The Ontario Securities Commission

OSC Bulletin

October 24, 2008

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The Ontario Securities Commission administers the
Securities Act of Ontario (R.S.O. 1990, c. S.5) and the
Commodity Futures Act of Ontario (R.S.O. 1990, c. C.20)

The Ontario Securities Commission
Cadillac Fairview Tower
Suite 1903, Box 55
20 Queen Street West
Toronto, Ontario
M5H 3S8

416-593-8314 or Toll Free 1-877-785-1555

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M1T 3V4

416-609-3800 or 1-800-387-5164

Contact Centre - Inquiries, Complaints:	Fax: 416-593-8122
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One Corporate Plaza
2075 Kennedy Road
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Customer Relations
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Notices / News Releases

1.1 Notices

1.1.1 Current Proceedings Before The Ontario Securities Commission

OCTOBER 24, 2008

CURRENT PROCEEDINGS

BEFORE

ONTARIO SECURITIES COMMISSION

- -

Unless otherwise indicated in the date column, all hearings will take place at the following location:

The Harry S. Bray Hearing Room
Ontario Securities Commission
Cadillac Fairview Tower
Suite 1700, Box 55
20 Queen Street West
Toronto, Ontario
M5H 3S8

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Wendell S. Wigle, Q.C.	—	WSW

SCHEDULED OSC HEARINGS

October 27, 2008 10:00 a.m.	**Norshield Asset Management (Canada) Ltd., Olympus United Group Inc., John Xanthoudakis, Dale Smith and Peter Kefalas** s.127 P. Foy in attendance for Staff Panel: WSW/DLK
October 27, 2008 10:00 a.m.	**Adrian Samuel Leemhuis, Future Growth Group Inc., Future Growth Fund Limited, Future Growth Global Fund limited, Future Growth Market Neutral Fund Limited, Future Growth World Fund and ASL Direct Inc.** s. 127(5) K. Daniels in attendance for Staff Panel: ST/MCH
October 28, 2008 2:30 p.m.	**Goldbridge Financial Inc., Wesley Wa Weber and Shawn C. Lesperance** s. 127 J. Feasby in attendance for Staff Panel: JEAT/PLK
October 29, 2008 10:00 a.m.	**David Berry** J. Superina in attendance for Staff Panel: LER/JEAT
November 3, 2008 10:00 a.m.	**Rene Pardo, Gary Usling, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited** s. 127 M. Britton/M. Boswell in attendance for Staff Panel: LER/ST

November 11, 2008
2:30 p.m.

LandBankers International MX, S.A. De C.V.; Sierra Madre Holdings MX, S.A. De C.V.; L&B LandBanking Trust S.A. De C.V.; Brian J. Wolf Zacarias; Roger Fernando Ayuso Loyo, Alan Hemingway, Kelly Friesen, Sonja A. McAdam, Ed Moore, Kim Moore, Jason Rogers and Dave Urrutia

s. 127

M. Britton in attendance for Staff

Panel: TBA

November 19, 2008
10:00 a.m.

Sunwide Finance Inc., Sun Wide Group, Sun Wide Group Financial Insurers & Underwriters, Bryan Bowles, Robert Drury, Steven Johnson, Frank R. Kaplan, Rafael Pangilinan, Lorenzo Marcos D. Romero and George Sutton

s. 127

C. Price in attendance for Staff

Panel: JEAT/CSP

November 25, 2008
2:30 p.m.

Shallow Oil & Gas Inc., Eric O'Brien, Abel Da Silva, Gurdip Singh Gahunia aka Michael Gahunia and Abraham Herbert Grossman aka Allen Grossman

s. 127(7) and 127(8)

M. Boswell in attendance for Staff

Panel: DLK/CSP/PLK

November 27, 2008
2:00 p.m.

Global Partners Capital, Asia Pacific Energy Inc., 1666475 Ontario Inc. operating as "Asian Pacific Energy", Alex Pidgeon, Kit Ching Pan also known as Christine Pan, Hau Wai Cheung, also known as Peter Cheung, Tony Cheung, Mike Davidson, or Peter McDonald, Gurdip Singh Gahunia also known as Michael Gahunia or Shawn Miller, Basis Marcellinius Toussaint also known as Peter Beckford, and Rafique Jiwani also known as Ralph Jay

s.127

M. Boswell in attendance for Staff

Panel: DLK/MCH

November 28, 2008
10:00 a.m.

Goldpoint Resources Corporation, Lino Novielli, Brian Moloney, Evanna Tomeli, Robert Black, Richard Wylie and Jack Anderson

s. 127(1) and 127(5)

M. Boswell in attendance for Staff

Panel: TBA

December 1, 2008
TBA

Firestar Capital Management Corp., Kamposse Financial Corp., Firestar Investment Management Group, Michael Ciavarella and Michael Mitton

s. 127

H. Craig in attendance for Staff

Panel: TBA

December 3, 2008
10:00 a.m.

Global Energy Group, Ltd. and New Gold Limited Partnerships

s. 127

H. Craig in attendance for Staff

Panel: TBA

December 4, 2008
11:00 a.m.

Shane Suman and Monie Rahman

s. 127 & 127(1)

C. Price in attendance for Staff

Panel: TBA

December 8, 2008
10:00 a.m.

John Illidge, Patricia McLean, David Cathcart, Stafford Kelley and Devendranauth Misir

S. 127 and 127.1

I. Smith in attendance for Staff

Panel: WSW/CSP/DLK

December 9, 2008
2:30 p.m.

Gold-Quest International, Health and Harmoney, Iain Buchanan and Lisa Buchanan

s.127

H. Craig in attendance for Staff

Panel: ST/MCH

January 5, 2009 TBA	**FactorCorp Inc., FactorCorp Financial Inc. and Mark Twerdun** s. 127 M. Mackewn in attendance for Staff Panel: TBA
January 5, 2009 10:00 a.m.	**Xi Biofuels Inc., Biomaxx Systems Inc., Ronald David Crowe and Vernon P. Smith** and **Xiiva Holdings Inc. carrying on Business as Xiiva Holdings Inc., Xi Energy Company, Xi Energy and Xi Biofuels** s. 127 M. Vaillancourt in attendance for Staff Panel: TBA
January 12, 2009 10:00 a.m.	**Franklin Danny White, Naveed Ahmad Qureshi, WNBC The World Network Business Club Ltd., MMCL Mind Management Consulting, Capital Reserve Financial Group, and Capital Investments of America** s. 127 C. Price in attendance for Staff Panel: TBA
January 26, 2009 10:00 a.m.	**Darren Delage** s. 127 M. Adams in attendance for Staff Panel: TBA
February 2, 2009 10:00 a.m.	**Biovail Corporation, Eugene N. Melnyk, Brian H. Crombie, John R. Miszuk and Kenneth G. Howling** s. 127(1) and 127.1 J. Superina/A. Clark in attendance for Staff Panel: TBA
February 9, 2009 10:00 a.m.	**MRS Sciences Inc. (formerly Morningside Capital Corp.), Americo DeRosa, Ronald Sherman, Edward Emmons and Ivan Cavric** s. 127 & 127(1) D. Ferris in attendance for Staff Panel: TBA
March 23, 2009 10:00 a.m.	**Imagin Diagnostic Centres Inc., Patrick J. Rooney, Cynthia Jordan, Allan McCaffrey, Michael Shumacher, Christopher Smith, Melvyn Harris and Michael Zelyony** s. 127 and 127.1 H. Craig in attendance for Staff Panel: TBA
April 6, 2009 10:00 a.m.	**Gregory Galanis** s. 127 P. Foy in attendance for Staff Panel: TBA
April 13, 2009 10:00 a.m.	**Matthew Scott Sinclair** s.127 P. Foy in attendance for Staff Panel: TBA
April 20, 2009 10:00 a.m.	**Al-Tar Energy Corp., Alberta Energy Corp., Drago Gold Corp., David C. Campbell, Abel Da Silva, Eric F. O'Brien and Julian M. Sylvester** s. 127 S. Horgan in attendance for Staff Panel: TBA

May 4, 2009
10:00 a.m.

Borealis International Inc., Synergy Group (2000) Inc., Integrated Business Concepts Inc., Canavista Corporate Services Inc., Canavista Financial Center Inc., Shane Smith, Andrew Lloyd, Paul Lloyd, Vince Villanti, Larry Haliday, Jean Breau, Joy Statham, David Prentice, Len Zielke, John Stephan, Ray Murphy, Alexander Poole, Derek Grigor and Earl Switenky

s. 127 and 127.1

Y. Chisholm in attendance for Staff

Panel: TBA

September 21, 2009
10:00 a.m.

Swift Trade Inc. and Peter Beck

s. 127

S. Horgan in attendance for Staff

Panel: TBA

November 16, 2009
10:00 a.m.

Sulja Bros. Building Supplies, Ltd. (Nevada), Sulja Bros. Building Supplies Ltd., Kore International Management Inc., Petar Vucicevich and Andrew DeVries

s. 127 & 127.1

M. Britton in attendance for Staff

Panel: TBA

TBA

Yama Abdullah Yaqeen

s. 8(2)

J. Superina in attendance for Staff

Panel: TBA

TBA

Microsourceonline Inc., Michael Peter Anzelmo, Vito Curalli, Jaime S. Lobo, Sumit Majumdar and Jeffrey David Mandell

s. 127

J. Waechter in attendance for Staff

Panel: TBA

TBA

Frank Dunn, Douglas Beatty, Michael Gollogly

s.127

K. Daniels in attendance for Staff

Panel: TBA

TBA

Peter Sabourin, W. Jeffrey Haver, Greg Irwin, Patrick Keaveney, Shane Smith, Andrew Lloyd, Sandra Delahaye, Sabourin and Sun Inc., Sabourin and Sun (BVI) Inc., Sabourin and Sun Group of Companies Inc., Camdeton Trading Ltd. and Camdeton Trading S.A.

s. 127 and 127.1

Y. Chisholm in attendance for Staff

Panel: JEAT/DLK/CSP

TBA

Juniper Fund Management Corporation, Juniper Income Fund, Juniper Equity Growth Fund and Roy Brown (a.k.a. Roy Brown-Rodrigues)

s.127 and 127.1

D. Ferris in attendance for Staff

Panel: TBA

TBA

Robert Kasner

s. 127

H. Craig in attendance for Staff

Panel: TBA

TBA

Merax Resource Management Ltd. carrying on business as Crown Capital Partners, Richard Mellon and Alex Elin

s. 127

H. Craig in attendance for Staff

Panel: JEAT/MC/ST

TBA	**Roger D. Rowan, Watt Carmichael Inc., Harry J. Carmichael and G. Michael McKenney** s. 127 J. Superina in attendance for Staff Panel: PJL/ST/DLK
TBA	**Rodney International, Choeun Chhean (also known as Paulette C. Chhean) and Michael A. Gittens (also known as Alexander M. Gittens)** s. 127 M. Britton in attendance for Staff Panel: WSW/ST
TBA	**Hollinger Inc., Conrad M. Black, F. David Radler, John A. Boultbee and Peter Y. Atkinson** s.127 J. Superina in attendance for Staff Panel: LER/MCH
November 24, 2008 10:00 a.m.	**Irwin Boock, Stanton De Freitas, Jason Wong, Saudia Allie, Alena Dubinsky, Alex Khodjiants, Select American Transfer Co., Leasesmart, Inc., Advanced Growing Systems, Inc., International Energy Ltd., Nutrione Corporation, Pocketop Corporation, Asia Telecom Ltd., Pharm Control Ltd., Cambridge Resources Corporation, Compushare Transfer Corporation, Federated Purchaser, Inc., TCC Industries, Inc., First National Entertainment Corporation, WGI Holdings, Inc. and Enerbrite Technologies Group** s. 127(1) & (5) P. Foy in attendance for Staff Panel: ST/DLK
TBA	**New Life Capital Corp., New Life Capital Investments Inc., New Life Capital Advantage Inc., New Life Capital Strategies Inc., 1660690 Ontario Ltd., L. Jeffrey Pogachar, Paola Lombardi and Alan S. Price** s. 127 S. Kushneryk in attendance for Staff Panel: WSW/ST

ADJOURNED SINE DIE

Global Privacy Management Trust and Robert Cranston

Andrew Keith Lech

S. B. McLaughlin

Livent Inc., Garth H. Drabinsky, Myron I. Gottlieb, Gordon Eckstein, Robert Topol

Portus Alternative Asset Management Inc., Portus Asset Management Inc., Boaz Manor, Michael Mendelson, Michael Labanowich and John Ogg

Maitland Capital Ltd., Allen Grossman, Hanouch Ulfan, Leonard Waddingham, Ron Garner, Gord Valde, Marianne Hyacinthe, Diana Cassidy, Ron Catone, Steven Lanys, Roger McKenzie, Tom Mezinski, William Rouse and Jason Snow

Euston Capital Corporation and George Schwartz

Al-Tar Energy Corp., Alberta Energy Corp., Eric O'Brien, Bill Daniels, Bill Jakes, John Andrews, Julian Sylvester, Michael N. Whale, James S. Lushington, Ian W. Small, Tim Burton and Jim Hennesy

Global Partners Capital, WS Net Solution, Inc., Hau Wai Cheung, Christine Pan, Gurdip Singh Gahunia

1.1.2 IIROC Rules Notice – Notice of Approval - UMIR – Provisions Respecting Short Sales and Failed Trades

INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA (IIROC)
NOTICE OF APPROVAL –
UNIVERSAL MARKET INTEGRITY RULES
PROVISIONS RESPECTING SHORT SALES AND FAILED TRADES

NOTICE OF COMMISSION APPROVAL

The Ontario Securities Commission approved amendments to the Universal Market Integrity Rules ("UMIR") 1.1 and 3.2, new UMIR Rules 7.10 and 7.11 and UMIR Policies 1.1 and 2.1 containing provisions related to short sales and failed trades. The Alberta Securities Commission, the Autorité des marches financiers, the New Brunswick Securities Commission, the Nova Scotia Securities Commission and Saskatchewan Securities Commission approved the amendments. The British Columbia Securities Commission did not object to the amendments.

A proposed amendment to repeal Rule 10.10 and eliminate the requirement to file the "Short Position Reports" was deferred at this time. A copy and description of the original amendments were published on September 7, 2007 at (2007) 30 OSCB 7809. A summary of public comments received, IIROC's responses, along with a description and a copy of the amendments revised to reflect non-material changes to the original amendments, are contained in Chapter 13 of this OSC Bulletin.

1.1.3 Notice of Ministerial Approval of NI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings and Consequential Amendment to NI 51-102 Continuous Disclosure Obligations

NOTICE OF MINISTERIAL APPROVAL

OF

NATIONAL INSTRUMENT 52-109
CERTIFICATION OF DISCLOSURE IN ISSUERS' ANNUAL AND INTERIM FILINGS

AND

CONSEQUENTIAL AMENDMENT TO
NATIONAL INSTRUMENT 51-102 *CONTINUOUS DISCLOSURE OBLIGATIONS*

On October 14, 2008, the Minister of Finance approved, pursuant to section 143.3 of the *Securities Act* (Ontario), the following rules made by the Ontario Securities Commission (together, the Rules):

- National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, including Forms 52-109F1, 52-109FV1, 52-109 – IPO/RTO, 52-109F1R, 52-109F1 – AIF, 52-109F2, 52-109FV2, 52-109F2 – IPO/RTO, and 52-109F2R, which repeals and replaces Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, including Forms 52-109F1, 52-109FT1, 52-109F2, and 52-109FT2; and

- Amendment Instrument to Form 51-102F1 *Management's Discussion & Analysis* of National Instrument 51-102 *Continuous Disclosure Obligations*.

