

INVESTORS' RIGHTS

In certain circumstances, investors resident in certain provinces of Canada are provided with a remedy for rescission or damages, or both, in addition to any other right they may have at law, where an offering memorandum and any amendment to it contains a misrepresentation. These remedies, or notice with respect thereto, must be exercised or delivered, as the case may be, by the investor within the time limits prescribed by the applicable securities legislation. The following is a summary of rights of rescission or damages, or both, available to investors resident in certain of the provinces of Canada.

The following summary is subject to the express provisions of the applicable securities laws, regulations and rules, and reference is made thereto for the complete text of such provisions, including the definition of the term "offering memorandum". Such provisions may contain limitations and statutory defences on which an issuer of securities and other applicable parties may rely. **Investors should refer to the applicable provisions of the securities legislation of their province for the particulars of these rights or consult with a legal advisor.** The rights of action described below are in addition to and without derogation from any other right or remedy available at law to the investor and are intended to correspond to the provisions of the relevant securities legislation and are subject to the defences contained therein.

Statutory Rights of Action (Ontario Investors)

Section 6.1 of Ontario Securities Commission Rule 45-501 provides that when an offering memorandum is delivered to an investor to whom securities are distributed in reliance upon the "accredited investor" prospectus exemption in Section 2.3 of NI 45-106, the right of action referred to in Section 130.1 of the *Securities Act* (Ontario) is applicable, unless the prospective investor is:

- (a) a Canadian financial institution, meaning either (i) an association governed by the *Cooperative Credit Associations Act* (Canada) or a central cooperative credit society for which an order has been made under section 473(1) of that Act; or (ii) a bank, loan corporation, trust company, trust corporation, insurance company, treasury branch, credit union, caisse populaire, financial services corporation, or league that, in each case, is authorized by an enactment of Canada or a jurisdiction of Canada to carry on business in Canada or a jurisdiction in Canada;
- (b) a Schedule III bank, meaning an authorized foreign bank named in Schedule III of the *Bank Act* (Canada);
- (c) the Business Development Bank of Canada incorporated under the *Business Development Bank of Canada Act* (Canada); or
- (d) a subsidiary of any person referred to in paragraphs (a), (b) or (c), if the person owns all of the voting securities of the subsidiary, except the voting securities required by law to be owned by the directors of the subsidiary.

Section 130.1 of the *Securities Act* (Ontario) provides such investors who purchase securities offered by an offering memorandum with a statutory right of action against the issuer of the securities offered under the offering memorandum for rescission or damages in the event that the offering memorandum and any amendment to it contains a "misrepresentation". "Misrepresentation" means an untrue statement of a material fact or an omission to state a material fact that is required to be stated or that is necessary to make any statement not misleading or false in the light of the circumstances in which it was made.

Where the offering memorandum is delivered to a prospective investor in connection with a trade made in reliance on Section 2.3 of NI 45-106, and that document contains a misrepresentation, the investor will be deemed to have relied upon the misrepresentation and will have a statutory right of action against the issuer of the securities for damages or, while still the owner of the securities, for rescission, in which case, if the investor elects to exercise the right of rescission, the investor will have no right of action for damages against the issuer, provided that the right of action for rescission will be exercisable by the investor only if the investor commences an action against the issuer not more than 180 days after the date of the transaction that gave rise to the cause of action, or, in the case of any action other than an action for rescission, the earlier of: (i) 180 days after the investor first had knowledge of the facts giving rise to the cause of action, or (ii) three years after the date of the transaction that gave rise to the cause of action.

The issuer shall not be liable for a misrepresentation if the issuer proves that the investor purchased the securities with knowledge of the misrepresentation. In an action for damages, the issuer shall not be liable for all or any portion of the damages that the issuer proves does not represent the depreciation in value of the securities as a result of the misrepresentation relied upon.

The issuer and every other person or company who becomes liable to make any payment for a misrepresentation may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment, unless the court rules that, in all the circumstances of the case, to permit recovery of the contribution would not be just and equitable.

In no case shall the amount recoverable for the misrepresentation exceed the price at which the securities were offered.

