

## THE VOICE OF THE SHAREHOLDER

April 10, 2003

Honourable Mrs. Janet Ecker  
Minister of Finance  
Government of Ontario  
MPP, Pickering-Ajax-Uxbridge  
7 Queen's Park Crescent – 7<sup>th</sup> Floor  
Toronto, Ontario  
M7A 1Y7

Re: Bill 198 and Provisions for Civil Liability for  
Continuous Disclosure in the Secondary Market

Dear Mrs. Ecker,

I am informed that Bill 198: Keeping the Promise for a Strong Economy Act (Budget Measures), 2003 had certain sections come into force on March 27, 2003 and April 7, 2003<sup>1</sup>. I am writing you, on behalf of the Canadian Coalition, to express support for the coming into force of the amendments to the Ontario *Securities Act* that are contained in Part XXVI of this act.

The Canadian Coalition for Good Governance is a group comprised of 19 large pension funds and money managers in Canada with total net assets under management of just over CDN \$345 billion. As an organized group, each of us cares very strongly about corporate governance practice in Canada. We are most pleased with the various initiatives recently proclaimed into force, among them:

- the increase in the maximum penalties that can be imposed by courts for offences under section 122 of the Ontario *Securities Act* from a fine of \$1 million and imprisonment for two years to a fine of \$5 million and imprisonment for five years less a day [section 181 of c.22];
- the creation of a power on the part of the Commission to impose an administrative fine of up to \$1 million [section 183(1) of c.22];

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<sup>1</sup> Bill 198: Keeping the Promise for a Strong Economy Act (Budget Measures), 2002, c.22. Sections 10, 12, 13, 14, 177, 178, 179, 180, 181, 183, 184, 186, 187, and 188 proclaimed to come into force April 07, 2003. O.C. 655/2003 dated March 19, 2003.

Sections 40, 103, 112 and Schedule "A" proclaimed to come into force March 27, 2003. O.C. 750/2003 dated March 27, 2003.

As per: The Ontario Gazette, v.136-13 Saturday 29<sup>th</sup> March, 2003.

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- the creation of a power on the part of the Commission to force disgorgement amounts obtained as a result of non-compliance with Ontario securities law [section 183(2) of c.22];
- the enshrining in the legislation of reviews of continuous disclosure records of reporting issuers [section 179 of c.22].
- the creation of rule-making authority on the part of the Commission to require reporting issuers to appoint audit committees and to prescribe requirements relating to the functions and responsibilities of audit committees, namely independence requirements [section 187(3) of c.22];
- the creation of a rule-making authority on the part of the Commission to require reporting issuers to establish and maintain internal controls and disclosure controls and requiring chief executive officers and chief financial officers to provide certifications related to internal controls and disclosure controls and procedures [section 187(3) of c.22].

We believe the above aspects of Bill 198 are most helpful for investors in Ontario and we are writing to indicate our support. However there are two aspects of Bill 198 that we believe require proclamation most urgently. Namely these are:

- the creation of express prohibitions against securities fraud, market manipulation and making misleading or untrue statements [section 182 of c.22];
- the creation of a statutory right for investors in the secondary market to sue companies and other responsible persons for oral or written misrepresentations or a failure to make timely disclosure [section 185 of c.22].

We are particularly interested in seeing the proclamation of the above two sections of Bill 198 because they would be the only legitimate legislation dealing with corporate governance matters in Ontario or Canada for that matter. The civil liability scheme contained in section 185 is a statutory framework for which all of us have long hoped would be enacted.

The civil liability scheme for investors is important to us because it allows a broad group of investors to re-enforce the aspects of securities legislation that the regulator may not wish to address for various reasons. We also feel that a civil liability scheme as laid out in section 185 provides for a type of “continuous shelf registration” that would allow reporting issuers to issue stock and other securities without the need of preparing a long form prospectus every issue. This legislation would surely streamline this aspect of the securities industry, while maintaining high levels of disclosure.

We feel that there are safeguards for the potential defendants of such a suit in this legislative scheme. The plaintiff to any suit filed under this scheme must first obtain the leave of the court before filing a statement of claim. In order to be in a position to grant leave to file, the court must be satisfied that the proposed action fills two pre-conditions that set a very high threshold for the plaintiff to meet:

- (1) the plaintiff must show to the court that the suit is brought in good faith, and

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(2) the court must be convinced that the suit has a reasonable prospect of success at trial, [section 138.8 of Part XXIII.I Civil Liability].