The Rules were previously made by the Commission on August 5, 2008. On August 5, 2008, the Commission also adopted as a policy Companion Policy 52-109CP *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Companion Policy).

Previously, the Rules, the Companion Policy and related materials were published in the OSC Bulletin on August 15, 2008. The Rules and the Companion Policy will come into force in Ontario on December 15, 2008.

As indicated in the CSA Notice published on August 15, 2008, the following notices are withdrawn in Ontario effective December 15, 2008:

- CSA Staff Notice 52-311 *Regarding the Required Forms of Certificates under MI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings*;

- CSA Staff Notice 52-316 *Certification of Design of Internal Control Over Financial Reporting*;

- CSA Staff Notice 52-322 *Status of Proposed Repeal and Replacement of Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings*;

- CSA Multilateral Staff Notice 57-302 *Failure to File Certificates Under Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings*; and

- Ontario Securities Commission Staff Notice 52-717 *Certification of Annual and Interim Certificates – Venture Issuer Basic Certificates*.

The Rules and the Companion Policy are published in Chapter 5 of this issue of the OSC Bulletin.

October 24, 2008

1.1.4 CSA Notice 81-318 - Request for Comment - Framework 81-406 Point of sale disclosure for mutual funds and segregated funds

CSA NOTICE 81-318 - REQUEST FOR COMMENT

FRAMEWORK 81-406 POINT OF SALE DISCLOSURE FOR MUTUAL FUNDS AND SEGREGATED FUNDS

The Joint Forum of Financial Market Regulators (the Joint Forum) released today its Framework 81-406 *Point of sale disclosure for mutual funds and segregated funds* (the Framework). The Framework is published in Chapter 5 of this issue of the OSC Bulletin.

The Framework reflects the shared vision for a more meaningful and effective disclosure regime. It does not outline specific requirements. Rather it sets out concepts and principles agreed upon by the Canadian Securities Administrators (the CSA or we) and the Canadian Council of Insurance Regulators (CCIR) as members of the Joint Forum.

The CSA and the CCIR will now begin their respective processes for implementing the Framework and its principles.

Request for comment

The CSA seeks feedback from all stakeholders to inform us on issues related to implementation of the Framework and its principles in advance of our publishing proposed changes to existing securities laws for first comment. We will consider these comments, prepare and publish the proposed changes and then follow our usual rule-making process to seek input from, and work collaboratively with, all stakeholders.

How to provide your comments

Submit your comments in writing by **December 23, 2008**.

Address your submissions to the regulators listed below:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Nova Scotia Securities Commission
Office of the Attorney General, Prince Edward Island
Financial Services Regulation Division, Consumer and Commercial Affairs Branch, Department of Government Services, Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government of the Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

Send your comments only to the addresses below. Your comments will be forwarded to the remaining CSA member jurisdictions:

John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West, Suite 1903, Box 55
Toronto, ON M5H 3S8
Fax: 416-593-2318
e-mail: jstevenson@osc.gov.on.ca

M^{e} Anne-Marie Beaudoin
Corporate Secretary
Autorité des marchés financiers
800, square Victoria, 22e étage
C.P. 246, tour de la Bourse
Montréal (Québec) H4Z 1G3
Fax : 514-864-6381
e-mail: consultation-en-cours@lautorite.qc.ca

If you are sending your comments by fax, mail or hand delivery, please forward a diskette or CD containing your submissions in Word, Windows format.

We cannot keep submissions confidential because securities legislation in certain provinces requires publication of a summary of the written comments received during the comment period. All comments will be posted on the OSC website at www.osc.gov.on.ca.

Questions

Please refer your questions to any of:

Noreen Bent
Manager and Senior Legal Counsel
Legal Services, Corporate Finance
British Columbia Securities Commission
Phone: 604-899-6741
nbent@bcsc.bc.ca

Christopher Birchall
Senior Securities Analyst
Corporate Finance
British Columbia Securities Commission
Phone: 604-899-6722
cbirchall@bcsc.bc.ca

Bob Bouchard
Director and Chief Administration Officer
Manitoba Securities Commission
Phone: 204-945-2555
Bob.bouchard@gov.mb.ca

Rhonda Goldberg
Manager, Investment Funds Branch
Ontario Securities Commission
Phone: 416-593-3682
rgoldberg@osc.gov.on.ca

Ian Kerr
Senior Legal Counsel, Corporate Finance
Alberta Securities Commission
Phone: 403-297-4225
Ian.Kerr@asc.ca

Éric Lapierre
Manager, Investment Funds
Autorité des marchés financiers
Phone: 514-395-0337 ext. 4471
eric.lapierre@lautorite.qc.ca

Stephen Paglia
Legal Counsel, Investment Funds Branch
Ontario Securities Commission
Phone: 416-593-2393
spaglia@osc.gov.on.ca

Eric Stevenson
Manager, Distribution Practices
Autorité des marchés financiers
Phone: 418-525-0337 ext. 4811
eric.stevenson@lautorite.qc.ca

October 24, 2008

1.2 Notices of Hearing

1.2.1 Irwin Boock et al. – ss. 127, 127.1

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
IRWIN BOOCK, STANTON DEFREITAS,
JASON WONG, SAUDIA ALLIE,
ALENA DUBINSKY, ALEX KHODJIAINTS,
SELECT AMERICAN TRANSFER CO.,
LEASESMART, INC.,
ADVANCED GROWING SYSTEMS, INC.,
INTERNATIONAL ENERGY LTD.,
NUTRIONE CORPORATION,
POCKETOP CORPORATION,
ASIA TELECOM LTD.,
PHARM CONTROL LTD.,
CAMBRIDGE RESOURCES CORPORATION,
COMPUSHARE TRANSFER CORPORATION,
FEDERATED PURCHASER, INC.,
TCC INDUSTRIES, INC., FIRST NATIONAL
ENTERTAINMENT CORPORATION,
WGI HOLDINGS, INC.
AND ENERBRITE TECHNOLOGIES GROUP

NOTICE OF HEARING
(Section 127 and 127.1)

TAKE NOTICE THAT the Ontario Securities Commission (the "Commission" will hold a hearing pursuant to sections 127 and 127.1 of the Securities Act, R.S.O. 1990, c. S.5, as amended (the "Act") at the offices of the Commission, 20 Queen Street West, 17th Floor, Large Hearing Room, commencing on November 24, 2008 at 10 a.m., or as soon thereafter as the hearing can be held:

AND TAKE NOTICE the purpose of the hearing is to consider whether it is in the public interest for the Commission to make an order:

(a) pursuant to clause 2 of subsection 127(1), that trading in any securities by Irwin Boock, Stanton DeFreitas, Jason Wong, Saudia Allie, Alena Dubinsky and Alex Khodjiaints (collectively, the "Individual Respondents") and by Select American Transfer Co. and Compushare Transfer Co. cease permanently or for such other period as specified by the Commission;

(b) pursuant to clause 2 of subsection 127(1), that trading in the securities of LeaseSmart, Inc., Advanced Growing Systems, Inc., NutriOne Corporation, International Energy Ltd., Pocketop Corporation, Asia Telecom Ltd., Pharm Control Ltd., Cambridge Resources Corporation, WGI Holdings, Inc., Federated Purchaser, Inc., First National Entertainment Corporation, TCC Industries, Inc., Enerbrite Technologies Group Inc. (collectively the "Issuer Respondents") cease permanently or for such other period as specified by the Commission;

(c) pursuant to clause 3 of subsection 127(1), that any exemptions contained in Ontario securities law do not apply to the Respondents, or any of them, permanently or for such other period as specified by the Commission;

(d) pursuant to clause 8 of subsection 127(1), that Irwin Boock, Stanton DeFreitas and Jason Wong be prohibited from becoming or acting as a director or officer of any issuer;

(e) pursuant to clause 9 of subsection 127(1), that the Individual Respondents, or any of them, pay an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law to the Commission for allocation to or for the benefit of third parties;

(f) pursuant to clause 10 of subsection 127(1), that the Individual Respondents, or any of them, disgorge to the Commission any amounts obtained as a result of non-compliance with securities law for allocation to or for the benefit of third parties;

(g) pursuant to section 127.1, that the Individual Respondents be ordered to pay the costs of the investigation and the costs of or related to the hearing incurred by or on behalf of the Commission;

(h) if necessary, pursuant to clause 7 of subsection 127(7), that the temporary orders previously made against the Respondents on May 18, 2007, May 22, 2007, May 30, 2007 and May 5, 2008, as amended and extended from time to time by the Commission, be extended until the conclusion of the hearing; and

(i) such other order as the Commission may consider appropriate.

BY REASON OF the allegations set out in the Statement of Allegations of Staff dated October 16, 2008, and such additional allegations as counsel may advise and the Commission may permit;

AND TAKE FURTHER NOTICE that any party to the proceeding may be represented by counsel if that party attends or submits evidence at the hearing;

AND TAKE FURTHER NOTICE that in the event that the Commission determines that any of the Respondents has not complied with Ontario securities law, Staff may request the Commission to consider whether, in the opinion of the Commission, an application should be made to the Superior Court of Justice for a declaration pursuant to section 128(1) of the Act that such persons have not complied with Ontario securities law, and that if such declaration be made, the Superior Court of Justice make such orders pursuant to section 128(3) of the Act as it considers appropriate.

AND TAKE FURTHER NOTICE that upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party and such party is not entitled to any further notice of the proceeding.

DATED at Toronto this 16th day of October, 2008.

"John Stevenson"
Secretary to the Commission

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND
IRWIN BOOCK, STANTON DEFREITAS,
JASON WONG, SAUDIA ALLIE,
ALENA DUBINSKY, ALEX KHODJIAINTS,
SELECT AMERICAN TRANSFER CO.,
LEASESMART, INC.,
ADVANCED GROWING SYSTEMS, INC.,
INTERNATIONAL ENERGY LTD.,
NUTRIONE CORPORATION,
POCKETOP CORPORATION,
ASIA TELECOM LTD.,
PHARM CONTROL LTD.,
CAMBRIDGE RESOURCES CORPORATION,
COMPUSHARE TRANSFER CORPORATION,
FEDERATED PURCHASER, INC.,
TCC INDUSTRIES, INC., FIRST NATIONAL
ENTERTAINMENT CORPORATION,
WGI HOLDINGS, INC.
AND ENERBRITE TECHNOLOGIES GROUP

STATEMENT OF ALLEGATIONS
(Section 127)

Staff of the Ontario Securities Commission allege the following in respect of the Respondents:

I. THE RESPONDENTS

1. Irwin Boock, Stanton DeFreitas, Jason Wong, Saudia Allie, Alena Dubinsky and Alex Khodjiaints (the "Individual Respondents") are all residents of Ontario and are connected to each other through a complex scheme of securities fraud involving: a) the creation of fraudulent shell corporations by way of "corporate hijackings" as described herein; and b) the issuance of fraudulent or false securities in those corporations; and c) the trading of the fraudulent or false securities by the Respondents in Ontario and elsewhere.

2. Select American Transfer Co. ("Select American") is a Delaware corporation that was established by Boock, DeFreitas and Wong in April 2005. Select American was operated as a transfer agent, primarily by DeFreitas, using aliases and nominees until May 2007, when it ceased operations due to cease trade orders issued by the Commission.

3. Compushare Transfer Corporation ("Compushare") is also a Delaware corporation that operated out of Toronto as a transfer agent. Compushare was incorporated by Boock in September 2006 and was operated by him using aliases and nominees until May 2008, when it ceased operations due to cease trade orders and other regulatory action by the Commission.

4. By virtue of the corporate hijacking scheme described herein, the following entities are fraudulently created U.S. corporations, the securities of which were quoted for trading on the Pink Sheets LLC in the over-the-counter securities market in the U.S.:

   (a) LeaseSmart, Inc. ("LeaseSmart");

   (b) Advanced Growing Systems, Inc. (formerly, The Bighub.com, Inc.) ("Bighub");

   (c) NutriOne Corporation ("NutriOne");

   (d) International Energy Ltd. ("International Energy");

   (e) Pocketop Corporation (formerly, Universal Seismic, Inc.) ("Pocketop");

   (f) Asia Telecom Ltd. ("Asia Telecom");

   (g) Pharm Control Ltd. ("Pharm Control");

(h) Cambridge Resources Corporation ("Cambridge Resources");

(i) WGI Holdings, Inc. ("WGI Holdings");

(j) Federated Purchaser, Inc. ("Federated Purchaser");

(k) First National Entertainment Corporation ("First National");

(l) TCC Industries, Inc. ("TCC Industries");

(m) Enerbrite Technologies Group Inc. ("Enerbrite")

(collectively, the "Issuer Respondents").

5. Select American and Compushare acted as the transfer agents to the Issuer Respondents and were the primary vehicles through which the corporate hijackings and share issuances were carried out.

6. Dubinsky and Khodjiaints operated trading accounts in Ontario in 2006 and 2007 for the purpose of receiving and trading fraudulent or false securities in a number of the Issuer Respondents.

II. THE FRAUDULENT SECURITIES SCHEME

A. Corporate Hijacking

7. The corporate hijacking scheme used to perpetrate securities fraud with respect to the Issuer Respondents was carried out in the following manner:

(a) Corporate documents were filed with the relevant Secretary of State in the U.S. (either Delaware, Nevada, California or Florida) to incorporate a company with the same name as a defunct public issuer. Typically, the directors, officers and registered agents listed on the corporate documents were either fictitious identities or nominees and the purported corporate addresses for the newly created entities would be mailbox locations obtained through UPS or other virtual mailbox providers;

(b) Shortly thereafter, amendment documents were filed with the relevant Secretary of State to effect a name change of the newly created entity and a consolidation of the company's shares in the form of a reverse stock split;

(c) Subsequently, steps were taken to obtain a new CUSIP number for the renamed, newly created entity as if it was the successor company to the defunct public issuer; and

(d) Documents containing false representations were then filed by the transfer agent with NASDAQ to obtain a new trading symbol for the renamed company and to effect the reverse stock split of the company's shares on a 1 for 1,000 basis.

B. Select American Transfer Co.

8. DeFreitas, Boock and Wong are the founders of Select American. Between April and August 2005, DeFreitas and Wong operated Select American jointly and were the directing minds of Select American.

9. Between April 2005 and July 2005, Boock, DeFreitas and Wong, acting individually or in concert, usurped the corporate identity of a number of defunct public issuers using the corporate hijacking scheme described above, including but not limited to LeaseSmart, Bighub, NutriOne and International Energy.

10. Boock, DeFreitas and Wong, using Select American as the vehicle, caused the companies to obtain quotations for trading on the Pink Sheets as if they were the legitimate defunct public issuers whose identities had been hijacked and, further, caused the companies to issue fraudulent shares as if they were the shares of the defunct public issuers.

11. In or around August 2005, Wong left Select American. Following Wong's departure, DeFreitas operated Select American using aliases and nominees. The day-to-day operations, however, were run with the assistance of Saudia Allie, a friend of DeFreitas' who was employed as the office manager of Select American.

12. Following Wong's departure, Boock and DeFreitas, acting individually or in concert, created additional fraudulent shell companies for which Select American acted as the transfer agent, including but not limited to Pocketop, Asia Telecom, Pharm Control and Cambridge Resources.

13. Following their incorporation, Boock and DeFreitas used Select American as the transfer agent to these entities to obtain quotations for trading on the Pink Sheets as if they were the legitimate defunct public issuers whose identities had been hijacked and, further, caused the companies to issue fraudulent shares as if they were the shares of the defunct public issuers.

14. In certain cases, Boock and DeFreitas also caused these companies to set up false web sites and issue false or promotional press releases as a means of creating a market for the fraudulent shares.