The foregoing is a summary only and is subject to the express provisions of the *Securities Act* (Ontario) and the regulations and rules made under it, and prospective investors should refer to the complete text of those provisions.

Statutory Rights of Action (New Brunswick Investors)

Section 2.1 of New Brunswick Securities Commission Rule 45-802 provides that the statutory rights of action in rescission or damages referred to in Section 150 of the *Securities Act* (New Brunswick) apply to information relating to an offering memorandum that is provided to an investor in securities in connection with a distribution made in reliance on the “accredited investor” prospectus exemption in Section 2.3 of NI 45-106. Section 150 provides that, subject to certain limitations, where any information relating to an offering of securities that is provided to an investor contains an untrue statement of a material fact or an omission to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made, a “misrepresentation”, an investor who purchases the securities shall be deemed to have relied on the misrepresentation if it was a misrepresentation at the time of purchase and the investor has, subject to certain defences, a right of action for damages against the issuer of the securities or may elect to exercise a right of rescission against the issuer, in which case the investor shall have no right of action for damages, provided that:

- (a) in an action for rescission or damages, the defendant will not be liable if it proves that the investor purchased the securities with knowledge of the misrepresentation;
- (b) in an action for damages, the defendant is not liable for all or any portion of the damages that it proves do not represent the depreciation in value of the securities as a result of the misrepresentation relied upon; and

- (c) in no case shall the amount recoverable under the right of action described herein exceed the price at which the securities were offered.

Pursuant to section 161 of the *Securities Act* (New Brunswick), no action shall be commenced to enforce a right of rescission unless such action is commenced not later than 180 days after the date of the transaction that gave rise to the cause of action and in the case of any action, other than an action for rescission, such action shall be commenced before the earlier of (i) one year after the plaintiff first had knowledge of the facts giving rise to the cause of action, and (ii) six years after the date of the transaction that gave rise to the cause of action.

Every person or company who becomes liable to make any payment for a misrepresentation may recover a contribution from any person or company who, if sued separately, would have been liable to make the same payment, unless the court rules that, in all the circumstances of the case, to permit recovery of the contribution would not be just and equitable.

The foregoing is a summary only and is subject to the express provisions of the *Securities Act* (New Brunswick) and the regulations and rules made under it, and prospective investors should refer to the complete text of those provisions.

Statutory Rights of Action (Nova Scotia Investors)

The right of action for rescission or damages described herein is conferred by section 138 of the *Securities Act* (Nova Scotia). Section 138 provides, in the relevant part, that in the event that an offering memorandum, together with any amendments hereto, or any advertising or sales literature (as defined in the *Securities Act* (Nova Scotia)) contains an untrue statement of material fact or omits to state a material fact that is required to be stated or that is necessary in order to make any statements contained herein or therein not misleading in light of the circumstances in which it was made, a “misrepresentation”, an investor in the securities offered under that offering memorandum is deemed to have relied upon such misrepresentation if it was a misrepresentation at the time of purchase and has, subject to certain limitations and defences, a statutory right of action for damages against the issuer of the securities, the directors of the issuer, if any and the persons (if any) who have signed the offering memorandum or, alternatively, while still the owner of the securities, may elect instead to exercise a statutory right of rescission against the issuer, in which case the investor shall have no right of action for damages against the issuer or its directors, provided that, among other limitations:

- (a) no action shall be commenced to enforce the right of action for rescission or damages by an investor resident in Nova Scotia later than 120 days after the date payment was made for the securities (or after the date on which initial payment was made for the securities where payments subsequent to the initial payment are made pursuant to a contractual commitment assumed prior to, or concurrently with, the initial payment);
- (b) no person will be liable if it proves that the investor purchased the securities with knowledge of the misrepresentation;
- (c) in the case of an action for damages, no person will be liable for all or any portion of the damages that it proves do not represent the depreciation in value of the securities as a result of the misrepresentation; and
- (d) in no case will the amount recoverable in any action exceed the price at which the securities were offered to the investor.

