liability for misrepresentations in non-core documents or public oral statements unless Plaintiff can prove knowledge of misrepresentation, deliberate avoidance of knowledge, or gross misconduct
- Proposed BC legislation applies to everything



Failure to Make Timely Disclosure

- failure to disclose a “**material change**” when required by the Act
- “**material change**” means a change in the business, operations or capital of an issuer that would reasonably be expected to have a significant effect on the market price or value of securities of the issuer



Who Can Sue?

- Any person or company who acquires or disposes of an issuer's securities:
 - Between the time the misrepresentation was made public and the time it was corrected; and
 - Between the time material information was required to be disclosed and the time it was actually disclosed



Who Can be Sued?

- the issuer
- any directors of the issuer at the time of the misrepresentation
- directors and officers who authorized, permitted or acquiesced in other disclosure violations



Who Can be Sued? (cont'd)

- any person with actual, implied or apparent authority who makes the public oral statement
- any “influential person”, or director or officer of an influential person who knowingly influenced the disclosure violation
 - “influential person” means a control person, promoter or insider



Liability Limits

- Issuer:
 - greater of 5% of market capitalization and \$1 million
- Director or Officer:
 - Of Issuer: greater of \$25,000 and 50% of aggregate compensation from the issuer
 - Of Influential Person/Significant Security Holder: greater of \$25,000 and 50% of aggregate compensation



Liability Limits (cont'd)

- Influential Person/Significant Security Holder:
 - Individual: greater of \$25,000 and 50% of person's compensation from issuer
 - Corporation: greater of 5% of its market capitalization and \$1 million



Liability Limits (cont'd)

- Experts:
 - greater of \$1 million and the revenue that the expert earned from the issuer in the past year
 - experts only liable if the expert actually made the misrepresentation or consented to the misrepresentation being publicly disclosed by the issuer – no liability for failure to make timely disclosure



Experts

- “Expert” includes:
 - accountants
 - actuaries
 - appraisers
 - auditors
 - engineers
 - financial analysts
 - geologists
 - lawyers



Damages and Liability

- Damages limited to the lesser of the plaintiff's damages and the prescribed amounts
- Liability proportionate to misconduct – joint and several liability applies only if there is knowledge of misconduct or reckless failure to obtain the knowledge



Deemed Reliance

- An investor with a right of action does not have to prove:
 - That the person relied on the misrepresentation, or
 - That the person would not have traded a security of the issuer, or a related security if the material information had been disclosed
- In some cases, knowledge of the disclosure violation will defeat a person's claim



Defences

- Available defences include:
 - Knowledge of Plaintiff
 - if plaintiff knew of the misrepresentation or material information/change
 - Due diligence
 - Reasonable investigation and no grounds to believe there was a misrepresentation or material information/change
 - issuer has reasonable system to ensure compliance and monitoring of system
 - Confidential disclosure
 - Confidentially filed document



Defences (cont'd)

- Forward-looking information
 - Information identified by cautionary language as forward looking, including a reasonable basis and assumptions for the information
- Reliance on expert reports
 - No liability if information based on expert report that expert consented to be publicly disclosed and person had no reasonable basis to know of disclosure violation



Defences (cont'd)

- Defences for experts
 - If an expert made a misrepresentation, the expert is not liable if the misrepresentation was based on information provided to the expert and it was reasonable for the expert to rely on that information

Limitation Period

- The earlier of:
 - Three years after the date of the contravention.
 - Six months after news release announcing that leave was granted to commence the action.



Procedural Points

- Court approval to proceed required
 - May grant leave if satisfied that the action has a “reasonable prospect of success”.
 - “good faith” requirement
- Court approval to settle or discontinue action required



Class Actions

- Class actions are specifically contemplated under the civil liability regime



Class Proceedings Act

- Any one member of a class can commence an action on behalf of the class, if an application for a court order certifying the action is made within 90 days of the deadline for filing the last statement of defence

Class Proceedings Act (cont'd)

- A “Class” must have “common issues”:
 - common but not necessarily identical issues of fact, or
 - common but not necessarily identical issues of law that arise from common but not necessarily identical facts;



Plaintiff Certification

- The court must certify a proceeding as a class proceeding if:
 1. the pleadings disclose a cause of action;
 2. there is an identifiable class of 2 or more persons;



Plaintiff Certification (cont'd)

3. the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
4. a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues; and



Plaintiff Certification (cont'd)

5. there is a representative plaintiff who
 - would fairly and adequately represent the interests of the class,



Plaintiff Certification (cont'd)

- has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
- does not have, on the common issues, an interest that is in conflict with the interests of other class members.



Procedural Matters

- A class proceeding may be settled, discontinued or abandoned only
 - with the approval of the court, and
 - on the terms the court considers appropriate.

Procedural Matters (cont'd)

- Class members not liable for costs (Ontario)
- Parties can proceed by way of contingency arrangements with lawyers



Application

- New civil liability for secondary market disclosure violations may create potential classes of plaintiffs - those persons who trade in securities during an ongoing disclosure violation



Recommendations

- Review existing disclosure policies, controls and procedures and ensure they are followed
- Assess policies against due diligence defence



Recommendations (cont'd)

- File Confidential Material Change Reports
- Adopt written Disclosure Policy and carefully plan public oral statements



Confidentiality Agreements

- Very common in mining industry
- Allows limited due diligence for purposes of JVs, contractual relations
- Most CAs broadly worded
- Will catch most M&A transactions



Guidance

- Look at scope
- What limitations are there on transactions
- Need termination provisions
- Need to provide that only binding if information actually provided



Guidance (Cont'd)

- Recent BCCA case of Aurizon Minerals v. Northgate
- Courts will enforce terms of contract
- Make sure that contract reflects business deal
- CA only deals with what you need protection for



Conclusion

- Adoption of and adherence to a formal disclosure policy increasingly important in light of civil liability for continuous disclosure
- Scope of CA's should be focused on your specific circumstances



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