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AN ADVANCE IN STOCK EXCHANGE ACTIVISM: THE INTERIM REPORT OF THE TSE COMMITTEE ON CORPORATE DISCLOSURE

In a recent effort to extend its sphere of authority, the Toronto Stock Exchange published the above-captioned report¹, which recommended the introduction of a civil liability concept in connection with continuous disclosure obligations.

A brief outline of the Committee's recommendations follows. The Montreal Exchange, in order to avoid being outdone, is likely to issue recommendations based on this Report, as it did with its Policy I-15 on corporate governance disclosure.

The Committee recommended that corporate issuers incur civil liability for misleading or untimely disclosure that cause investor losses. Investors who bought or sold securities of an issuer during any period of inadequate disclosure would be eligible to claim damages. As stated in the Report, this liability :

- would attach to a misrepresentation contained both in statutory documents and in any statement made by anyone who is, or appears to be, a person in authority acting on behalf of the issuer; and
- would extend to directors, officers, promoters and principal shareholders of that issuer.

The Committee recommended that securities regulatory authorities have authority to intervene in any civil lawsuit brought under any legislation based upon the recommendations. In this respect, any plaintiff would **be deemed** to have relied on the inadequate information to make an investment decision.

The Committee recommended that certain defences be available, including the due diligence defence, and that certain caps on damages be applied, namely: (i) in the case of an issuer, the greater of \$1 million and 5% of its market capitalization, or (ii) in the case of an individual, the greater of \$25,000 and 50% of such person's total compensation during the preceding 12 months.

¹ TSE Committee on Corporate Disclosure - Interim Report. It was distributed to all TSE - listed issuers and published for comment until March 15, 1996. A final report will be delivered in June 1996.

The Committee recommended that the content of annual information forms be enhanced so as to be equivalent to prospectus level disclosure and that the short-form prospectus system (*Prompt Offering Qualification System* or *POP System* in Ontario) be made available to all issuers. The level of disclosure in a material change report would be required to be the same as in a prospectus.

In short, it appears that a number of these recommendations would necessitate amendments to the existing legislation. It cannot be predicted whether all of these recommendations will be implemented. For instance, the Committee recommended that paragraph 75(3) of the *Securities Act* (Ontario) be amended:

- to require that any issuer's decision not to make public disclosure that it deems to be detrimental to its interests be reached reasonably; and
- to preclude any issuer to refrain from making any disclosure if there are grounds to believe that the market is trading on leaked information.

The Committee also recommended that issuers adopt practical measures to enhance retail investors' access to information, including :

- holding, subsequent to the disclosure of interim reports, information meetings with analysts and providing shareholders with appropriate electronic access to the proceedings thereof; and

- ensuring the availability to analysts and shareholders of relevant corporate financial and technical information and data generally sought by analysts.

Moreover, the Committee recommended that the Toronto Stock Exchange adopt certain measures, including:

- the development of training courses for officers responsible for continuous disclosure; and
- the publication of "TSE Speaks", a semi-annual publication which would deal with (i) disclosure failures by issuers under these rules and (ii) major disclosure problems under said rules.

If you require further information on the Report or wish to make submissions before the Committee, prior to the preparation of the final report, we will be pleased to assist you. You may contact Marc Dagenais of our Montreal office (Direct line: (514) 877-3080) or any other member of the Securities Law group.