In addition, no person or company, other than the issuer, is liable if the person or company proves that:

- (a) the offering memorandum or any amendment thereto was sent or delivered to the investor without the person's or company's knowledge or consent and that, on becoming aware of its delivery, the person or company gave reasonable general notice that it was delivered without the person's or company's knowledge or consent;
- (b) after delivery of the offering memorandum or any amendment thereto and before the purchase of the securities by the investor, on becoming aware of any misrepresentation in the offering memorandum, or any amendment thereto, the person or company withdrew the person's or company's consent to the offering memorandum or any amendment thereto, and gave reasonable general notice of the withdrawal and the reason for it; or
- (c) with respect to any part of the offering memorandum or any amendment thereto purporting (i) to be made on the authority of an expert, or (ii) to be a copy of, or an extract from, a report, an opinion or a statement of an expert, the person or company had no reasonable grounds to believe and did not believe that (iii) there had been a misrepresentation, or (iv) the relevant part of the offering memorandum or any amendment thereto (A) did not fairly represent the report, opinion or statement of the expert, or (B) was not a fair copy of, or an extract from, the report, opinion or statement of the expert.

Furthermore no person or company other than the issuer is liable with respect to any part of the offering memorandum or any amendment thereto not purporting (i) to be made on the authority of an expert; or (ii) to be a copy of, or an extract from, a report, opinion or statement of an expert, unless the person or company (iii) failed to conduct a reasonable investigation to provide reasonable grounds for a belief that there had been no misrepresentation; or (iv) believed that there had been a misrepresentation.

If a misrepresentation is contained in a record incorporated by reference in, or deemed incorporated into, the offering memorandum or any amendment thereto, the misrepresentation is deemed to be contained in the offering memorandum or any amendment thereto.

The liability of all persons or companies referred to above is joint and several with respect to the same cause of action. A defendant who is found liable to pay a sum in damages may recover a contribution, in whole or in part, from a person or company who is jointly and severally liable to make the same payment in the same cause of action unless, in all the circumstances of the case, the court is satisfied that it would not be just and equitable.

The foregoing is a summary only and is subject to the express provisions of the *Securities Act* (Nova Scotia) and the regulations and rules made under it, and prospective investors should refer to the complete text of those provisions.

Statutory Rights of Action (Manitoba Investors)

The right of action for rescission or damages described herein is conferred by section 141.1 of the *Securities Act* (Manitoba). The *Securities Act* (Manitoba) provides, in the relevant part, that in the event that an offering memorandum contains a misrepresentation, a purchaser who purchases a security offered by the offering memorandum is deemed to have relied on the representation if it was a misrepresentation at the time of purchase.

Such purchaser has a statutory right of action for damages against the issuer of the securities, and against every director of the issuer at the date of the offering memorandum or, alternatively, while still an owner of the securities purchased by the purchaser, may elect instead to exercise a statutory right of rescission against the issuer, in which case the purchaser shall have no right of action for damages against such directors. No such action may be commenced to enforce the right of action for rescission or damages more than (a) 180 days after the day of the transaction that gave rise to the cause of action, in the case of an action for rescission, or (b) the earlier of (i) 180 days after the day that the plaintiff first had knowledge of the facts giving rise to the cause of action, or (ii) two years after the day of the transaction that gave rise to the cause of action, in any other case.

The *Securities Act* (Manitoba) provides a number of limitations and defences, including the following:

- (a) no person or company is liable if the person or company proves that the purchaser had knowledge of the misrepresentation;
- (b) in the case of an action for damages, the defendant is not liable for all or any part of the damages that the defendant proves do not represent the depreciation in value of the security as a result of the misrepresentation; and
- (c) in no case will the amount recoverable in any action exceed the price at which the securities were offered under the offering memorandum.

