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NEWS LETTE

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Civil Liability for Secondary Market Disclosure

Because the Toronto Stock Exchange is Canada's primary market for equities, and due to Toronto's position as Canada's largest financial centre, Ontario securities laws must almost invariably be taken into account in connection with public companies, no matter where in the country they are based. The Province of Ontario's *Securities Act* (the "Act") was amended effective December 31, 2005 to provide stock market investors with a powerful new civil remedy. For many years the Act provided a statutory cause of action only to investors who purchased securities in the primary market (i.e. pursuant to a prospectus, offering memorandum or take over bid circular). The recent amendments to the Act will now provide an additional statutory cause of action for investors who purchase or sell securities from or to third parties without any involvement of the issuer (the so-called "secondary market"). Under the new regime, secondary market investors will have the right to sue for a misrepresentation in a filed document or public oral statement and for a failure to make timely disclosure of a material change in the issuer's business. Potential plaintiffs in an action for misrepresentation in a continuous disclosure document or public oral statements are any investors who acquired or sold an issuer's securities between the time the misrepresentation was made and the time it was publicly corrected. With respect to failure to make timely disclosure, potential plaintiffs are those investors who acquired or sold the issuer's securities from the date when the obligation arose to the date of actual disclosure. There is a

wide array of potential defendants ranging from the issuer, its directors and officers, "influential persons", experts and "spokespersons" (in the case of public oral statements). Influential persons include promoters, controlling persons and certain other insiders.

This new statutory right does not preclude investors from suing for fraudulent or negligent misrepresentation or other common law causes of action. What is interesting, however, is that unlike common law actions for negligent misrepresentation, if an investor commences an action under the new regime, the investor will not have to prove he or she relied detrimentally on the alleged misrepresentation. It is this feature of the amendments to the Act that have lead many experts to believe that class action suits are inevitable.

It should be noted that the amendments provide safeguards against claims brought without merit and afford defendants the opportunity to establish various defences (such as due diligence, reliance on experts, plaintiff knew of material change, etc.). In addition, the amendments will cap the quantum of potential liability depending upon the category of defendant. Nonetheless, it is widely anticipated that this new civil remedy for secondary market investors will lead to a significant new wave of litigation.

From a practical point-of-view, this development has been a catalyst in leading many public companies in Canada to establish disclosure committees entrusted with the oversight of all outside communications, not only in the form of media releases and formal filings required under

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securities legislation, but also investor presentations, information posted on the company's web-site and the like.

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Is There Such A Thing As European Law?

Is there such a thing as European law? Yes, there is. Mostly, it consists of thick layers of detailed regulations, joining a queue of even more regulations, which then need to be transformed into national law - a process which often exceeds the time limits imposed by the European Commission.

There is the European law seen in ordinances that are directly applicable in all member states of the European Union (there are now 25 member states). And there might even eventually be a European Constitution - if one is ever approved.

Then there are the courts. Courts, in most European countries, do not create law. They just find it in cases where others have overlooked it. You might have heard that, within the European common market, the free trade of goods and services is a fundamental principle. Also core to the system is the freedom of European citizens to establish themselves and work in the territory of other member states of the Union.

Now, something new is emerging: the freedom of choice of corporate form. This is a trend resulting from decisions by the European Court of Justice in three cases: *Centros*, *Überseering* and, most recently, *Inspire Art*, interpreting a corporation's "freedom of establishment". In these decisions, the European Court of Justice has determined that once a corporation has been validly established in one member state - even if it has no actual business activity in that state - other

member states must recognize the corporation as validly formed. This is a new phenomenon: not European law becoming national, but national law becoming European.

In practice, a Canadian company looking to conquer a European market, be it Germany or France, could use the corporate forms offered by these countries (like the S.A.R.L or the GmbH) or it could choose to open a branch of the Canadian corporation in Paris or Frankfurt. As a consequence of the ECJ's recent decisions, however, if it considers the use of local vehicles in France or Germany too burdensome, it can now also incorporate a British Limited company and carry on its business in France or Germany through the British company, even though there will be absolutely no business in England.

Ultimately, the tendency is clear: the incorporation possibilities offered by 25 member countries (and more, in the future), will be at the disposal of those seeking to do business anywhere in the European Union.

All ramifications of this development have not yet been explored. Some in Germany, for example, are using it to avoid the workers representation rules applicable to German companies. Countries that have strict rules for minimum capitalisation may also be at a disadvantage in what clearly is becoming an area of European competition. Businessmen seeking their advantage will use what suits them best. The lack of detail will not stop them. The curiosity of their legal advisers will increase, as will the options for avoiding unwanted consequences of a specific legal system.

And further decisions of the European Court of Justice increasing the possibilities in a more and more common market are to be expected. Europe has taken time to develop mental and legal unity. It will need even more time. But it will, ultimately, achieve it.

*Günter Knorr
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Firm News

Toronto Office

Recently, Lette, Whittaker was pleased to act as legal counsel to Eramet S.A. with respect to Eramet's approximately \$270 million take over bid for all of the shares of Weda Bay Minerals Inc. (TSX:WDA). On May 2, 2006 Eramet announced the overwhelming success of its bid. Eramet is one of the world's leading integrated mining and metallurgy companies that produces non-ferrous metals and their chemical derivatives, high-performance special steels, nickel alloys and superalloys and high-performance parts for industry. **Weda Bay Minerals Inc.** is an exploration and development company that controls the Halmahera Nickel Cobalt Project at Weda Bay, Halmahera in Eastern Indonesia. Eramet's financial advisor was Merrill Lynch. Lette, Whittaker's team included Bernard Lette, Barry Webster and Patrizia Banducci.

Munich Office

Kerstin Anker finished her work as a co-author on the juridical commentary to the German Drug Act. The Book will probably be published this summer with the second edition. It also includes European Union Legislation and gives an introduction to drug registration in the US.

Hartmut Schilling accompanied the German Minister of Economy on his trip to Macedonia in his function as adviser to the Macedonian Government on its entry to the European Union. Macedonia gained its status as candidate for membership in the European Union last fall.