15. Boock and DeFreitas also sold some of the fraudulently created shell companies to third parties who were seeking to "go public" by way of a reverse takeover or reverse merger with an existing privately-held company. More particularly, DeFreitas sold NutriOne and Cambridge Resources to third parties in Montreal and Boock sold International Energy to a third party in Florida and Pharm Control to a third party in Ontario. In other cases, however, the fraudulent shell companies were purely vehicles for DeFreitas and Boock to issue and trade fraudulent securities.

16. In her role, Allie participated in and facilitated the fraudulent scheme by assisting DeFreitas in operating Select American, including by preparing the fraudulent share certificates for the shares of the Issuer Respondents for which Select American was the transfer agent. In preparing the share certificates, Allie knowingly and fraudulently signed the share certificates in a manner that purported the shares to be authenticated by the officers and directors of Select American. Allie knew the officers and directors of Select American to be either aliases or nominees.

C. Compushare as a Vehicle for Additional Shell Companies

17. Between August 2006 and March 2007, Boock used Compushare as a separate vehicle through which to perpetrate securities fraud. In that period, Boock created the following fraudulent entities: WGI Holdings, Federated Purchaser and Enerbrite.

18. Using Compushare as the vehicle, Boock then caused the companies to obtain quotations for trading on the Pink Sheets as if they were the legitimate defunct public issuers whose identities had been hijacked and, further, caused the companies to issue fraudulent shares as if they were the shares of these defunct public issuers.

19. In certain cases, Boock caused these companies to set up false web sites and issue promotional or false press releases as a means of creating a market for the securities.

20. With respect to Enerbrite, Boock acted together in concert with Wong in incorporating the initial fraudulent entity in September 2006, which was initially named IDF International but which was renamed Compliance Resource Group and was merged with and further renamed Enerbrite following the sale of the entity as a shell company by Boock.

21. In addition to selling this predecessor shell to Enerbrite, Boock sold the predecessor shell of Federated Purchaser to third parties for the purposes of a reverse merger.

D. Cease Trade of Select American and Continued Operation of Compushare

22. In or around April 2007, DeFreitas caused Select American to be sold to a third party in Montreal. Shortly thereafter, on or around May 18, 2007, the Commission issued temporary cease trade orders in respect of Select American and others, including DeFreitas and the fraudulent shell companies identified above for which Select American was the transfer agent. Following the cease trade orders, Select American ceased operations.

23. Boock, however, continued to perpetrate securities fraud using Compushare as the vehicle to carry out corporate hijackings and to issue and trade securities of the hijacked entities.

24. In December 2007 and February 2008, respectively, Boock incorporated First National and TCC Industries. Compushare acted as the transfer agent for both entities and, using Compushare as the vehicle, Boock caused these entities to obtain quotations on the Pink Sheets and to issue fraudulent shares for trading in the over-the-counter securities market.

E. Cease Trade of Compushare

25. On May 5, 2008, the Commission issued temporary cease trade orders against Boock, Compushare and others, including the fraudulently created entities for which Compushare acted as the transfer agent. Following the cease trade orders issued by the Commission, Compushare ceased operations.

F. Trading by Individual Respondents

(i) Trading by Wong

26. For his involvement in the scheme as described above, Wong primarily received fraudulent shares in lieu of compensation, including shares of LeaseSmart, International Energy, Asia Telecom and Pocketop.

27. Between February and March 2006, Wong sold the fraudulent shares of LeaseSmart he had received through a corporate trading account held at RBC Direct Investing Inc. ("RBC") and controlled by him.

28. Subsequently, between November 2006 and February 2007, Wong sold the additional fraudulent shares he had received in International Energy, Asia Telecom and Pocketop. These trades were made through a separate corporate trading account at RBC controlled by Wong.

29. In November 2007, Wong received additional compensation from Boock in respect of his involvement in the scheme as described herein.

(ii) Trading by DeFreitas – The Franklin Ross Accounts

30. Between November 2006 and May 2007, DeFreitas operated approximately 48 nominee accounts at Franklin Ross, a brokerage firm in the U.S. DeFreitas opened and operated the accounts purportedly as a "foreign affiliate" to the firm (the "Franklin Ross Accounts"). DeFreitas was recommended to Franklin Ross by Wong.

31. A number of the Franklin Ross Accounts were opened by DeFreitas solely for the purpose of trading in fraudulent securities of companies for which Select American was the transfer agent.

32. In at least 23 of the 48 Franklin Ross Accounts, DeFreitas engaged in a wholesale liquidation of fraudulent securities in LeaseSmart, Bighub, International Energy, NutriOne, Pocketop, Asia Telecom, Pharm Control and Cambridge Resources as well as others for which Select American was the transfer agent and which exhibited the same pattern of fraudulent corporate history.

33. The proceeds of trading from these 23 accounts totalled over USD $750,000 in 2006 and over USD $2.3 million in 2007. All of the trading proceeds were transferred to bank accounts in Ontario that were controlled and owned by DeFreitas.

(iii) Trading by DeFreitas and Boock – The Scottrade Account

34. In January 2007, using fraudulent and deceitful means, DeFreitas and Boock caused a corporate trading account to be opened at Scottrade, a retail brokerage firm in the U.S. that offers discount brokerage services online, in order to trade additional fraudulent securities (the "Scottrade Account"). The Scottrade Account was opened in the name of For Better Living Inc., a company created by DeFreitas and Boock using aliases and nominees.

35. In February and March 2007, DeFreitas and Boock caused share certificates representing millions of fraudulent shares in International Energy, Asia Telecom, Pharm Control and Universe Seismic to be issued by the respective entities and to be deposited to the Scottrade Account. Using the online trading services of Scottrade, Boock sold the fraudulent shares from Ontario between February and October 2007.

36. In July 2007, using fraudulent and deceitful means, DeFreitas and Boock caused approximately $120,000 of the proceeds of the trading in the Scottrade Account to be transferred to them in Ontario.

(iv) Trading by Dubinsky and Khodjiaints

37. Alena Dubinsky and Alex Khodjiaints are residents of Toronto. Dubinsky is the girlfriend of Khodjiaints. Their involvement in the scheme is described below and includes: a) fraudulent and manipulative trading of shares of a number of the Issuer Respondent; and b) participation in an illegal distribution of those shares.

- **RBC Account**

38. In June 2006, at the instruction of Khodjiaints, Dubinsky opened an account at RBC in her name.

39. The account was operated and maintained by Dubinsky and Khodjiaints between June 2006 and March 2007.

40. Between July and September 2006, millions of fraudulent share certificates were issued to Khodjiaints in Dubinsky's name, including shares of: BigHub (42.5 million), Leasesmart (30 million), El Apparel (the fraudulent predecessor company to NutriOne) (12 million), Universal Seismic (the fraudulent predecessor company to Pocketop) (1.8 million) and International Energy (.25 million).

41. At the time, Boock and DeFreitas controlled the issuance of shares in these companies and caused the shares to be issued to Khodjiaints in Dubinsky's name.

42. At the instruction of Khodjiaints, Dubinsky deposited the shares to the RBC account, a significant number of which were sold by December 2006. All of the sales were carried out by or at the instruction of Khodjiaints.

43. Around that time, RBC expressed concerns to Dubinsky regarding the questionable nature of the securities and the trading in the account.

44. As of December 2006, the only activity in the account at RBC had been: a) the delivery of over 100 million securities in entities whose securities were quoted for trading on the Pink Sheets, all of which had Select American as the transfer agent; and b) significant selling activity with respect to the shares.

45. In March 2007, RBC advised Dubinsky that it was restricting the account due to its concerns regarding the securities and the transactions in the account.

- **HSBC Account**

46. In February 2007, as a result of the difficulties in trading in the RBC account, Khodjiaints instructed Dubinsky to open a trading account at HSBC Securities (Canada) Inc. ("HSBC").

47. As with the account at RBC, Dubinsky opened the account at HSBC in her name.

48. In March 2007, at the instruction of Khodjiaints, Dubinsky deposited millions of fraudulent shares of the Bighub (10 million), LeaseSmart (10 million), International Energy (289 million) and Universal Seismic (the fraudulent predecessor to Pocketop) (1.5 million), all of which had also been traded in her account at RBC. In addition, Dubinsky deposited millions of shares of Pharm Control and Asia Telecom to the account.

49. At that time, Boock and DeFreitas controlled the issuance of shares in these companies and caused the shares identified above to be issued to Khodjiaints in Dubinsky's name.

50. Once the shares were deposited, Khodjiaints proceeded to engage in manipulative trading in respect of the securities, and in particular in respect of the shares of Pharm Control and Asia Telecom.

51. Over a 5 day trading period between March 7 and 13, 2007, Khodjiaints sold approximately 40 million shares of Pharm Control, which represented virtually all of the Pharm Control shares issued to him in Dubinsky's name. Khodjiaints carried out the selling following an intensive period of promotional press releases by or on behalf of Pharm Control.

52. The sales of Pharm Control as identified constituted approximately 40% of the total volume of trading in Pharm Control on those days.

53. With respect to the securities of Asia Telecom, most of the trading occurred on 4 separate days within a 6 day period between March 7 and 14, 2007 and consisted of selling large quantities of shares on days when Asia Telecom had made press releases containing promotional information regarding its purported business.

54. In that 4 day period, Khodjiaints sold approximately 60 million shares of Asia Telecom, which represented virtually all of the Asia Telecom shares issued to him in Dubinsky's name.

55. The sales of Asia Telecom as identified constituted approximately 25% of the total volume of trading in Asia Telecom on those days.

56. In addition to the fraudulent and manipulative nature of the trading by Khodjiaints, the trades in the securities of Pharm Control and Asia Telecom were trades in securities not previously issued. Neither a preliminary prospectus nor a prospectus had been filed with the Commission and no receipts had been issued by the Director to qualify the trading of these securities in Ontario.

57. On or around March 12, 2007, Dubinsky sought to withdraw $400,000 in trading proceeds from the account. HSBC did not allow the withdrawal due to its concerns regarding the questionable nature of the securities and the trading that had been carried out in the account.

58. As of March 19, 2007, HSBC restricted the account and any remaining securities were not sold. As of that time, very few securities remained in the account.

59. During the operation of the account at HSBC, the only account activity was: a) the delivery of hundreds of millions of fraudulent shares in entities quoted for trading on the Pink Sheets for which Select American acted as the transfer agent; and b) the virtual wholesale liquidation of those shares on successive or near successive days following the issuance of promotional press releases by the company.

60. The total proceeds generated from the trading in the account at HSBC (attributable almost entirely to trading the fraudulent securities of Pharm Control and Asia Telcom) was approximately $1 million. The trading was the most profitable trading of all the trading across Canada in these securities.

61. The trading in the account was fraudulent, manipulative and constituted an illegal distribution in which both Dubinsky and Khodjiaints participated.

BREACHES OF THE ACT

62. With respect to each of the Individual Respondents, by their involvement in the securities scheme described above, each of them has engaged in acts, practices or courses of conduct relating to securities that they knew or reasonably ought to have known resulted in or contributed to a misleading appearance of trading activity in, or an artificial price for, the securities contrary to subsection 126.1(a) of the Securities Act (the "Act") and, further, perpetrated a fraud on persons or companies contrary to subsection 126.1(b) of the Act.

63. In addition, Dubinsky and Khodjiaints, in trading and carrying out acts in furtherance of trading in the securities of Pharm Control and Asia Telecom as described above, participated in an illegal distribution of those securities contrary to section 53 of the Act.

64. With respect to the Issuer Respondents, by virtue of their status as instruments for securities fraud and by virtue of their fraudulent corporate history, it is contrary to the public interest that their securities trade in Ontario's capital markets.

65. With respect to Select American and Compushare, by virtue of their status as vehicles for securities fraud, it is contrary to the public interest that they be permitted to trade or act as market participants in Ontario's capital markets.

66. Such further and other allegations as Staff may advise and the Commission may permit.

DATED this 16th day of October, 2008.

1.2.2 XI Biofuels Inc. et al. – ss. 127, 127.1

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND -

IN THE MATTER OF
XI BIOFUELS INC., BIOMAXX SYSTEMS INC.,
XIIVA HOLDINGS INC. CARRYING ON BUSINESS AS
XIIVA HOLDINGS INC., XI ENERGY COMPANY,
XI ENERGY AND XI BIOFUELS,
RONALD CROWE AND VERNON SMITH

NOTICE OF HEARING
(Sections 127 and 127.1)

TAKE NOTICE THAT the Ontario Securities Commission (the "Commission") will hold a hearing pursuant to sections 127 and 127.1 of the Ontario *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") at the offices of the Commission at 20 Queen Street West, 17th Floor Hearing Room on Tuesday, October 21, 2008 at 10 a.m., or as soon thereafter as the hearing can be held, to consider:

(i) whether, in the opinion of the Commission, it is in the public interest, pursuant to ss. 127 and 127.1 of the Act to order that:

(a) trading in any securities by XI Biofuels Inc. ("XI Biofuels"), Biomaxx Systems Inc. ("Biomaxx"), Ronald Crowe ("Crowe"), Vernon Smith ("Smith") and Xiiva Holdings Inc. carrying on business as Xiiva Holdings Inc., XI Energy Company, XI Energy and XI Biofuels ("Xiiva") (collectively the "Respondents") cease permanently or for such period as is specified by the Commission;

(b) the acquisition of any securities by the Respondents is prohibited permanently or for such other period as is specified by the Commission;

(c) any exemptions contained in Ontario securities law do not apply to the Respondents permanently or for such period as is specified by the Commission;

(d) the Respondents be reprimanded;

(e) Crowe and Smith (collectively the "Individual Respondents") resign one or more positions that they hold as a director or officer of any issuer, registrant or investment fund manager;

(f) the Individual Respondents be prohibited from becoming or acting as a director or officer of any issuer, a registrant or investment fund manager;

(g) the Respondents be prohibited from becoming or acting as a registrant, as an investment fund manager or as a promoter;

(h) the Respondents each pay an administrative penalty of not more than $1 million for each failure by that respondent to comply with Ontario securities law;

(i) each of the Respondents disgorge to the Commission any amounts obtained as a result of non-compliance by that respondent with Ontario securities law; and,

(j) the Respondents be ordered to pay the costs of the Commission investigation and the hearing;

(ii) whether to make such further orders as the Commission considers appropriate.

BY REASON OF the allegations as set out in the Statement of Allegations of Staff of the Commission dated October 16, 2008 and such additional allegations as counsel may advise and the Commission may permit;

AND BY REASON OF the evidence filed with the Commission and the testimony heard by the Commission;

AND TAKE FURTHER NOTICE that any party to the proceedings may be represented by counsel at the hearing;

AND TAKE FURTHER NOTICE that upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party and such party is not entitled to any further notice of the proceedings.

DATED at Toronto this 16th day of October, 2008

"John Stevenson"
Secretary to the Commission

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND -

IN THE MATTER OF
XI BIOFUELS INC., BIOMAXX SYSTEMS INC.,
XIIVA HOLDINGS INC. CARRYING ON BUSINESS AS
XIIVA HOLDINGS INC., XI ENERGY COMPANY,
XI ENERGY AND XI BIOFUELS,
RONALD CROWE AND VERNON SMITH

STATEMENT OF ALLEGATIONS
OF STAFF OF THE ONTARIO SECURITIES COMMISSION

Staff of the Ontario Securities Commission ("Staff") make the following allegations:

I. THE RESPONDENTS

1. Xiiva Holdings Inc. ("Xiiva") was incorporated in Ontario on or about June 7, 1995. On or about June 25, 2005, Xiiva's status with the Ministry of Government and Consumer Services was described as cancelled for failing to comply with the *Corporations Tax Act*. Xiiva was revived on or about September 24, 2007.