This last hurdle is a very high threshold for the plaintiff because it mandates a preliminary review of the proposed action by a judicial body, thus preventing class action suits that do not have a firm basis in law. We also note that there is also the safeguard of proportionate liability built into this legislation [section 138.6 of Part XXIII.I Civil Liability]. Finally, knowing that the judiciary are presently inclined towards the non-certification of class action lawsuits in this province, we urge you to consider the proclamation of the entirety of Part XXVI of The Budget Measures Act, c.22 and especially section 185 with great speed.

There are three other issues that I must canvass with you before I close. On November 24, 2001, Bill S-11 containing certain amendments to the *Canada Business Corporations Act* came into force. The members of the Coalition all view these amendments favourably and recognize them as improvements to the overall standard of corporate governance in Canada. We feel these amendments allow for stronger international representation on boards of directors of Canadian corporations who are increasingly becoming players in the global market. The amendment that directly affected institutional investors the most was the amendment that facilitated greater shareholder communications regarding a reporting issuer's proxy materials. The amendment that seriously limited the definition of what actions may constitute "solicit" or "solicitation" of proxies has greatly aided us in our efforts to work with federally incorporated companies. I am writing to you now to request that you adopt similar amendments to the *Ontario Business Corporations Act* and it would be helpful if these changes could be incorporated into the Ontario *Securities Act* as well. This would greatly assist those of us in this province who are trying to effect a change for the better in the world of corporate governance in the province of Ontario.

One special issue that we must mention to you is the real need for corporations to publish the results of their annual meetings. We would like to see amendments made to the *Ontario Business Corporations Act* that would mandate all provincially incorporated companies to publish on their websites, or via other means of public disclosure, the annual results of their proxy votes. The various members of the Coalition dutifully vote our proxies regarding every company with which we invest. Some of us publish our voting intentions on our websites. However, like other investors in this province, we have no method of finding out the results of our votes. We mention this to you because such an amendment would naturally flow with any other changes to the provincial corporations act that would broaden the powers of institutional investors to communicate regarding their intentions to vote prior to a company's annual meeting. We are requesting logical and democratic tools to assist us in our efforts to work with the companies with which we invest. It is very important that we exercise our proprietary rights that flow from share ownership.

Finally, we must point out a serious discrepancy between proxy voting in Canada and proxy voting in the United States. Currently in the United States when a shareholder votes on a slate of nominees for the Board of Directors, the shareholder may vote for or withhold against each nominee individually. In Canada, the shareholder does not have the option of voting in this

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fashion. Canadian shareholders must vote for or withhold against the entire slate as presented by the Board. This can have very serious consequences if there is only one director for whom the shareholder wishes to withhold his or her vote. If the shareholder feels strongly opposed to one director in Canada, then the decision must be made to withhold against the entire slate of nominees for the board. We do not think this makes very much sense, and unfortunately there is no legislation that has evolved as a matter of practice on point. We believe that it would be helpful to have legislation that offers the shareholder the opportunity to vote individually for each candidate for the board of directors in Ontario. We hope that you will also consider this point in any future amendments to the *Ontario Business Corporations Act*.

I have covered a lot of material with this letter, but the members of the Coalition are of the opinion that the promotion of good corporate governance practice is essential if the companies incorporated in this province are to compete in a global market. I would be more than happy to meet with you to discuss any of these suggestions at any time.

Sincerely,

Michael Wilson,  
Chairman,  
The Canadian Coalition for Good Governance

cc.

Mr. Robert Christie,  
Deputy Minister of Finance

Mr. P. Howell,  
Assistant Deputy Minister

Mr. David Olesen,  
Director of Policy

Mr. David Brown,  
Chair, Ontario Securities Commission



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*Canadian Coalition for Good Governance Members:*

Alberta Teachers' Retirement Fund Board

AMI Partners Inc.

Aurion Capital Management Inc.

Burgundy Asset Management

Connor, Clark & Lunn Investment Management

Franklin Templeton Investments Corp.

International Finance Participation Trust

Jarislowky Fraser Ltd.

KBSH Capital Management Inc.

LaSalle Firefighters Pension Plan

Mackenzie Financial Corp.

MFC Global Investment Management

Ontario Teachers' Pension Plan

OPSEU Pension Trust

RBC Global Investment Management

Standard Life Investments Ltd.

Trustees of the I.U.O.E. Local 793 Pension Plan for Operating Engineers in Ontario

TAL Global Asset Management

UBS Global Asset Management