

Canadian Securities Laws, Issuer Websites and Social Media: Do The Evolution

By Matthew Merkley

A lot has changed since the '90s and change has, for the most part, been a good thing, although I still have a nostalgic yearning to wear plaid flannel and Doc Martens again. Despite the astonishing technological developments over the past 25 years, one thing that hasn't kept pace has been the Canadian Securities Administrators' (CSA) approach to the permitted methods for the initial dissemination of material information by public companies.

1991

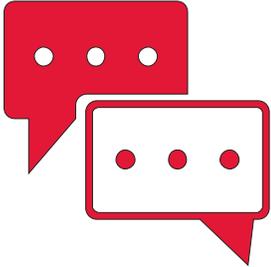


In 1991, Pearl Jam released its epic first album (*Ten*), *Blossom* debuted on network television, *Point Break* (featuring Keanu Reeves as Johnny Utah, an FBI agent) was in theatres, the Standard and Poor's/Toronto Stock Exchange Composite Index (TSX Index) reached a high of approximately 3,600, and I was logging into bulletin board systems using my 9,600 bit/s dial-up modem. Meanwhile, CSA's National Policy Statement 40 *Timely Disclosure* provided that:

"[...] immediate disclosure of all material information through the news media is required." and

"A media release should be transmitted to the media by the quickest possible method and in a manner which provides for wide dissemination. Media releases should be made to news services that disseminate financial news nationally, to the financial press and to daily newspapers that provide regular coverage of financial news."

2002



Fast-forward to 2002: Kelly Clarkson won the first season of *American Idol*, ICQ was issued a United States patent for instant messaging, the TSX Index reached nearly 8,000, and my multimedia Pearl Jam website was transferring gigabytes of data daily. Meanwhile, the CSA's newly enacted National Policy 51-201 *Disclosure Standards* (NP 51-201) provided that:

"Companies may satisfy the 'generally disclosed' requirement by using one or a combination of the following disclosure methods:

- (a) News releases distributed through a widely circulated news or wire service.
- (b) Announcements made through press conferences or conference calls that interested members of the public may attend or listen to either in person, by telephone, or by other electronic transmission (including the Internet)." and

"Posting information to a company's Web site will not, by itself, be likely to satisfy the 'generally disclosed' requirement."

It's noteworthy that as per NP 51-201:

"Securities legislation does not define the term 'generally disclosed'. Insider trading court decisions state that information has been generally disclosed if:

- (a) the information has been disseminated in a manner calculated to effectively reach the marketplace; and
- (b) public investors have been given a reasonable amount of time to analyze the information."

2016



Today, a picture of Selena Gomez sipping from an iconic bottle of Cola has over 5.4 million likes (and counting) on Instagram, scientists have the ability to 3D print a human organ, the official movie trailer for *Star Wars: The Force Awakens* had 128 million views in the first 24 hours of its posting to YouTube last year, the TSX Index recently reached a high of more than 14,850, and I'm able to use my smartphone to control the thermostat of a house thousands of kilometres away. Meanwhile, NP 51-201 still provides as it did in 2002, including that:

"Investors' access to the Internet is not yet sufficiently widespread such that a Web site posting alone would be a means of dissemination 'calculated to effectively reach the marketplace.' Further, effective dissemination involves the 'pushing out' of information into the marketplace. Notwithstanding the ability of some issuers' Web sites to alert interested parties to new postings, Web sites by and large do not push information out into the marketplace. Instead,

investors would be required to seek out this information from a company's Web site. Active and effective dissemination of information is central to satisfying the 'generally disclosed' requirement." and

"We support the use of technology in the disclosure process and believe that companies' Web sites can be an important and useful tool in improving communications to the marketplace. As technology evolves and as more investors gain access to the Internet, it may be that postings to certain companies' Web sites alone could satisfy the 'generally disclosed' requirement. At such time, we will revisit this policy statement and reconsider the guidance provided on this issue."

In my opinion, that time has come, particularly given that dissemination of a press release over news wires within Canada can easily cost more than C\$1,000, while a website or social media post incurs no incremental cost to an issuer.

Since co-authoring *Applying Canadian Securities Laws to Social Media: A Square Peg in a Round Hole (OWTTE)* last year, I have been surprised by the lack of advancement in this area — particularly given the not-so-recent developments in the U.S. concerning the approach to regulation by the Securities and Exchange Commission regarding the dissemination of material information through websites and social media outlets. The Toronto Stock Exchange (TSX) recently proposed potential rule changes that would mandate the posting of certain constating, securityholder, governance and security-based compensation documents on an issuer's website (see our June 2016 *Blakes Bulletin: TSX Proposes New Website and Equity Compensation Plan Disclosure*), but its Electronic Communications Disclosure Guidelines continue to echo NP 51-201:

"Disclosure of information by an issuer through its web site or e-mail will not satisfy the issuer's disclosure obligations. The corporation must continue to use traditional means of dissemination." and

"An issuer must not post a material news release on a web site or distribute it by e-mail or otherwise on the Internet before it has been disseminated on a news wire service in accordance with *TSX Timely Disclosure Policy*."

As the years have passed, I too have failed to stay on the leading edge of ever-evolving technology — I have never used a ride-sharing app, I still print airline tickets, I used Bluetooth for the first time earlier this year, I don't own a tablet — and so, by no means do I consider myself to be a 21st Century Digital Boy. However, I do have a Twitter account and subscribe to RSS feeds to follow developments in corporate governance, law and finance, Ontario craft beer news and (of course) Pearl Jam and many senior lawyers I know (in their 50s) and my parents (in their 60s) have social media accounts, as do my pre-teen children.

38% of Canadians use websites, social media and mobile apps as their main news sources (62% aged under 35)

According to the website *internetworldstats.com*, 95 per cent of Canadians are Internet users, compared to 87 per cent of Americans. Canada also has the highest social media network penetration in the world, with 82 per cent of Canadians using a social network (U.S.: 75 per cent). According to the 2016 Digital News Report conducted by the Reuters Institute for the Study of Journalism at Oxford University (Oxford Report), 38 per cent of surveyed Canadians (42 per cent of surveyed Americans), who used a source of news in the prior week, said that websites, social media and mobile apps were their main news sources (62 per cent for Canadians aged under 35), while, in particular, social media was the principal news source for 16 per cent of Canadians (31 per cent aged under 35). In addition, according to the Oxford Report, 35 per cent of surveyed Canadians (35 per cent of surveyed Americans) use social media as one of their starting points for getting their news, second only to “search” at 36 per cent.

It is time for the CSA and TSX to revisit their rules and policies regarding the release of material information by issuers. It is now 2016 — although, admittedly, it does resemble 1991: Temple of the Dog is going on tour, the gang from *Full House* is streaming new episodes, a remake of *Point Break* was recently in theatres, and Hillary Clinton may soon be living in the White House again.

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