2. Biomaxx Systems Inc. ("Biomaxx") was incorporated in Ontario on or about October 22, 2001.

3. XI Biofuels Inc. ("XI Biofuels") was incorporated in Ontario on or about September 24, 2007.

4. Ronald Crowe ("Crowe") and Vernon Smith ("Smith") are residents of Barrie, Ontario. Staff allege that Crowe and Smith were the directing minds of each of Xiiva, Biomaxx and XI Biofuels during the Material Time (as defined below).

5. Crowe is a director and the president of Xiiva. Smith became a director of Xiiva on or about July 10, 2007 and resigned from that position on or about July 19, 2007. Smith signed treasury directions to Xiiva's transfer agent as a "director" of Xiiva from December 2005 to July 2006 and in August 2007.

6. Smith is a director of Biomaxx and since July 2007, has been the president and sole employee of Biomaxx. Crowe was an officer and director of Biomaxx from May 2005 to July 2007 and was the president of Biomaxx from February 2006 to July 2007.

7. Crowe is the sole officer and director of XI Biofuels.

8. On or about May 21, 2008, Xiiva, Biomaxx and XI Biofuels were petitioned into bankruptcy.

II. BACKGROUND TO ALLEGATIONS

- **Trading in Securities of Biomaxx and Xiiva**

9. Staff allege that between December 2004 and October 2007, Crowe, Smith and Biomaxx traded in securities of Biomaxx. Staff further allege that between December 2004 and November 2007, Crowe, Smith, XI Biofuels and Xiiva traded in securities of Xiiva. The period December 2004 to November 2007 will hereinafter be referred to as the Material Time.

10. Throughout the Material Time, none of the Respondents were registered in any capacity with the Commission.

11. The trades in securities of Biomaxx and Xiiva referred to herein were trades in securities not previously issued and were therefore distributions. No preliminary prospectus was filed and no receipts were issued for them by the Director to qualify the trading of Biomaxx and Xiiva securities.

- **Trading in Securities of Biomaxx**

12. Biomaxx purported to be a company that engaged in the design and construction of biofuel plants for the conversion of plant waste into bio-diesel. The company also purported to offer consulting services.

13. During the Material Time, the address found on Biomaxx's website was the address of a business centre providing, *inter alia*, mail and conference room services to third parties.

14. During the Material Time, more than 2,500,000 Biomaxx securities were issued to more than 200 investors (the "Biomaxx Investors").

15. The transfer agent used by Biomaxx to effect the trades in Biomaxx securities was Heritage Trust Company ("Heritage"), an Ontario corporation located in Toronto.

16. The treasury directions sent to Heritage by Biomaxx in connection with the issuance of Biomaxx securities were signed by either of Smith, Crowe or Crowe's son, Richard Farley Crowe. In each case, Heritage was provided with one of two addresses in Cyprus as the address for the Biomaxx Investors. In fact, some or all of the Biomaxx Investors reside in the United Kingdom and Australia.

17. Some or all of the Biomaxx Investors:

    (a) were cold called by representatives of Pro Capital Asset Management and Trust LLC ("PCAMT") purportedly domiciled in Nicosia, Cyprus;

    (b) were instructed to remit funds to pay for their shares to Alpha Bank located in Nicosia, Cyprus;

    (c) were not aware that their registered address on the Biomaxx shareholder list was an address located in Cyprus; and

    (d) paid between $1.81 USD and $3.96 USD per share for their shares.

18. During the Material Time, less than $350,000 was deposited into the only known bank accounts for Biomaxx.

- **Trading in Securities of Xiiva**

19. During the Material Time, Xiiva carried on business under two different names, XI Energy and XI Biofuels.

20. According to its website, XI Energy professed to be developing "propriety bio-technology" to improve the fermentation process related to the production of ethanol as an alternative fuel and providing environmental consulting services in the fields of biotechnology, biofuels and renewable energy.

21. During the period December 2005 to July 2006, approximately 41,000 Xiiva securities were issued to approximately 12 investors and the share certificates for these securities bore the name Xiiva "operating as XI Energy". In each case, Heritage was given one of two addresses, one in London, UK and the other in Barcelona, Spain as the address of the investor.

22. According to its website, XI Biofuels purported to "design and build small micro-refineries" to produce ethanol for fuel from wood waste. During the period July 2007 to November 2007, more than 200,000 Xiiva securities were issued to more than 70 investors (the "Xiiva Investors"). The share certificates for these securities bore the name Xiiva "operating as XI Biofuels".

23. During the Material Time, the addresses found on the websites for XI Biofuels and XI Energy were, in fact, the addresses of business centres providing, inter alia, mail and conference room services to third parties.

24. Heritage was the transfer agent used by Xiiva. The treasury directions sent to Heritage by Xiiva in connection with the issuance of Xiiva securities were signed by either of Smith or Crowe.

25. In addition to being used as a trade name for Xiiva, XI Biofuels is also the name of a separate corporation wholly owned by Xiiva which was incorporated in Ontario on or about September 24, 2007 through the efforts of Crowe.

26. Shortly after XI Biofuels was incorporated, Crowe opened three bank accounts in the name of XI Biofuels:

    (a) A Canadian dollar bank account at Meridian Credit Union in Barrie, on or about September 25, 2007 (the "Meridian Account");

    (b) A Canadian dollar bank account at a National Bank of Canada branch in Barrie, on or about October 18, 2007; and

(c) A U.S. dollar account at the National Bank of Canada branch in Barrie, on or about November 1, 2007 (which account, along with the account in (b) above, to be referred to hereafter as the "National Accounts").

27. Crowe was the only signatory to the Meridian and National Accounts.

28. During the period July 2007 to November 2007, at least seven different entities were marketing Xiiva treasury shares to potential investors:

(a) Some Xiiva Investors were cold called by representatives of XI Biofuels. Some or all of these Xiiva Investors were directed to remit funds for the purchase of their shares to one of the National Accounts;

(b) Other Xiiva Investors were cold called by an entity calling itself Venpar (Venture Alliance Partners) purportedly domiciled in Copenhagen, Denmark or by an entity calling itself VCPM (VC Private Management), purportedly operating from Switzerland, but domiciled and registered in the British Virgin Islands. Some or all of these Xiiva Investors were directed to remit funds for the purchase of their shares to one of the National or Meridian Accounts; and

(c) Other Xiiva Investors were cold called by entities calling themselves Emerging Equity Group and Strategic Investment Group, both purportedly domiciled in Barcelona, Spain and by Crickmore and Lutz and Prestige Asset Management, both purportedly domiciled in Luxembourg. Some or all of these Xiiva Investors were directed to remit funds for the purchase of their shares to one of two Bank of America accounts in favour of International Escrow Services, purportedly domiciled in Lakeland, Florida.

29. The investor funds deposited into the National and Meridian Accounts relate to the issuance of only 73,700 Xiiva securities. Funds for the payment of 142,746 Xiiva securities from 46 of the Xiiva Investors are not accounted for in any known bank accounts of Xiiva or XI Biofuels.

30. Similarly, funds for the payment of the 41,000 Xiiva securities in the name of Xiiva "operating as XI Energy" issued to 12 investors are not accounted for in any known bank accounts of Xiiva or XI Biofuels.

31. Virtually all of the money on deposit in the Meridian account was wire transferred to Timber Trace Investments, an entity located in Nassau Bahamas ("Timber Trace"). On or about November 7, 2007, Crowe attempted to wire transfer virtually all of the funds on deposit in the National Accounts at that time to Timber Trace.

32. Representatives of Xiiva advised at least one of the Xiiva Investors on or about November 20, 2007, that Xiiva securities would likely be listed on the Frankfurt Exchange in the near future.

SUMMARY OF STAFF'S ALLEGATIONS

33. The specific allegations advanced by Staff are that during the Material Time:

(a) The Respondents traded in securities of Biomaxx and/or Xiiva without being registered to trade in securities contrary to section 25(1)(a) of the *Securities Act*, R.S.O. 1990, c. S.5, (the "Act") and contrary to the public interest;

(b) The Respondents traded in securities of Biomaxx and/or Xiiva when a preliminary prospectus and a prospectus had not been filed and receipts had not been issued for either of Biomaxx or Xiiva by the Director, contrary to section 53(1) of the Act and contrary to the public interest;

(c) The Respondents engaged or participated in acts, practices or courses of conduct relating to the distribution of and trading of Biomaxx and/or Xiiva securities that were contrary to the public interest and harmful to the integrity of the Ontario capital markets;

(d) Representatives or agents of Xiiva and/or XI Biofuels made representations without the written permission of the Director, with the intention of effecting a trade in securities of Xiiva, that such security would be listed on a stock exchange or quoted on any quotation or trade reporting system, contrary to section 38(3) of the Act and contrary to the public interest;

(e) Smith and Crowe, as directors and/or officers or *de facto* directors and/or officers of Biomaxx, authorized, permitted or acquiesced in the commission of the violations of sections 25 and 53 of the Act, set out above, by Biomaxx and, accordingly, failed to comply with Ontario securities law pursuant to section 129.2 of the Act; and

(f) Smith and Crowe, as directors and/or officers of Xiiva and XI Biofuels, or *de facto* directors and/or officers of Xiiva and XI Biofuels, authorized, permitted or acquiesced in the commission of the violations of sections 25, 38 and 53 of the Act, set out above, by Xiiva and XI Biofuels and, accordingly, failed to comply with Ontario securities law pursuant to section 129.2 of the Act.

34. Staff reserve the right to make such other allegations as Staff may advise and the Commission may permit.

DATED at Toronto, October 16th, 2008

1.3 News Releases

1.3.1 Canadian Securities Regulators Seek Input on Proposed Trade-through Protection Rule

FOR IMMEDIATE RELEASE
October 17, 2008

CANADIAN SECURITIES REGULATORS SEEK INPUT
ON PROPOSED TRADE-THROUGH PROTECTION RULE

Toronto – The Canadian Securities Administrators (CSA) today published amendments to National Instrument 21-101 *Marketplace Operation* (NI 21-101) and National Instrument 23-101 *Trading Rules* (NI 23-101) that would introduce a trade-through protection rule.

Trade-through protection ensures that better-priced orders are executed first. The proposed rule would require each marketplace to establish, maintain and enforce written policies and procedures that are designed to prevent trade-throughs. Trade-through protection is currently addressed as part of the best price obligation imposed by the Investment Industry Regulatory Organization of Canada (IIROC).

"Trade-through protection is important to maintain investor confidence in the fairness and efficiency of our market," said Jean St-Gelais, Chair of the CSA and President & Chief Executive Officer of the Autorité des marchés financiers (Québec). "At this stage, having sought input on a trade-through protection framework and its impact on the Canadian market, we have developed a proposed rule that will ultimately benefit investors."

Throughout the development of the proposed rule, the CSA has sought feedback from Canadian market participants, the majority of whom voiced their support for trade-through protection. The proposed rule follows the publication of a CSA Discussion Paper 23-403 *Market Structure Developments and Trade-through Obligations*, as well as a public forum in 2005, and a Joint Notice with Market Regulation Services Inc. (now IIROC) on *Trade-Through, Best Execution and Access to Marketplaces* in April 2007.

The CSA invites interested stakeholders to provide input on the amendments and responses to the various questions raised in the CSA Notice. National Instrument 21-101 *Marketplace Operation*, National Instrument 23-101 *Trading Rules*, and related companion policies are available on various CSA members' websites. The comment period is open until January 15, 2009.

The CSA, the council of the securities regulators of Canada's provinces and territories, co-ordinates and harmonizes regulation for the Canadian capital markets.

For more information:

Laurie Gillett
Ontario Securities Commission
416-595-8913

Sylvain Théberge
Autorité des marchés financiers
514-940-2176

Ken Gracey
British Columbia Securities Commission
604-899-6577

Mark Dickey
Alberta Securities Commission
403-297-4481

Marc Gallant
Department of the Attorney General
Prince Edward Island
902-368-4552

Fred Pretorius
Yukon Securities Registry
867-667-5225

Ainsley Cunningham
Manitoba Securities Commission
204-945-4733

Wendy Connors-Beckett
New Brunswick Securities Commission
506 643-7745

Nathalie MacLellan
Nova Scotia Securities Commission
902-424-8586

Barbara Shourounis
Saskatchewan Financial Services Commission
306-787-5842

Doug Connolly
Financial Services Regulation Div.
Newfoundland and Labrador
709-729-2594

Louis Arki
Nunavut Securities Registry
867-975-6587

Donn MacDougall
Securities Registry
Northwest Territories
867-920-8984

1.4 Notices from the Office of the Secretary

1.4.1 Robert Kasner

FOR IMMEDIATE RELEASE
October 16, 2008

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
ROBERT KASNER

TORONTO – The Commission issued an Order on consent of all parties scheduling a Hearing on the Merits to commence on June 1, 2009 at 10:00 a.m. and proceed through June 3, 2009, or on such other dates as are agreed by the parties and determined by the Office of the Secretary.

A copy of the Order dated October 15, 2008 is available at **www.osc.gov.on.ca**.

OFFICE OF THE SECRETARY
JOHN P. STEVENSON
SECRETARY

For media inquiries: Wendy Dey
Director, Communications
& Public Affairs
416-593-8120

Laurie Gillett
Manager, Public Affairs
416-595-8913

Carolyn Shaw-Rimmington
Assistant Manager,
Public Affairs
416-593-2361

For investor inquiries: OSC Contact Centre
416-593-8314
1-877-785-1555 (Toll Free)

1.4.2 Conrad M. Black and John A. Boultbee

FOR IMMEDIATE RELEASE
October 16, 2008

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
CONRAD M. BLACK AND JOHN A. BOULTBEE

TORONTO – Following an *in camera* hearing held on January 10 and 11, 2007, today the Commission published its Amended Confidential Reasons and Decision, dated March 5, 2007 and its Amended Confidential Order dated March 5, 2007.

A copy of the Amended Confidential Reasons and Decision, dated March 5, 2007, which includes an introductory note with respect to the reasons for sealing the original document and the Amended Confidential Order dated March 5, 2007 are available at **www.osc.gov.on.ca**.

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Director, Communications
& Public Affairs
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Laurie Gillett
Manager, Public Affairs
416-595-8913

Carolyn Shaw-Rimmington
Assistant Manager,
Public Affairs
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1.4.3 Irwin Boock et al.

FOR IMMEDIATE RELEASE
October 17, 2008

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
IRWIN BOOCK, STANTON DEFREITAS,
JASON WONG, SAUDIA ALLIE,
ALENA DUBINSKY, ALEX KHODJIAINTS
SELECT AMERICAN TRANSFER CO.,
LEASESMART, INC.,
ADVANCED GROWING SYSTEMS, INC.,
INTERNATIONAL ENERGY LTD.,
NUTRIONE CORPORATION,
POCKETOP CORPORATION,
ASIA TELECOM LTD.,
PHARM CONTROL LTD.,
CAMBRIDGE RESOURCES CORPORATION,
COMPUSHARE TRANSFER CORPORATION,
FEDERATED PURCHASER, INC.,
TCC INDUSTRIES, INC., FIRST NATIONAL
ENTERTAINMENT CORPORATION,
WGI HOLDINGS, INC.
AND ENERBRITE TECHNOLOGIES GROUP

TORONTO – The Office of the Secretary issued a Notice of Hearing setting the matter down to be heard on November 24, 2008 at 10 a.m. or as soon thereafter as the hearing can be held in the above named matter.

