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Reply to the Attention of Charlotte Conlin
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Date December 17, 2015

By E-Mail comment@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: Comments on the Revised Consultation Draft CMA

We are pleased to provide you with our comments on the August 25, 2015 revised consultation draft uniform provincial Capital Markets Act (the "***CMA***"). We have limited our comments to what we consider to be our most substantial concerns.

Confidentiality and the *Freedom of Information and Protection of Privacy Act* Generally

The Cooperative Capital Market Regulatory System ("**CCMR**") noted in August 2015 that participating jurisdictions continue to discuss the best way to ensure that the Capital Markets Regulatory Authority is accountable for access to information request and to protect personal information. Previous ministerial comments have stated that "it is anticipated that one or more of the current freedom of information and protection of privacy regimes will apply".

Currently, Ontario's *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c .F.31 ("***FIPPA***"), s.67(2) contemplates that the confidentiality provisions in sections 16 and 17 of the *Securities Act*, R.S.O. 1990, c.S.5 prevail over *FIPPA*. One prudent step would be to amend *FIPPA* to replace reference to sections 16 and 17 of the *Securities Act* with section 193 of the *CMA*.

However, these amendments to ***FIPPA*** alone do not necessarily protect the interests of parties whose information may be gathered by the authority in a satisfactorily way. This is because the confidentiality provisions in the ***CMA*** contain more exceptions than the confidentiality provisions found in sections 16 and 17 of the *Securities Act*.

For example, section 193(3)(b) of the ***CMA*** now permits disclosure of information if (presumably in the Authority's sole discretion) the disclosure is consistent with the purposes for which the information was obtained. It is possible that requestors and or institutions may suggest that the broad permission to disclose in the ***CMA*** negates an affected party's expectation of confidentiality when providing information to the Authority which would be incorrect given the mandatory nature of several investigative provisions in the ***CMA***.

Section 17 of the existing Ontario *Securities Act* does contain exceptions to confidentiality, however, this section includes provisions that provide procedural fairness to affected parties.

The combination of new confidentiality provisions with the new investigatory powers that the ***CMA*** purports to provide in Part 11 mean that the applicability of exemptions to access to information and freedom of information legislation should not be performed as an afterthought. Rather, the treatment of confidential information should be clearly articulated and properly subject to comment.

Given that legislative changes to provincial or federal access to information and privacy information may be necessary, we are also concerned about the uncertainty that may result from not resolving these issues. For many market participants, the uncertainty will be unacceptable. We urge the CCMR to place a high priority on this question and to urge participating provincial governments to address the necessary legislative changes in other statutes that may be required.

Section 63 – Fraud and Unjust Deprivation

We are concerned about the introduction of the concept of "unjust deprivation" to the offences under section 63 of the *CMA*. The CCMR responded to prior comments regarding the use of "unjust deprivation" by noting that "[t]his 'unjust deprivation' language is derived from case law interpreting the meaning of fraud in current securities legislation and under the *Criminal Code* in order to capture the *actus reus* of fraud without the requirement to establish subjective knowledge of the fraud." The CCMR also noted that section 63 "mirror[s] the language in s. 126.1 of the OSA such that the person engaging in the conduct must know or ought reasonably to know that the conduct perpetuates a fraud." We do not read section 63 in this way. In our view, section 63 does not reflect the offence of fraud under either the *Criminal Code* or the *Ontario Securities Act* but creates an offence currently unknown to the law of fraud and deceit.

The plain language of section 63 creates two separate offences: knowing participation in fraud, which involves subjective knowledge or a *mens rea* component, and a new offence of "unjust deprivation". As we read section 63, the offence of "unjust deprivation" does not require any subjective knowledge on the part of the person accused, but is established solely on the resulting harm. The "unjust deprivation" offence does not reflect the *actus reus* of fraud in section 380 of the *Criminal Code*.[1] Section 63 instead creates two separate offences out of the conjunctive test for criminal fraud established by the Supreme Court of Canada in *R. v. Theroux*.[2] Criminal fraud requires the Crown to establish that the accused engage in an act of deceit, falsehood or some other fraudulent means *and* that this conduct resulted in the victim being deprived (through

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[1] The offence of fraud is set out in section 380(1) which defines the *actus reus* of fraud as "Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person .... of any property, money or valuable service or security ...". Fraud is an indictable offence, regardless of the value of the subject matter of the offence. property.

[2] [1993] 2 SCR 5 at 20. "These doctrinal observations suggest that the *actus reus* of the offence of fraud will be established by proof of: 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and 2. Deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk."

actual loss or pecuniary risk).[3] In contrast, section 63 creates an offence of fraud as well as an offence of "unjust deprivation" through the use of the conjunction "or" between subsection 63(1)(a) and (b). [4]

The concept of "unjust deprivation" is not a component of the tort of deceit. The gravamen of deceit is the making of a false representation which is known to be untrue, or which was made with a reckless disregard to its truth. Instead, "unjust deprivation" is a concept used at times to refer to the corresponding loss in cases of unjust enrichment. It is also used as a basis on which the court will justify piercing the corporate veil where the corporation has been used to perpetrate a fraud or other "unjust deprivation".

We urge the CCMR to reconsider the current wording of section 63 and redraft it to remove the word "unjust" in section 63(1)(a) and replace the word "or" between section 63(1)(a) and (b) with "and" to accurately reflect the *actus reus* of fraud.

We thank the CCMR for the opportunity to provide our comments on the ***CMA*** and the draft initial regulations.

Yours truly,

McMillan LLP

Charlotte Conlin
Counsel

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[3] *Ibid* at p. 15, citing *R. v. Olan* "(i) the offence has two elements: dishonest act and deprivation: (ii) the dishonest act is established by proof of deceit, falsehood of 'other fraudulent means'; (iii) the element of deprivation is established by proof of detriment, prejudice, or risk of prejudice to the economic interests of the victim, caused by the dishonest act."

[4] Section 63 similarly does not reflect the *actus reus* of fraud or market manipulation in section 126.1 includes conduct that "perpetrates a fraud" thus incorporating the requirements for fraud, including a resulting deprivation.