All persons or companies referred to above that are found to be liable or accept liability are jointly and severally liable. A defendant who is found liable to pay a sum in damages may recover a contribution, in whole or in part, from a person who is jointly and severally liable to make the same payment in the same cause of action unless, in all the circumstances of the case, the court is satisfied that it would not be just and equitable. In addition, no director of the issuer will be liable if that director proves that:

- (a) the offering memorandum was sent to the purchaser without the director's knowledge or consent, and that, after becoming aware that it was sent, the director promptly gave reasonable notice to the issuer that it was sent without the director's knowledge and consent;
- (b) after becoming aware of the misrepresentation, the director withdrew his or her consent to the offering memorandum and gave reasonable notice to the issuer of the withdrawal and the reason for it;
- (c) with respect to any part of the offering memorandum purporting to be made on the authority of an expert or to be a copy of, or an extract from, an expert's report, opinion or statement, the director proves that he or she did not have any reasonable grounds to believe and did not believe that there had been a misrepresentation, or that the relevant part of the offering memorandum (i) did not fairly represent the expert's report, opinion or statement, or (ii) was not a fair copy of, or an extract from, the expert's report, opinion or statement; or
- (d) with respect to any part of the offering memorandum not purporting to be made on an expert's authority and not purporting to be a copy of, or an extract from, an expert's report, opinion or statement, unless the director (i) did not conduct an investigation sufficient to provide reasonable grounds for a belief that there had been no misrepresentation, or (ii) believed there had been a misrepresentation.

If a misrepresentation is contained in a record incorporated by reference in, or is deemed to be incorporated into, an offering memorandum, the misrepresentation is deemed to be contained in the offering memorandum.

Statutory Rights of Action (Saskatchewan Investors)

Section 138 of *The Securities Act, 1988* (Saskatchewan), as amended provides that where an offering memorandum or any amendment to it is sent or delivered to a purchaser and it contains a misrepresentation (as defined in *The Securities Act, 1988* (Saskatchewan)), a purchaser who purchases a security covered by the offering memorandum or any amendment to it is deemed to have relied upon that misrepresentation, if it was a misrepresentation at the time of purchase, and has a right of action for rescission against the issuer or a selling security holder on whose behalf the distribution is made or has a right of action for damages against:

- (a) the issuer or a selling security holder on whose behalf the distribution is made;
- (b) every promoter and director of the issuer or the selling security holder, as the case may be, at the time the offering memorandum or any amendment to it was sent or delivered;
- (c) every person or company whose consent has been filed respecting the offering, but only with respect to reports, opinions or statements that have been made by them;
- (d) every person who or company that, in addition to the persons or companies mentioned in (a) to (c) above, signed the offering memorandum or the amendment to the offering memorandum; and
- (e) every person who or company that sells securities on behalf of the issuer or selling security holder under the offering memorandum or amendment to the offering memorandum.

Such rights of rescission and damages are subject to certain limitations including the following:

- (a) if the purchaser elects to exercise its right of rescission against the issuer or selling security holder, it shall have no right of action for damages against that party;
- (b) in an action for damages, a defendant will not be liable for all or any portion of the damages that he, she or it proves do not represent the depreciation in value of the securities resulting from the misrepresentation relied on;
- (c) no person or company, other than the issuer or a selling security holder, will be liable for any part of the offering memorandum or any amendment to it not purporting to be made on the authority of an expert and not purporting to be a copy of, or an extract from, a report, opinion or statement of an expert, unless the person or company failed to conduct a reasonable investigation sufficient to provide reasonable grounds for a belief that there had been no misrepresentation or believed that there had been a misrepresentation;
- (d) in no case shall the amount recoverable exceed the price at which the securities were offered; and

- (e) no person or company is liable in an action for rescission or damages if that person or company proves that the purchaser purchased the securities with knowledge of the misrepresentation.

In addition, no person or company, other than the issuer or selling security holder, will be liable if the person or company proves that:

- (a) the offering memorandum or any amendment to it was sent or delivered without the person's or company's knowledge or consent and that, on becoming aware of it being sent or delivered, that person or company gave reasonable general notice that it was so sent or delivered; or
- (b) with respect to any part of the offering memorandum or any amendment to it purporting to be made on the authority of an expert, or purporting to be a copy of, or an extract from, a report, an opinion or a statement of an expert, that person or company had no reasonable grounds to believe and did not believe that there had been a misrepresentation, the part of the offering memorandum or any amendment to it did not fairly represent the report, opinion or statement of the expert, or was not a fair copy of, or an extract from, the report, opinion or statement of the expert.