A copy of the Notice of Hearing dated October 16, 2008 and Statement of Allegations of Staff of the Ontario Securities Commission dated October 16, 2008 are available at

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JOHN P. STEVENSON
SECRETARY

For media inquiries: Wendy Dey
Director, Communications
& Public Affairs
416-593-8120

Laurie Gillett
Manager, Public Affairs
416-595-8913

Carolyn Shaw-Rimmington
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Public Affairs
416-593-2361

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1.4.4 XI Biofuels Inc. et al.

FOR IMMEDIATE RELEASE
October 17, 2008

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
XI BIOFUELS INC., BIOMAXX SYSTEMS INC.,
XIIVA HOLDINGS INC. CARRYING ON BUSINESS AS
XIIVA HOLDINGS INC., XI ENERGY COMPANY,
XI ENERGY AND XI BIOFUELS,
RONALD CROWE AND VERNON SMITH

TORONTO – The Office of the Secretary issued a Notice of Hearing setting the matter down to be heard on October 21, 2008 at 10 a.m. or as soon thereafter as the hearing can be held in the above named matter.

A copy of the Notice of Hearing dated October 16, 2008 and Statement of Allegations of Staff of the Ontario Securities Commission dated October 16, 2008 are available at **www.osc.gov.on.ca**.

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JOHN P. STEVENSON
SECRETARY

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Director, Communications
& Public Affairs
416-593-8120

Laurie Gillett
Manager, Public Affairs
416-595-8913

Carolyn Shaw-Rimmington
Assistant Manager,
Public Affairs
416-593-2361

For investor inquiries: OSC Contact Centre
416-593-8314
1-877-785-1555 (Toll Free)

1.4.5 Irwin Boock et al.

FOR IMMEDIATE RELEASE
October 17, 2008

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
IRWIN BOOCK, SVETLANA KOUZNETSOVA,
VICTORIA GERBER,
COMPUSHARE TRANSFER CORPORATION,
FEDERATED PURCHASER, INC.,
TCC INDUSTRIES, INC.,FIRST NATIONAL
ENTERTAINMENT CORPORATION,
WGI HOLDINGS, INC. AND
ENERBRITE TECHNOLOGIES GROUP

TORONTO – The Commission issued an Order in the above matter which provides that in relation to all Respondents, except Gerber and Kouznetsova:

1. the hearing to extend the Temporary Cease Trade Order, as amended, is adjourned until November 24, 2008 at 10:00 a.m.;

2. pursuant to subsection 127(8) of the Act, the Temporary Cease Trade Order, as amended, is extended until November 25, 2008 or until further order of the Commission.

A copy of the Order dated October 17, 2008 is available at **www.osc.gov.on.ca**.

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JOHN P. STEVENSON
SECRETARY

For media inquiries: Wendy Dey
Director, Communications
& Public Affairs
416-593-8120

Laurie Gillett
Manager, Public Affairs
416-595-8913

Carolyn Shaw-Rimmington
Assistant Manager,
Public Affairs
416-593-2361

For investor inquiries: OSC Contact Centre
416-593-8314
1-877-785-1555 (Toll Free)

1.4.6 Stanton De Freitas

FOR IMMEDIATE RELEASE
October 17, 2008

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
STANTON DE FREITAS

TORONTO – The Commission issued an Order which provides that:

1. the hearing to extend the Temporary Order, as modified, is adjourned until November 24, 2008 at 10:00 a.m.; and

2. pursuant to subsection 127(8) of the Act, the Temporary Order, as modified, is extended until, November 25, 2008 or until further order of the Commission.

A copy of the Order dated October 17, 2008 is available at **www.osc.gov.on.ca**.

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SECRETARY

For media inquiries: Wendy Dey
Director, Communications
& Public Affairs
416-593-8120

Laurie Gillett
Manager, Public Affairs
416-595-8913

Carolyn Shaw-Rimmington
Assistant Manager,
Public Affairs
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1.4.7 David Watson et al.

FOR IMMEDIATE RELEASE
October 17, 2008

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, C. S.5, AS AMENDED

AND

IN THE MATTER OF
DAVID WATSON, NATHAN ROGERS,
AMY GILES, JOHN SPARROW,
LEASESMART, INC.,
ADVANCED GROWING SYSTEMS, INC.
(a Florida corporation),
PHARM CONTROL LTD., THE BIGHUB.COM, INC,,
UNIVERSAL SEISMIC ASSOCIATES INC.,
POCKETOP CORPORATION, ASIA TELECOM LTD.,
INTERNATIONAL ENERGY LTD.,
CAMBRIDGE RESOURCES CORPORATION,
NUTRIONE CORPORATION AND
SELECT AMERICAN TRANSFER CO.

TORONTO – The Commission issued an Order today which provides that in relation to all Respondents, except Watson, Rogers, Giles and Sparrow:

1. the hearing to extend the Temporary Orders, as modified, is adjourned until November 24, 2008 at 10:00 a.m.; and

2. pursuant to subsection 127(8) of the Act, the Temporary Orders, as modified, are extended until November 25, 2008 or until further order of the Commission.

A copy of the Order dated October 17, 2008 is available at **www.osc.gov.on.ca**.

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Public Affairs
416-593-2361

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416-593-8314
1-877-785-1555 (Toll Free)

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Chapter 2

Decisions, Orders and Rulings

2.1 Decisions

2.1.1 Mackenzie Financial Corporation et al.

Headnote

NP 11-203 Process for Exemptive Relief Applications in Mutliple Jurisdictions – Approval of mutual fund merger – approval required because merger does not meet the criteria for pre-approval – fee structure of merging funds not substantially similar – some mergers are taxable events – filer providing access, rather than sending, most recent annual and interim financial statements to shareholders of terminating fund.

Applicable Legislative Provisions

National Instrument 81-102 Mutual Funds, s. 5.5(1)(b).

September 26, 2008

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(THE "JURISDICTION")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATION IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
MACKENZIE FINANCIAL CORPORATION
(the "FILER")

AND

IN THE MATTER OF
PUTNAM CANADIAN MONEY MARKET FUND,
PUTNAM CANADIAN BOND FUND,
PUTNAM CANADIAN BALANCED FUND,
PUTNAM U.S. VOYAGER FUND,
PUTNAM U.S. VALUE FUND, AND
PUTNAM INTERNATIONAL FUND
(collectively, the "TERMINATING FUNDS")

AND

IN THE MATTER OF
MACKENZIE SENTINEL MONEY MARKET FUND,
MACKENZIE SENTINEL BOND FUND,
MACKENZIE MAXXUM CANADIAN BALANCED FUND,
MACKENZIE UNIVERSAL U.S. GROWTH
LEADERS CLASS (UNHEDGED),
MACKENZIE UNIVERSAL U.S. BLUE CHIP CLASS,
AND MACKENZIE FOCUS INTERNATIONAL CLASS
(collectively, the "CONTINUING FUNDS")

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer on behalf of the Terminating Funds for a decision under the securities legislation of the Jurisdiction of the principal regulator (the "Legislation") for approval of the proposed mergers of the Terminating Funds into the respective Continuing Funds (the "Proposed Mergers") pursuant to subsection 5.5(1)(b) of National Instrument 81-102 *Mutual Funds* ("NI 81-102") (the "Exemption Sought").

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions:

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) Mackenzie has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, Northwest Territories, Nunavut and Yukon.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Filers:

The Filer

1. Mackenzie is a corporation governed by the laws of Ontario and is registered as an advisor in the categories of investment counsel and portfolio manager in Ontario, Manitoba and Alberta. Mackenzie is also registered with the Ontario

Securities Commission as a dealer in the category of Limited Market Dealer, as well as registered under the *Commodity Futures Act* (Ontario) in the categories of Commodity Trading Counsel & Commodity Trading Manager.

2. Mackenzie is the manager and trustee of the Terminating Funds, each of which is an open-ended mutual fund trust governed under the laws of Ontario.

3. Mackenzie is the manager and trustee of the Continuing Funds, of which Mackenzie Sentinel Money Market Fund, Mackenzie Sentinel Bond Fund and Mackenzie Maxxum Canadian Balanced Fund are open-ended mutual fund trusts governed under the laws of Ontario and of which, Mackenzie Universal U.S. Growth Leaders Class (Unhedged), Mackenzie Universal U.S. Blue Chip Class, and Mackenzie Focus International Class are classes of shares of Mackenzie Financial Capital Corporation ("Capitalcorp"), a mutual fund corporation governed by the laws of Ontario. (The Terminating Funds and Continuing Funds are collectively referred to as the "Funds" and each may be referred to as a "Fund".)

The Funds

4. Series A, D and F units of the Terminating Funds are available and are offered for sale in all provinces and territories of Canada under a simplified prospectus and annual information form dated April 8, 2008, as amended.

5. Series A, B, G and I units of the Mackenzie Sentinel Money Market Fund; Series A, F, G, I, O and M units of Mackenzie Sentinel Bond Fund; Series A, F, I, O, P T6, and T8 units Mackenzie Maxxum Canadian Balanced Fund; Series A, F, I and O shares of Mackenzie Universal U.S. Growth Leaders Class (Unhedged); Series A, F, I and O shares of Mackenzie Universal U.S. Blue Chip Class and Series A, F, I and O shares of Mackenzie Focus International Class are available and are offered for sale in all provinces and territories of Canada under a simplified prospectus and annual information form dated November 14, 2007, as amended. In addition, Series F of Mackenzie Sentinel Money Market Fund, Series D of Mackenzie Maxxum Canadian balanced Fund, Series D of Mackenzie Universal U.S. Growth Leaders Class, Series D of Mackenzie Universal U.S. Blue Chip Class and Series D of Mackenzie Focus International Class are being created and will be qualified by way of a prospectus amendment prior to the effective date of the mergers by September 26, 2008.

6. The Funds are reporting issuers under the applicable securities legislation of each province and territory of Canada and are not on the list of defaulting reporting issuers maintained under the applicable securities legislation of the Decision Makers.

7. Other than where the Decision Makers have exempted a Fund therefrom, each of the Funds follows the standard investment restrictions and practices established by the Authorities.

8. The net asset value for each series of units of the Funds is calculated on a daily basis on each day the Toronto Stock Exchange is open for trading.

The Mergers

9. The Filer proposes to merge the Terminating Funds into the Continuing Funds. A press release, material change report, and amendment to the simplified prospectus and annual information form of the Terminating Funds and the Continuing Funds were filed on SEDAR on or about June 30, 2008, in respect of the Proposed Mergers.

10. A management information circular (the "Circular"), in connection with the Proposed Mergers was filed on SEDAR and mailed to the Terminating Funds' investors of record, as at August 11, 2008, on or about August 26, 2008.

11. As required by National Instrument 81-107, an Independent Review Committee (the "IRC") has been appointed for the Funds. Mackenzie presented the terms of the Proposed Mergers to the IRC for a recommendation. The IRC reviewed the Proposed Mergers and recommended that it be put to shareholders of the Funds for their consideration on the basis that the Proposed Mergers would achieve a fair and reasonable result for the Funds.

12. Unitholders of the Terminating Funds were asked to approve the Proposed Mergers at a special meeting of unitholders. Implicit in the approval of unitholders of the Proposed Mergers is the adoption by the Terminating Funds of the investment objectives and strategies, and fee structure of the Continuing Funds. The unitholders approved the Proposed Mergers on September 22, 2008.

13. Mackenzie will pay all of the expenses incurred in connection with the Proposed Mergers, including all brokerage commissions payable in connection with the acquisition by the Continuing Funds of the investment portfolio of the Terminating Funds, the costs of holding the special meeting, and of soliciting proxies.

14. Subject to the required approvals of the Authorities and investors, the Proposed Mergers will be implemented on or about September 26, 2008.

15. Investors of Terminating Funds will continue to have the right to redeem units of the Terminating Funds for cash at any time up to the close of business on the business day immediately preceding the effective date of the Proposed Mergers. Some investors may, if they choose to redeem their shares for cash, incur redemption charges and/or other fees.

16. Following the Proposed Mergers, the Continuing Funds will continue as publicly offered open-ended mutual funds.

17. Mackenzie has concluded that pre-approval of the Proposed Mergers is not available under subsection 5.6(1) of NI 81-102 because the fee structures of the Terminating Funds are not, or may be considered not to be, "substantially similar" to the fee structures of their corresponding Continuing Funds. Otherwise, the Proposed Mergers comply with all other criteria for pre-approved reorganizations and transfers set out in section 5.6 of NI 81-102, except for those criteria from which the Filer has previously obtained future relief.

18. The Filer has previously obtained relief from the simplified prospectus and financial statement delivery requirements in subparagraph 5.6(1)(f)(ii) of NI 81-102. The conditions set out in that relief have been met with respect to the Proposed Mergers.

19. The management expense ratios ("MERs") of the Continuing Funds are less than that of the pre-waiver MERs of the corresponding Terminating Funds. In many cases, the Filer waived or absorbed the fund operating expenses for a Terminating Fund to reduce the MER. The Filer intends to immediately discontinue this practice. The Filer will pay for all variable operating expenses and charge each Continuing Fund a fixed rate annual administration fee (the "Administration Fee"). In addition to the Administration Fee, the Continuing Funds will continue to be charged fund costs (the "Fund Costs") consisting of: interest and borrowing costs; all applicable taxes; all IRC fees and expenses; fees related to external services that are not commonly charged in the Canadian mutual fund industry as of June 15, 2007; and the costs of complying with any new regulatory requirements imposed after June 15, 2007.

20. The fundamental investment objectives of the Terminating Funds are compatible with those of the corresponding Continuing Funds.

21. Putnam Canadian Money Market Fund, Putnam Canadian Bond Fund, and Putnam Canadian Balanced Fund are mutual fund trusts, which are proposed to merge with other mutual find trusts. As a result, the Proposed Mergers for these three funds will be completed on a tax deferred basis.

22. Putnam U.S. Voyager Fund, Putnam U.S. Value Fund, and Putnam International Fund are each merging into a different class of shares of Capitalcorp. As a result, these transactions will be taxable events for investors who hold these Funds outside of a registered plan. For investors who hold these Funds within a registered plan, such as an RRSP, RRIF or RESP, there are no tax consequences to the Proposed Mergers. For taxable investors, Mackenzie will offer unitholders the opportunity to file an election to defer gains under Section 85(1) of the Income Tax Act. For investors who make such an election, there will be no immediate tax impact resulting from the Proposed Mergers. Capital gains or losses, if any, will only be realized once an investor redeems shares from Mackenzie Financial Capital Corporation. Until such time, taxable investors will benefit from the ability to exchange on a tax-deferred basis between all Capitalcorp funds.

23. Complete details of the tax election package will be sent to all taxable investors by Mackenzie upon completion of the Proposed Mergers.

24. The tax implications of the Proposed Mergers, as well as the differences between the Terminating Funds and Continuing Funds were described in the Circular so that investors of the Terminating Funds could consider this information before voting on the Proposed Mergers.

25. The Flier submits that the Proposed Mergers will result in the following benefits:

    a. Superior Performance of the Continuing Funds: The Continuing Funds have demonstrated similar or better historical performance over most time periods (as of July 31st 2008),

    b. Similar or Lower MER: In all cases, the MER charged to investors in the Continuing Fund is less than the pre-waiver MER charged to investors in the Terminating Fund.

    c. Greater certainty concerning operating expenses: Mackenzie bears the cost of most variable operating expenses for the Continuing Funds other than Fund Costs in exchange for an Administration Fee that it charges to each series of each Continuing Fund. This ensures greater predictability and transparency of future expenses year to year.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted.

