

SECURITIES UPDATE

MAY 2013

2013 Ontario Budget: Capital Markets Essentials

Premier Kathleen Wynn's Ontario budget was tabled on May 2, 2013. It contains proposed new powers for the Ontario Securities Commission ("OSC") to "update and strengthen" securities laws in Ontario. Full text of the bill is available here.

The proposed amendments to the Ontario Securities Act (the "**Act**") and related legislation include:

- Procedures for the OSC to share investigative information with other regulatory and law enforcement authorities;
 - New offences for attempted market manipulation and attempted fraud; and
 - An expansion of the Act's insider trading provisions.
- The budget also contains additional insight into the Ontario government's perspectives on the development of a national securities regulator.

Information Sharing

The amendments would give the OSC new powers to make an order for disclosure, without notice and without giving an opportunity to be heard, if it considers that it is in the public interest. This would include disclosure of the items described in subsection 17(1):

- (a) the nature or content of an order under section 11 [Investigation order] or 12 [Financial examination order];
- (b) the name of any person examined or sought to be examined under section 13 [Power of investigator or examiner], any testimony given under section 13, any information obtained under section 13, the nature or content of any questions asked under section 13, the nature or content of any demands for the production of any document or other thing under section 13, or the fact that any document or other thing was produced under section 13; or
- (c) all or part of a report provided under section 15 [Report of investigation or examination].

This disclosure could be made to any entity referred to in paragraph 1, 3, 4 or 5 of section 153 of the Act, being the following:

1. Other securities, derivatives or financial regulatory authorities.
3. Self-regulatory bodies or organizations.
4. Law enforcement agencies.
5. Governmental or regulatory authorities not mentioned in paragraphs 1 to 4.

Attempts at Market Manipulation and Fraud

The government is also proposing to add "attempted" market manipulation and "attempted" fraud to its list of offences included in the Act. This inclusion would make it considerably easier for OSC staff to meet the burden of proof since the OSC would only need to show that market manipulation or fraud was *intended*, regardless of whether the act ultimately succeeded or failed.

Expanded Insider-Trading

The budget also proposes an expansion of the definition of who is considered to be a "person or company in a special relationship with a reporting issuer". The current rules cover only those persons or companies "proposing" to undertake certain actions. The amendments would broaden the definition so that it would then capture those persons or companies "considering or evaluating" certain actions. This expanded definition would include persons or companies considering or evaluating whether to:

- Make a take-over bid of a reporting issuer;
- Become a party to “a reorganization, amalgamation, merger or arrangement or similar business combination with the reporting issuer or to acquire a substantial portion of its property”; and
- Engage in business or professional activities.

Therefore, if the amendments pass, any and all persons or companies caught by this broadened definition would be considered to be a “person or company in a special relationship with the reporting issuer” and would consequently be prohibited from purchasing or selling securities of the reporting issuer.

This expanded definition would address a situation that arose in an August 2012 OSC Panel decision, which was discussed in our Q3 2012 WeirFoulds Securities Newsletter. In that case, the OSC Panel decided that the actions of a former Research in Motion (“RIM”) executive did not constitute insider trading because RIM was not yet “proposing” an acquisition of Certicom at the time the executive purchased the shares of Certicom. Rather, RIM was at an earlier stage in the process, where it might have been said that it was merely “considering or evaluating” such a transaction. If the proposed rules had been in place when the executive bought the Certicom shares, then the Panel would have likely come to a different conclusion.

Ontario Perspectives on a National Securities Regulator

The budget reiterates the Ontario government’s position that it is “prepared to work with the federal government and other interested provinces to establish a common cooperative securities regulator”. At the same time, it emphasizes the importance of the OSC, as clearly the dominant regulator, stating that “over half of the Canadian securities industry GDP and employment and 80 per cent of market activity take place in Ontario”. In the Budget, the government also detailed its expectations for any new national securities regulator, as follows:

- Support vibrant capital markets;
- Reduce costs for issuers and investors;
- Provide a more modern and responsible regulatory environment;
- Include an expert and independent board to govern, which would be accountable to a council of participating ministers;
- Locate the corporate and executive head office in Toronto;
- Recognize and build on expertise across Canada such as oil and gas expertise in Calgary; and
- Function through a voting structure for fundamental changes that recognizes Ontario’s significant capital markets.

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