Not all defences which may be relied upon are described herein. Please refer to the full text of *The Securities Act, 1988* (Saskatchewan) for a complete listing.

Similar rights of action for damages and rescission are provided in section 138.1 of *The Securities Act, 1988* (Saskatchewan) in respect of a misrepresentation in advertising and sales literature disseminated in connection with an offering of securities. Section 138.2 of *The Securities Act, 1988* (Saskatchewan) also provides that where an individual makes a verbal statement to a prospective purchaser that contains a misrepresentation relating to the security purchased and the verbal statement is made either before or contemporaneously with the purchase of the security, the purchaser is deemed to have relied on the misrepresentation, if it was a misrepresentation at the time of purchase, and has a right of action for damages against the individual who made the verbal statement.

Section 141(1) of *The Securities Act, 1988* (Saskatchewan) provides a purchaser with the right to void the purchase agreement and to recover all money and other consideration paid by the purchaser for the securities if the securities are sold in contravention of *The Securities Act, 1988* (Saskatchewan), the regulations to *The Securities Act, 1988* (Saskatchewan) or a decision of the Saskatchewan Financial Services Commission.

Section 141(2) of *The Securities Act, 1988* (Saskatchewan) also provides a right of action for rescission or damages to a purchaser of securities to whom an offering memorandum or any amendment to it was not sent or delivered prior to or at the same time as the purchaser enters into an agreement to purchase the securities, as required by Section 80.1 of *The Securities Act, 1988* (Saskatchewan).

The rights of action for damages or rescission under *The Securities Act, 1988* (Saskatchewan) are in addition to and do not derogate from any other right which a purchaser may have at law.

Section 147 of *The Securities Act, 1988* (Saskatchewan) provides that no action shall be commenced to enforce any of the foregoing rights more than:

- (a) in the case of an action for rescission, 180 days after the date of the transaction that gave rise to the cause of action; or

- (b) in the case of any other action, other than an action for rescission, the earlier of (i) one year after the plaintiff first had knowledge of the facts giving rise to the cause of action, or (ii) six years after the date of the transaction that gave rise to the cause of action.

The Securities Act, 1988 (Saskatchewan) also provides a purchaser who has received an amended offering memorandum delivered in accordance with subsection 80.1(3) of *The Securities Act, 1988* (Saskatchewan) has a right to withdraw from the agreement to purchase the securities by delivering a notice to the person who or company that is selling the securities, indicating the purchaser's intention not to be bound by the purchase agreement, provided such notice is delivered by the purchaser within two business days of receiving the amended offering memorandum.

Rights for Certain Purchasers in Alberta

If this offering memorandum or any amendment to it contains a misrepresentation, investors in Alberta who purchase pursuant to the \$150,000 minimum purchase exemption under NI 45-106 (but not investors who are accredited investors within the meaning of that Instrument) to whom this offering memorandum was delivered shall be deemed to have relied on the misrepresentation if it was a misrepresentation at the time of the purchase of the Units. A misrepresentation means an untrue statement of a material fact or an omission to state a material fact that is required to be stated or that is necessary to make any statement not misleading or false in the light of the circumstances in which it was made. In such circumstances, the investor has a right of action for damages, or, alternatively, for rescission, against the Fund; provided that no action may be commenced to enforce either right of action unless it is commenced:

- (d) in the case of rescission, on notice given to the Fund not later than 180 days from the day of the transaction that gave rise to the right of action; or
- (e) in the case of damages, on notice given to the Fund not later than the earlier of (i) 180 days from the day that the purchaser first had knowledge of the facts giving rise to the right of action, or (ii) one year from the day of the transaction that gave rise to the right of action;

and provided also that:

- (f) the Fund will not be held liable if it proves the purchaser purchased Units with knowledge of the misrepresentation;
- (g) in an action for damages, the Fund will not be liable for all or any portion of those damages that it proves do not represent the depreciation in value of the Units as a result of the misrepresentation; and
- (h) in no case will the amount recoverable under this right of action exceed the price at which the Units were sold to the purchaser.

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