"R. Goldberg"
Manager, Investment Funds Branch
Ontario Securities Commission

2.1.2 FAP USA, L.P. - s. 6.1(1) of NI 31-102 National Registration Database and s. 6.1 of OSC Rule 13-502 Fees

Applicant seeking registration as an international dealer is exempted from the electronic funds transfer requirement pursuant to subsection 6.1(1) of National Instrument 31-102 – National Registration Database and activity fee contemplated under section 4.1 of Ontario Securities Commission Rule 13-502 – Fees is waived in respect of this discretionary relief, subject to certain conditions.

Rules Cited

National Instrument 31-102 National Registration Database (2007) 30 OSCB 5430, s. 6.1.
Ontario Securities Commission Rule 13-502 – Fees (2003) 26 OSCB 867, ss. 4.1, 6.1.

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED
(the Act)

AND

IN THE MATTER OF
FAP USA, L.P.

DECISION
(Subsection 6.1(1) of National Instrument 31-102 - National Registration Database and Section 6.1 of Ontario Securities Commission Rule 13-502 - Fees)

UPON the Director having received the application of FAP USA, L.P. (the **Applicant**) for an order pursuant to subsection 6.1(1) of National Instrument 31-102 - *National Registration Database* (**NI 31-102**) granting the Applicant relief from the electronic funds transfer requirement contemplated under NI 31-102 and for relief from the activity fee requirement contemplated under section 4.1 of Ontario Securities Commission Rule 13-502 - *Fees* (**Rule 13-502**) in respect of this discretionary relief;

AND UPON considering the application and the recommendation of the staff of the Ontario Securities Commission (the **Commission**);

AND UPON the Applicant having represented to the Director as follows:

1. The Applicant is a limited partnership formed under the laws of the State of Delaware in the United States of America. The head office of the Applicant is located in New York, New York, United States of America.

2. The Applicant is registered as a broker-dealer with the Securities and Exchange Commission and is a member of the Financial Industry Regulatory Authority in the United States.

3. The Applicant is not registered in any capacity under the Act and is not a reporting issuer in any province or territory of Canada. However, the Applicant is in the process of applying to the Commission for registration under the Act as a dealer in the category of international dealer.

4. NI 31-102 requires that all registrants in Canada enrol with CDS Inc. (**CDS**) and use the national registration database (**NRD**) to complete certain registration filings. As part of the enrolment process, registrants are required to open an account with a member of the Canadian Payments Association from which fees may be paid with respect to the NRD by electronic pre-authorized debit (the **electronic funds transfer requirement** or **EFT Requirement**).

5. The Applicant anticipates encountering difficulties in setting up a Canadian based bank account for purposes of fulfilling the EFT Requirement.

6. The Applicant confirms that it is not registered in, and does not intend to register in, another category to which the EFT Requirement applies and that Ontario is the only jurisdiction in which it is seeking registration.

7. Staff of the Canadian Securities Administrators has indicated that, with respect to applications from international dealers and international advisers (or applicants in equivalent categories of registration) for relief from the EFT Requirement, it is prepared to recommend waiving the fee normally required to accompany applications for discretionary relief (the **Application Fee**).

8. For Ontario registrants, the requirement for payment of the Application Fee is set out in section 4.1 of Rule 13-502.

AND UPON the Director being satisfied that to do so would not be prejudicial to the public interest;

IT IS THE DECISION of the Director, pursuant to subsection 6.1(1) of NI 31-102 that the Applicant is granted an exemption from the EFT Requirement for so long as the Applicant:

A. makes acceptable alternative arrangements with CDS for the payment of NRD fees and makes such payment within ten (10) business days of the date of the NRD filing or payment due date;

B. pays its participation fee under the Act to the Commission by cheque, draft, money order or other acceptable means at the time of filing its application for annual renewal, which shall be no later than the first day of December in each year;

C. pays any applicable activity fees, or other fees that the Act requires it to pay to the Commission, by cheque, draft, money order or other acceptable means at the appropriate time; and

D. is not registered in any other Canadian jurisdiction in another category to which the EFT Requirement applies, or has received an exemption from the EFT Requirement in each jurisdiction to which the EFT Requirement applies;

PROVIDED THAT the Applicant submits a similar application in any other Canadian jurisdiction where it becomes registered as an international dealer, international adviser or in an equivalent registration category;

AND IT IS THE FURTHER DECISION of the Director, pursuant to section 6.1 of Rule 13-502, that the Application Fee will be waived in respect of the application for this Decision.

"Donna Leitch"
Assistant Manager, Registrant Regulation
Ontario Securities Commission

2.1.3 KKR Capital Markets LLC - s. 6.1(1) of NI 31-102 National Registration Database and s. 6.1 of OSC Rule 13-502 Fees

Applicant seeking registration as an international dealer is exempted from the electronic funds transfer requirement pursuant to subsection 6.1(1) of National Instrument 31-102 – National Registration Database and activity fee contemplated under section 4.1 of Ontario Securities Commission Rule 13-502 – Fees is waived in respect of this discretionary relief, subject to certain conditions.

Rules Cited

National Instrument 31-102 – National Registration Database (2007) 30 OSCB 5430, s. 6.1.
Ontario Securities Commission Rule 13-502 – Fees (2003) 26 OSCB 867, ss. 4.1, 6.1.

October 7, 2008

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED
(the Act)

AND

IN THE MATTER OF
KKR Capital Markets LLC

DECISION
(Subsection 6.1(1) of National Instrument 31-102 - National Registration Database and Section 6.1 of Ontario Securities Commission Rule 13-502 - Fees)

UPON the Director having received the application of KKR Capital Markets LLC (the **Applicant**) for an order pursuant to subsection 6.1(1) of National Instrument 31-102 - *National Registration Database* (**NI 31-102**) granting the Applicant relief from the electronic funds transfer requirement contemplated under NI 31-102 and for relief from the activity fee requirement contemplated under section 4.1 of Ontario Securities Commission Rule 13-502 - *Fees* (**Rule 13-502**) in respect of this discretionary relief;

AND UPON considering the application and the recommendation of the staff of the Ontario Securities Commission (the **Commission**);

AND UPON the Applicant having represented to the Director as follows:

1. The Applicant is a limited liability company formed under the laws of the State of Delaware in the United States of America. The head office of the Applicant is located in New York, New York, United States of America.

2. The Applicant is registered as a broker-dealer with the Securities and Exchange Commission and is a member of the Financial Industry Regulatory Authority in the United States.

3. The Applicant is not registered in any capacity under the Act and is not a reporting issuer in any province or territory of Canada. However, the Applicant is in the process of applying to the Commission for registration under the Act as a dealer in the category of international dealer.

4. NI 31-102 requires that all registrants in Canada enrol with CDS Inc. (**CDS**) and use the national registration database (**NRD**) to complete certain registration filings. As part of the enrolment process, registrants are required to open an account with a member of the Canadian Payments Association from which fees may be paid with respect to the NRD by electronic pre-authorized debit (the **electronic funds transfer requirement** or **EFT Requirement**).

5. The Applicant anticipates encountering difficulties in setting up a Canadian based bank account for purposes of fulfilling the EFT Requirement.

6. The Applicant confirms that it is not registered in, and does not intend to register in, another category to which the EFT Requirement applies and that Ontario is the only jurisdiction in which it is seeking registration.

7. Staff of the Canadian Securities Administrators has indicated that, with respect to applications from international dealers and international advisers (or applicants in equivalent categories of registration) for relief from the EFT Requirement, it is prepared to recommend waiving the fee normally required to accompany applications for discretionary relief (the **Application Fee**).

8. For Ontario registrants, the requirement for payment of the Application Fee is set out in section 4.1 of Rule 13-502.

AND UPON the Director being satisfied that to do so would not be prejudicial to the public interest;

IT IS THE DECISION of the Director, pursuant to subsection 6.1(1) of NI 31-102 that the Applicant is granted an exemption from the EFT Requirement for so long as the Applicant:

A. makes acceptable alternative arrangements with CDS for the payment of NRD fees and makes such payment within ten (10) business days of the date of the NRD filing or payment due date;

B. pays its participation fee under the Act to the Commission by cheque, draft, money order or other acceptable means at the time of filing its application for annual renewal, which shall be no later than the first day of December in each year;

C. pays any applicable activity fees, or other fees that the Act requires it to pay to the Commission, by cheque, draft, money order or other acceptable means at the appropriate time; and

D. is not registered in any other Canadian jurisdiction in another category to which the EFT Requirement applies, or has received an exemption from the EFT Requirement in each jurisdiction to which the EFT Requirement applies;

PROVIDED THAT the Applicant submits a similar application in any other Canadian jurisdiction where it becomes registered as an international dealer, international adviser or in an equivalent registration category;

AND IT IS THE FURTHER DECISION of the Director, pursuant to section 6.1 of Rule 13-502, that the Application Fee will be waived in respect of the application for this Decision.

"Donna Leitch"
Assistant Manager, Registrant Regulation
Ontario Securities Commission

2.1.4 Telstra Corporation Limited - MRRS Decision

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – subsection 1(10) of the Securities Act – Application by Australian issuer for a decision that it is not a reporting issuer – Canadian resident shareholders beneficially own less than 2% of the issuer's outstanding shares and represent less than 2% of total number of shareholders – In the last 12 months, issuer has not conducted an offering of its securities in Canada or taken any steps that indicate that there is a market for its securities in Canada – issuer has no plans to seek a public offering or private placement of its securities in Canada – No securities of the issuer trade on any market or exchange in Canada (or have ever traded on any market or exchange in Canada) – issuer's securities listed on Australian Stock Exchange – issuer is subject to reporting requirements under Australian securities law – issuer has issued a press release announcing that it has submitted an application for a decision that it is not a reporting issuer – issuer has undertaken to continue to concurrently deliver to its securityholders resident in Canada, all disclosure material it is required by Australian securities law to deliver to Australian resident securityholders – requested relief granted.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10).

October 15, 2008

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN,
MANITOBA, ONTARIO, QUEBEC,
NEW BRUNSWICK, PRINCE EDWARD ISLAND,
NOVA SCOTIA, AND NEWFOUNDLAND
AND LABRADOR

AND

IN THE MATTER OF THE
MUTUAL RELIANCE REVIEW SYSTEM
FOR EXEMPTIVE RELIEF APPLICATIONS

AND

IN THE MATTER OF
TELSTRA CORPORATION LIMITED

MRRS DECISION DOCUMENT

Background

The local securities regulatory authority or regulator (the "**Decision Maker**") in each of British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Nova Scotia and Ontario (the "**Jurisdictions**") has received an application from Telstra Corporation Limited (the "**Applicant**") for a decision under the securities legislation of the Jurisdictions (the "**Legislation**") that the Applicant is not a reporting issuer under the Legislation (the "**Requested Relief**").

Under the Mutual Reliance Review System for Exemptive Relief Applications:

(a) the Ontario Securities Commission is the principal regulator for this application, and

(b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Applicant:

1. The Applicant is incorporated under and regulated by the *Australian Corporations Act 2001* (the "**Australian Corporations Act**") as a "public company". The Applicant's head office and principal place of business is in Melbourne, Australia. The Applicant is currently a reporting issuer in each of the Jurisdictions.

2. The Applicant, together with its subsidiaries, is the principal telecommunications carrier in Australia, offering a broad range of telecommunications and information services. The Applicant's market capitalization was approximately A$53.879 Billion as at July 21, 2008.

3. The Applicant underwent a capital reorganization in November 1997 pursuant to which the Government of the Commonwealth of Australia (the "**Commonwealth**"), which had held all of the issued and outstanding capital stock of the Applicant, sold approximately 33.3% of the Applicant's issued shares to the public in the form of ordinary shares ("**Ordinary Shares**") or American Depositary Receipts ("**ADRs**") (the "**Commonwealth Sale**").

4. In October 1999 the Commonwealth sold an additional 16.6% of the Applicant's then issued Ordinary Shares to the public.

5. On November 20, 2006, the Commonwealth sold a further 31.1% of the Applicant's then issued Ordinary Shares to the public and transferred its remaining 17.1% to the Future Fund, an investment fund established by the Commonwealth pursuant to the *Future Fund Act 2006* (Australia). The board of guardians of the Future Fund is responsible for investment decisions and holds all Future Fund investments for and on behalf of the Commonwealth. The board of guardians is a separate legal entity to the Commonwealth.

6. The Ordinary Shares are quoted on the Australian Stock Exchange and on the New Zealand Stock Exchange. In addition, the Applicant has debt securities valued at approximately A$16.6 billion listed on the Australian Stock Exchange, the London Stock Exchange and the Swiss Stock Exchange.

7. The Applicant is not in default of any reporting or other requirement of the Australian Stock Exchange, the New Zealand Stock Exchange, the London Stock Exchange, the Swiss Stock Exchange or the Australian Corporations Act. The Applicant is not in default of securities legislation in any jurisdiction in Canada, except that the Applicant has not filed on SEDAR its annual financial statements and related information for the year ended June 30, 2008 that were due on September 29, 2008 (or paid related filing and participation fees) in view of the fact that the final form of this decision document was pending on that date.

8. The ADRs were issued by the Bank of New York as depositary and until April 23, 2007 were listed on the New York Stock Exchange (the "**NYSE**"). As at July 14, 2008, there were 27,805,022 ADRs outstanding. There are approximately 48 registered holders of ADRs of the Applicant worldwide. The ADRs currently trade on the over-the-counter market in the United States under the symbol "TLSYY".

9. As of July 14, 2008 there was an aggregate of 12,433,047,357 Ordinary Shares of the Applicant issued and outstanding worldwide. The only issued and outstanding class of shares of the Applicant are the Ordinary Shares. There are approximately 1.4 million registered holders of Ordinary Shares of the Applicant worldwide.

10. As part of the Commonwealth Sale, Ordinary Shares and American Depositary Shares ("**ADS**") were distributed by prospectus to investors resident in Canada (the "**Canadian Offering**"). Each ADS represented 20 Ordinary Shares and were evidenced by ADRs. As a result of the volume of trading activity of ADRs listed on the NYSE being low, the Applicant decreased the number of Ordinary Shares underlying each ADR from 20 Ordinary Shares to 5 Ordinary Shares. This was done to reduce the trading price of ADRs to a level more in-line with other foreign issuers listed on the NYSE at the time. This decrease was effective from August 23, 1999.

11. In connection with the Canadian Offering, the Applicant obtained an order of the principal regulator dated September 12, 1997 (the "**Order**") exempting the Applicant from the continuous disclosure requirements of sections 75, 77, 78 and 79 of the Ontario *Securities Act* (as they were drafted at that time) in light of the Applicant's agreement to comply with applicable U.S. securities laws relating to current reports and annual reports and to file concurrently with the principal regulator any such reports filed with the U.S. Securities and Exchange Commission (the "**SEC**") and the NYSE. Substantively similar orders were issued by the Decision Makers in the other Jurisdictions: British Columbia (June 22, 1998 with effect as of September 10, 1997), Alberta (September 11, 1997), Saskatchewan (September 24, 1997), Manitoba (September 12, 1997), Quebec (February 9, 1998 with effect as of September 12, 1997), New Brunswick (September 8, 1997), Nova Scotia (September 10, 1997), Newfoundland and Labrador (September 12, 1997) and

Prince Edward Island (September 12, 1997) (collectively, the "**Additional Orders**"). The Applicant complied with the terms of the Order and the Additional Orders.

12. The Order states that the exemption from Canadian continuous disclosure requirements granted thereby would "cease to be operative upon the publication in final form of a rule of the [Ontario Securities] Commission relating to foreign issuer disclosure". Accordingly, as of the March 30, 2004 effective date of National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers* ("**NI 71-102**"), the Applicant relied on and complied with the exemptions from Canadian continuous disclosure requirements afforded to "SEC foreign issuers" (as such term is defined in NI 71-102) under Part 4 of NI 71-102 and paid all related applicable filing and participation fees in each of the Jurisdictions. In addition, as of March 30, 2004, the Applicant relied on the corresponding exemption from financial statement certification requirements in section 4.1 of Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings ("MI 52-109") afforded to issuers that comply with the financial statement certification requirements of U.S. securities laws.

13. No securities of the Applicant have ever been listed, traded, or quoted on a marketplace in Canada as defined in National Instrument 21-101 *Marketplace Operation* ("**NI 21-101**") and the Applicant does not intend to have its securities listed, traded or quoted on such a marketplace in Canada.

14. In order to determine the number of Ordinary Shares beneficially owned directly by persons with addresses in Canada, the Applicant employed a third party specialist firm, Link Market Services Limited, to analyse its share register as at July 14, 2008.

15. In order to determine the number of Ordinary Shares beneficially owned by persons with addresses in Canada but registered in the names of third party intermediaries, the Applicant employed a specialist firm, Thomson Reuters, to first identify those registered holders of Ordinary Shares holding the top 200 largest positions (the "**Top 200 Holders**"). The Top 200 Holders represent the registered holders of approximately 75% of the Applicant's Ordinary Shares on a worldwide basis.

16. Procedures for tracing the beneficial ownership of shares of an Australian listed corporation are detailed in Chapter 6C, Part 6C.2 of the Australian Corporations Act (the "**Tracing Provisions**").

17. Pursuant to the procedures detailed in the Tracing Provisions, notices were issued to each of the Top 200 Holders to identify the ultimate beneficial owners of Ordinary Shares held by the Top 200 Holders with addresses in Canada.

18. Recipients of notices under the Tracing Provisions are required to reply within two business days with details regarding the beneficial owner of securities in respect of which a notice is given. Failure to do so is an offence under the Australian Corporations Act.

19. Although the Top 200 Holders did not include CDS or Depository Trust Company (DTC), the Applicant's agents undertook specific searches of those names and derivatives of those names. Other searches conducted by the Applicant's agents were specifically designed to turn up the names of Canadian intermediaries.

20. Based on the above procedures and analyses, representing the Applicant's reasonable efforts to ascertain the number of direct and indirect holders of its Ordinary Shares resident in Canada and the holdings of those persons, the Applicant has concluded that, as of July 14, 2008, there was an aggregate of 7,653,253 Ordinary Shares beneficially owned directly and indirectly by persons with addresses in Canada, representing less than 0.05% of all of the issued and outstanding Ordinary Shares of the Applicant. As of the same date there were 318 direct and indirect holders of Ordinary Shares resident in Canada, representing less than 0.022% of the total number of holders of Ordinary Shares. The particulars are as follows:

Canadian Shareholders Holding Ordinary Shares Directly

Jurisdiction	Number of Holders	Number of Ordinary Shares Held
British Columbia	90	105,001
Alberta	64	53,691
Saskatchewan	1	1,000
Manitoba	3	9,200
Ontario	118	149,325
Québec	16	20,108
Nova Scotia	5	9,700
New Brunswick	1	1,000
Prince Edward Island	1	1,000
Newfoundland & Labrador	2	640
Yukon Territory	Nil	Nil
Northwest Territories	Nil	Nil
Nunavut	Nil	Nil
Total	**301**	**350,665**

Canadian Shareholders Holding Ordinary Shares Indirectly

Jurisdiction	Number of Holders	Number of Ordinary Shares Held
British Columbia	1	777,267
Alberta	Nil	Nil
Saskatchewan	1	11,310
Manitoba	Nil	Nil
Ontario	9	1,528,739
Québec	5	4,638,972
Nova Scotia	Nil	Nil
New Brunswick	1	346,300
Prince Edward Island	Nil	Nil
Newfoundland & Labrador	Nil	Nil
Yukon Territory	Nil	Nil
Northwest Territories	Nil	Nil
Nunavut	Nil	Nil
Total	**17**	**7,302,588**

21. Accordingly, the above procedures and analyses support the conclusion that, as of July 14, 2008, residents of Canada (i) do not beneficially own directly or indirectly more than 2% of the Ordinary Shares of the Applicant worldwide, and (ii) do not represent more than 2% of the total number of owners directly or indirectly of Ordinary Shares of the Applicant worldwide.

22. The above procedures and analyses also support the conclusion that even if each of the 27,805,022 ADRs were held by Canadian residents (therefore representing 139,025,110 Ordinary Shares) and the ADRs were exchanged for Ordinary Shares, residents of Canada would still not (i) beneficially own directly or indirectly more than 2% of the Ordinary Shares of the Applicant worldwide, or (ii) represent more than 2% of the total number of owners directly or indirectly of Ordinary Shares of the Applicant worldwide. This conclusion is reasonable for the following reasons:

    (a) Each ADR represents 5 Ordinary Shares of the Applicant. Therefore, the 27,805,022 issued and outstanding ADRs represent 139,025,110 Ordinary Shares (or approximately 1.12% of the 12,433,047,357 Ordinary Shares of the Applicant that are currently issued and outstanding worldwide). Those 139,025,110 Ordinary Shares have been issued and are held by the depositary bank that administers the Applicant's ADR program.

    (b) There are approximately 1.4 million registered holders of Ordinary Shares of the Applicant worldwide and approximately 48 registered holders of ADRs of the Applicant worldwide. If all the issued and outstanding ADRs were exchanged for Ordinary Shares, there would be approximately 1.4 million registered holders of the Applicant worldwide and 2% of that number would be 28,000.

    (c) Therefore, there would have to be approximately 28,000 direct and indirect holders of ADRs resident in Canada in order for those holders to represent more than 2% of the total number of holders of Ordinary Shares of the Applicant worldwide following an exchange of all of the ADRs for Ordinary Shares. In the circumstances, it is highly unlikely that there are 28,000 direct and indirect holders of ADRs resident in Canada. The Applicant believes the number of direct and indirect holders of ADRs resident in Canada is well below the 2% threshold.

    Consequently, the Applicant has not conducted the same efforts (or expended the same time, money and resources) to determine the number of direct and indirect holders of ADRs resident in Canada and the holdings of those persons as it did to determine the number of direct and indirect holders of Ordinary Shares resident in Canada and their holdings as the result of any such analysis would not change the conclusions reached above.

23. The vast majority of the Applicant's debt securities has been sold into the Australian and European markets and has been placed by brokers using the Euroclear and Cedel systems in Europe. The Applicant has never sold or issued its debt securities directly into the Canadian marketplace. After exercising reasonable efforts to ascertain the direct and indirect holders of its debt securities in Canada, the Applicant has been able to ascertain that as of June 30, 2008, there were only two Canadian residents that beneficially owned directly or indirectly debt securities of the Applicant. Those holders (two Canadian chartered banks) held debt securities of the Applicant valued at approximately A$69.5 million, which represents less than 0.01% of the total value of the Applicant's issued and outstanding listed debt securities worldwide.

24. On June 4, 2007, the Applicant filed a Form 15F – Certification of a Foreign Private Issuer's Termination of Registration of a Class of Securities under Section 12(g) of *The Securities Exchange Act of 1934* or its Termination of the Duty to File Reports under Section 13(a) or Section 15(d) of *The Securities Exchange Act of 1934* (the "**Deregistration Application**") with the SEC. The Applicant filed the Deregistration Application on the basis that the average daily trading volume ("**ADTV**") of its equity securities in the United States was 5% or less of the worldwide ADTV in the same securities as measured over a 12-month period ending within 60 days of the Deregistration Application.

25. The Deregistration Application was accepted by the SEC on September 6, 2007 and the Applicant is no longer subject to file current reports and annual reports with the SEC. Since that time the Applicant has relied on and complied with the exemptions from Canadian continuous disclosure requirements afforded to "designated foreign issuers" (as such term is defined in NI 71-102) under Part 5 of NI 71-102 and paid all related applicable filing and participation fees in each of the Jurisdictions. In addition, since September 6, 2007, the has Applicant relied on the corresponding exemption from financial statement certification requirements in section 4.2 of MI 52-109 afforded to issuers complying with sections 5.4 and 5.5 of NI 71-102.

26. The Applicant is subject to the reporting requirements of the Australian Stock Exchange and the Australian Corporations Act (the "**Australian Reporting Requirements**"). The Australian Reporting Requirements are similar in nature and scope to the reporting requirements under National Instrument 51-102 *Continuous Disclosure Obligations* ("**NI 51-102**").

27. The Applicant delivers to holders of Ordinary Shares resident in Canada all disclosure material required by Australian Reporting Requirements to be delivered to shareholders. As required by Australian Reporting Requirements, the disclosure material is also available to holders of Ordinary Shares through the Applicant's website.

28. Securityholders of the Applicant resident in Canada would have the same civil remedies under Australian law as securityholders resident in Australia in the event of a misrepresentation in the continuous disclosure documents of the Applicant.

29. In the last 12 months, the Applicant has not conducted an offering of its securities in Canada or taken any other steps that indicate that there is a market for its securities in Canada. The Applicant has no plans to seek a public offering of its securities in Canada or an offering pursuant to an exemption from the registration requirement and prospectus requirement of the Legislation.

30. The Applicant has undertaken in favour of each of the Decision Makers that it will continue to concurrently deliver to its securityholders resident in Canada, all disclosure material it is required by the Australian Reporting Requirements to deliver to Australian resident securityholders.

31. On August 1, 2008, the Applicant issued a press release in Canada announcing that it had submitted an application to the Decision Makers for a decision under the Legislation that the Applicant is not a reporting issuer in the Jurisdictions.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted.

“Mary G. Condon”
Commissioner
Ontario Securities Commission

“Paul K. Bates”
Commissioner
Ontario Securities Commission

2.1.5 Alpha ATS L.P.

Headnote

Hybrid Application for Exemptive Relief – Coordinated relief from the requirement to be recognized as a "stock exchange" or "exchange" under securities regulation and passport relief from the application of paragraph 6.6(b) of National Instrument 21-101 Marketplace Operation.

Applicable Legislative Provisions

1. Sections in the Provincial Securities Acts Relevant to Recognition as an Exchange and Exemption by the Commission
   - 1.1. BCSA ss. 25 & 33(1),
   - 1.2. ASA ss. 62 & 213,
   - 1.3. SSA ss. 25 & 147.41,
   - 1.4. MSA ss.139(1) & 167,
   - 1.5. OSA ss. 21(1) & 147,
   - 1.6. QSA ss. 169 & 263,
   - 1.7. NBSA ss. 36 & 195.4,
   - 1.8. PEISA ss. 70(a) & 16.1,
   - 1.9. NLSA ss. 24(1) & 138.19/142.1.

2. National Instrument 21-101 Marketplace Operation, s. 6.6(b).

October 16, 2008

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO, BRITISH COLUMBIA, ALBERTA,
MANITOBA, SASKATCHEWAN, QUEBEC,
NEW BRUNSWICK, PRINCE EDWARD ISLAND,
AND NEWFOUNDLAND AND LABRADOR
(**THE JURISDICTIONS**)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
ALPHA ATS L.P.
(THE FILER)

DECISION

Background

The regulator in Ontario has received an application from the Filer for a decision under section 15.1 of National Instrument 21-101 *Marketplace Operation* (NI 21-101) for exemptive relief from the application of paragraph 6.6 (b) of NI 21-101 in relation to the Odd Lot Facility (as defined below) which is the requirement for an ATS to notify the securities regulatory authority in writing at least six months before it first provides, directly, or through one or more subscribers, a guarantee of a two-sided market for a security on a continuous or reasonably continuous basis (Passport Exemptive Relief).

AND

The securities regulatory authority or regulator in each of Ontario, British Columbia, Alberta, Manitoba, Saskatchewan, Quebec, New Brunswick, Prince Edward Island, and Newfoundland and Labrador (Coordinated Exemptive Relief Decision Makers) has received an application from the Filer for a decision under the securities legislation of the Coordinated Exemptive Relief Decision Makers (the Legislation) (as set out in **Appendix A**) for an exemption from the requirement to be recognized as a "stock exchange" or "exchange" (Coordinated Exemptive Relief).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions:

(a) the Ontario Securities Commission is the principal regulator for this application,

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in British Columbia, Alberta, Manitoba, Saskatchewan, Quebec, New Brunswick, Prince Edward Island, Nova Scotia and Newfoundland and Labrador for relief regarding NI 21-101,

(c) the decision is the decision of the principal regulator for the exemptive relief regarding paragraph 6.6 (b) of NI 21-101, and

(d) the decision evidences the decision of each Coordinated Exemptive Relief Decision Maker.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* (NP 11-203) and NI 21-101 have the same meaning if used in this decision, unless otherwise defined.

Representations

The decision is based on the following facts represented by the Filer:

1. The Filer is a limited partnership registered in Manitoba and consists of one general partner, Alpha ATS Inc., and one limited partner, Alpha Trading Systems Limited Partnership. Its head office is located in Toronto, Ontario.

2. The Filer is registered as an investment dealer in Ontario and is a member of the Investment Industry Regulatory Organization of Canada (IIROC).

3. The Filer has applied to each of the provinces of Québec, British Columbia, Alberta, Saskatchewan, Manitoba, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland & Labrador via the Passport Exemptive Relief Application Process with Québec as the principal regulator for exemptive relief from being registered as a dealer in these jurisdictions so the Filer may operate as an alternative trading system (ATS) without being registered.

4. The Filer is not in default of any securities legislation in any jurisdiction in Canada.

5. The Filer will operate as an ATS that provides a transparent, continuous, electronic matching platform where trading occurs through the central limit order book (CLOB) and a contingent order book, and will support trading in listed TSX and TSXV securities on its system.

6. Only members of IIROC, who are in good standing, may be eligible to be a subscriber of Alpha ATS L.P.

7. The Filer is offering a facility (Odd Lot Facility), that provides for the execution of orders with a quantity of less than a standard trading unit (Odd Lot Orders) and orders that have a combination of a standard trading unit plus a non-standard trading quantity (Mixed Lot Orders). This facility is described below:

    (a) A subscriber will qualify to become an “Alpha Odd Lot Dealer” if it has met all applicable Alpha ATS L.P. requirements as set out in section 5 *Odd Lot Dealer Trading Policies* of Alpha ATS L.P’s Trading Policies, as amended.

    (b) Each Alpha Odd Lot Dealer will be randomly assigned a list of securities based on the number of Alpha Odd Lot Dealers. Each Alpha Odd Lot Dealer will also be assigned the underlying family of securities associated with a primary security.

    (c) Incoming Odd Lot Orders with a limit price that is equal to or better than the best bid and the best offer on Alpha ATS L.P. (ABBO), will auto-execute at the time of the order entry at the ABBO price. All other Odd Lot Orders with a limit price will execute at their limit price when either the last sale price of a standard trading unit traded on Alpha is executed at a sale price equal to or better than the Odd Lot Order’s price limit, or when the ABBO crosses the price of the Odd Lot Order.

(d) For Mixed Lot Orders, the round lot portion will trade in the CLOB and the Odd Lot portion will auto-execute at the price of execution of the last board lot of the mixed lot order.

8. Because the Filer is offering the Odd Lot Facility described in paragraph 7 and as a result may be providing directly or through its subscribers, a guarantee of a two-sided market on a continuous or reasonably continuous basis, the Filer may not fall within the definition of "alternative trading system" under NI 21-101.

Decision

1. The decision of the principal regulator under NI 21-101 is that the Passport Exemptive Relief is granted.

2. The decision of the Coordinated Review Decision Makers under the Legislation is that the Coordinated Exemptive Relief is granted.

3. The decisions in paragraphs 1 and 2 are subject to the following terms and conditions:

(a) The Filer complies with and is subject to the ATS Rules as if it is an ATS except that the Filer is not required to comply with paragraph 6.6(b) of NI 21-101 in relation to the Odd Lot Facility relating to advance notice of providing guarantees of a two-sided market;

(b) If the Filer intends to carry on stock exchange or exchange activities listed in paragraphs 6.6(a), (c) and (d) in NI 21-101 it will notify the securities regulatory authorities in accordance with the timeframe provided in the subsections;

(c) If trading on Alpha ATS L.P. meets the following thresholds, Alpha ATS L.P. shall notify the securities regulatory authorities in writing within 30 calendar days after the end of the relevant month:

i) during either the first or second month of operation, the average daily dollar value, the total trading volume, or the number of trades on Alpha ATS L.P. of any type of security is equal to or greater than 10% of the average daily dollar value, the total trading volume, or the number of trades respectively, for the month in that type of security on all marketplaces in Canada; and

ii) during at least two of the preceding three months of operation, the average daily dollar value, the total trading volume, or the number of trades on Alpha ATS L.P. of any type of security is equal to or greater than 10% of the average daily dollar value, the total trading volume, or the number of trades respectively, for the month in that type of security on all marketplaces in Canada; and

(d) The Filer meets its obligations under the registration granted by the Ontario Securities Commission on August 26, 2008 and the Exemption Order granted by the other Jurisdictions on September 16, 2008.

As to the Passport Relief:

"B J Geisler"
Director, Market Regulation Branch
Ontario Securities Commission

As to the Coordinated Relief:

"Margot C. Howard"
Commissioner
Ontario Securities Commission

"Paulette Kennedy"
Commissioner
Ontario Securities Commission

APPENDIX A:
SECTIONS IN THE PROVINCIAL SECURITIES ACTS
RELEVANT TO THE RECOGNITION OF AN EXCHANGE & EXEMPTION BY THE COMMISSION

Jurisdiction	Sections in Provincial Securities Act Relevant to: (a) Recognition of an Exchange and; (b) Exemption by the Commission
British Columbia	(a) S. 25 (b) S. 33(1)
Alberta	(a) S. 62 (b) S. 213
Saskatchewan	(a) S. 25 (b) S. 147.41
Manitoba	(a) S. 139(1) (b) S. 167
Ontario	(a) S. 21(1) (b) S. 147
Québec	(a) S. 169 (b) S. 263
New Brunswick	(a) S. 36 (b) S. 195.4
Prince Edward Island	(a) S. 70 (a) S. 16.1
Newfoundland & Labrador	(a) S. 24(1) (b) Ss. 138.19 and 142.1

2.1.6 Manulife Financial Corporation et al.

Headnote

NP 11-203 – credit support issuer will not satisfy conditions of exemption in section 13.4 of NI 51-102 – credit support issuer will have securities outstanding that are not designated credit support securities – credit support issuer exempt from certain continuous disclosure, certification, and insider reporting requirements under the Legislation, subject to conditions – issuers will not be able to rely on resale exemption in subsection 2.6(3) of NI 45-102 because a winding-up is not an amalgamation or a merger – issuers exempt from prospectus requirement subject to conditions – in Ontario, issuers will not become reporting issuers, following a reorganization that includes a winding-up, under the definition of reporting issuer in the Legislation because a winding-up is not an amalgamation or a merger – issuers designated reporting issuers in Ontario subject to conditions.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 1(11)(b), 53, 74(1), 121(2)(a)(ii) and Part XXI.

September 26, 2008

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
MANULIFE FINANCIAL CORPORATION (MFC),
JOHN HANCOCK FINANCIAL SERVICES, INC. (JHFS),
JOHN HANCOCK CANADIAN CORPORATION (JHCC)
AND THE MANUFACTURERS INVESTMENT
CORPORATION (MIC)
(MFC, JHFS and MIC collectively, the Filers)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filers for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) for relief:

1. pursuant to section 1(11)(b) of the Legislation, such that JHFS be designated a reporting issuer (the **JHFS Reporting Issuer Designation**) in the Jurisdiction immediately upon the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS pursuant to the JHCC Wind-Up (as defined below);

2. pursuant to section 1(11)(b) of the Legislation, such that MIC be designated a reporting issuer (the **MIC Reporting Issuer Designation**) in the Jurisdiction immediately upon completion of the MIC Merger (as defined below);

3. pursuant to section 74(1) of the Legislation, from the requirement that JHFS file a preliminary prospectus and a prospectus (the **JHFS Prospectus Exemption**) in respect of the first trade in JHFS Notes (as defined below) following the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS pursuant to the JHCC Wind-Up;

4. pursuant to section 74(1) of the Legislation, from the requirement that MIC file a preliminary prospectus and a prospectus (the **MIC Prospectus Exemption**) in respect of the first trade in MIC Notes (as defined below) following the MIC Merger;

5. pursuant to section 13.1 of National Instrument 51-102 — *Continuous Disclosure Obligations* (**NI 51-102**), exempting JHFS (the **JHFS Continuous Disclosure Exemption**) from all of the requirements of NI 51-102 following the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS pursuant to the JHCC Wind-Up;

6. pursuant to section 121(2)(a)(ii) of the Legislation exempting insiders (as defined in section 1(1) of the Legislation) of JHFS (the **JHFS Insider Reporting Exemption**) in respect of securities of JHFS from the requirements of sections 107, 108 and 109 of the Legislation following the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS pursuant to the JHCC Wind-Up;

7. pursuant to section 6.1 of National Instrument 55-102 — *System for Electronic Disclosure by Insiders* (**SEDI**) (NI 55-102) exempting insiders (as defined in section 1(1) of the Legislation) of JHFS (the **JHFS Insider Profile Exemption**) in respect of securities of JHFS from the requirements of section 2.1 of NI 55-102 following the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS pursuant to the JHCC Wind-Up;

8. pursuant to section 4.5 of Multilateral Instrument 52-109 — *Certification of Disclosure in Issuers' Annual and Interim Filings* (**MI 52-109**), exempting JHFS (the **JHFS Certification Exemption**) from the requirements to file (i) annual certificates (as defined in MI 52-109) under section 2.1 of MI 52-109, and (ii) interim certificates (as defined in MI 52-109) under section 3.1 of MI 52-109,

following the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS pursuant to the JHCC Wind-Up; and

9. pursuant to section 5.4 of National Policy 11-203 — *Process for Exemptive Relief Applications in Multiple Jurisdictions* (**NP 11-203**) such that the application for this decision and this decision be kept confidential (the **Request for Confidentiality**);

(collectively, the **Requested Relief**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) the Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 — *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Yukon, Northwest Territories and Nunavut (the **Passport Jurisdictions**) in respect of all of the Requested Relief except for (i) the JHFS Reporting Issuer Designation and the MIC Reporting Issuer Designation, which are only sought in the Jurisdiction, and (ii) the JHFS Continuous Disclosure Exemption, the JHFS Insider Reporting Exemption and the JHFS Insider Profile Exemption, which are sought in all of the Passport Jurisdictions except for the Northwest Territories and Nunavut.

Interpretation

Terms defined in National Instrument 14-101 – *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filers:

1. The head offices of MFC, JHFS, JHCC and MIC are located in Toronto, Ontario, Boston, Massachusetts, Halifax, Nova Scotia and Bloomfield Hills, Michigan, respectively.

2. Section 3.6 of NP 11-203 provides that for any application under NP 11-203, the principal regulator is identified in the same manner as in sections 4.1 to 4.5 of MI 11-102. Section 4.2(b) and 4.3(a) of MI 11-102 provide that the principal regulator for an application for an exemption is the securities regulatory authority or regulator of the jurisdiction in which the person or company's head office is located or the jurisdiction in which the head office of the reporting issuer is located. Section 4.4 of MI 11-102 further provides that if the jurisdiction identified under section 4.2 or 4.3, as applicable, is not a specified jurisdiction, the principal regulator for the application is the securities regulatory authority or regulator of the specified jurisdiction with which the reporting issuer, person, or company has the most significant connection. In addition, section 4.5(2) of MI 11-102 provides that if at any one time a person or company is seeking more than one exemption and not all of the exemptions are needed in the jurisdiction of the principal regulator as determined under section 4.2, 4.3 or 4.4 of MI 11-102, the person or company may make the application to the securities regulatory authority or regulator in the specified jurisdiction in which the person or company is seeking all of the exemptions and with which the reporting issuer, person or company has the most significant connection.

3. In accordance with paragraph 3.6(3)(b) of NP 11-203, the principal regulator for MFC is the Ontario Securities Commission because MFC's head office is located in Ontario. In accordance with paragraph 3.6(6)(c) of NP 11-203, the principal regulator for JHFS and MIC is the Ontario Securities Commission because the location of JHFS' and MIC's head offices are not located in a specified jurisdiction (Massachusetts and Michigan, respectively) and the regulator of the specified jurisdiction with which JHFS and MIC have the most significant connection is the Ontario Securities Commission. In accordance with paragraph 3.6(8)(a) of NP 11-203, the principal regulator for JHCC, in connection with the Requested Relief, is the Ontario Securities Commission because the Filers are seeking all of the Requested Relief only in Ontario.

4. MFC was incorporated under the *Insurance Companies Act* (Canada) on April 26, 1999. On September 23, 1999, in connection with the demutualization of The Manufacturers Life Insurance Company (**MLI**), MFC became the sole shareholder of MLI and certain holders of participating life insurance policies of MLI became shareholders of MFC. On September 24, 1999, MFC filed a final prospectus in connection with an initial treasury and secondary offering conducted in Canada and the United States. On April 28, 2004, MFC completed a merger (the **Merger**) with JHFS and as a result MFC became the beneficial owner of all of the issued and outstanding shares of JHFS common stock. MFC is a publicly traded company on the Toronto Stock Exchange, the New York Stock Exchange (the **NYSE**), the Stock Exchange of Hong Kong Limited and the Philippine Stock Exchange. MFC is a reporting issuer or the equivalent in each of the provinces and territories of Canada. MFC is not, to its knowledge, in default of its reporting issuer

obligations under the Legislation or the securities legislation of the Passport Jurisdictions.

5. JHFS was incorporated under the Delaware General Corporation Law on August 26, 1999 to become the holding company for John Hancock Mutual Life Insurance Company (**John Hancock Mutual**). Effective February 1, 2000, John Hancock Mutual adopted a plan of reorganization and converted from a mutual life insurance company to a stock life insurance company and became a wholly-owned subsidiary of JHFS. Also, on February 1, 2000, JHFS completed an initial public offering of its common stock in the United States. On December 6, 2001, JHFS issued US$500 million in 5.625% senior notes maturing on December 1, 2008 in the United States (the **JHFS US Dollar Notes**) pursuant to a U.S. shelf registration statement. The JHFS US Dollar Notes were offered in the United States and not in Canada. To the knowledge of the Filers, the number of Canadian resident beneficial holders of the JHFS US Dollar Notes is not significant. JHFS was a publicly traded company listed on the NYSE until the completion of the Merger, when MFC became the beneficial owner of all of the outstanding shares of common stock of JHFS and JHFS common stock ceased to be listed on the NYSE. JHFS is not subject to reporting obligations in the United States under the United States *Securities Exchange Act of 1934*, as amended (the **Exchange Act**). JHFS is not a reporting issuer or the equivalent in any of the provinces or territories of Canada.

6. JHCC was incorporated as an unlimited liability company under the *Companies Act* (Nova Scotia) on March 27, 2001 as an indirect wholly-owned subsidiary of JHFS. JHCC's sole function has been in relation to the issuance of securities. It has no operations that are independent of JHFS or its subsidiaries, it offers no products or services, it owns no properties and it has no employees. Following the Merger, JHCC became an indirect wholly-owned subsidiary of MFC. The financial results of JHCC have been, since the date of the Merger, included in the consolidated financial results of MFC. JHCC's original primary business was to access Canadian capital markets to raise funds on behalf of the Canadian subsidiary companies of JHFS. JHCC is a reporting issuer or the equivalent in each of the provinces of Canada. JHCC is not, to its knowledge, in default of its reporting issuer obligations under the Legislation or the securities legislation of the Passport Jurisdictions.

7. The only securities that JHCC has outstanding are common shares held by John Hancock Canadian LLC (**JHC(LLC)**), a wholly-owned subsidiary of JHFS and an indirect wholly-owned subsidiary of MFC, and two tranches of notes: $220 million of 6.672% non-convertible senior unsecured notes payable May 31, 2011 (the **6.672% Notes**) and $175 million of 6.496% non-convertible senior unsecured notes payable November 30, 2011 (the **6.496% Notes**, and with the 6.672% Notes, the **JHCC Notes**).

8. The 6.672% Notes were issued under the terms of the amended and restated trust indenture (the **6.672% Indenture**) dated April 26, 2001, as amended and restated on October 16, 2001, between JHCC and Computershare Trust Company of Canada (the **Trustee**). The 6.496% Notes were issued under the terms of the trust indenture (the **6.496% Indenture**) dated October 16, 2001 between JHCC and the Trustee. No further external offerings of securities by JHCC are contemplated.

9. JHFS has unconditionally and irrevocably guaranteed JHCC's payment obligations under the JHCC Notes pursuant to a separate guarantee in respect of each tranche of JHCC Notes (the **JHFS Guarantees**). MFC, as parent company to JHFS and JHCC, has supplemented the JHFS Guarantees by providing full and unconditional subordinated guarantees dated as of June 30, 2005 of JHCC's payment obligations in respect of each tranche of JHCC Notes (the **MFC-JHCC Guarantees**).

10. MIC was incorporated in Michigan on October 13, 1995 and is an indirect wholly-owned subsidiary of MFC. MIC is the holding company for certain subsidiaries of MFC that carry on life insurance and wealth management business in the United States. MIC is not subject to reporting obligations in the United States under the Exchange Act. MIC is not a reporting issuer or the equivalent in any of the provinces or territories of Canada.

11. In connection with the offering of the JHCC Notes, JHCC and JHFS applied for and received exemptive relief from certain continuous disclosure obligations. The Nova Scotia Securities Commission was the principal regulator in respect of previous exemptive relief applications made by JHCC and JHFS for which mutual reliance review system decision documents were issued on September 17, 2001 and March 21, 2001 (the **NSSC Prior Decision Documents**).

12. The NSSC Prior Decision Documents relieved JHCC from the requirements of provincial securities legislation to prepare and file with securities regulators and to deliver to holders of the JHCC Notes (**Noteholders**) certain public disclosure documents regarding JHCC, provided that, among other things, certain continuous disclosure materials filed by JHFS with the United States Securities and Exchange Commission (**SEC**) would be filed with provincial securities regulators and certain of such documents would be provided to Noteholders.

13. When JHFS ceased having reporting obligations under the Exchange Act in June 2005, JHCC was no longer able to file with provincial securities regulators and provide Noteholders with JHFS disclosure documents filed with the SEC. MFC, as the parent company to JHFS and JHCC, supplemented the JHFS Guarantees by providing the MFC-JHCC Guarantees. MFC became the relevant source of credit support for the JHCC Notes. A mutual reliance review system decision document issued on July 20, 2005 (the **July 2005 Decision Document**) provided JHCC with relief from certain continuous disclosure requirements of provincial securities legislation and from the MI 52-109 certification requirements. The NSSC Prior Decision Documents were superseded by the July 2005 Decision Document.

14. MFC is undertaking a reorganization of certain of its U.S. subsidiaries. There are a number of reasons for the reorganization, including to support the company's capital structure, simplify financial reporting, improve efficiencies and better position MFC for future growth. The reorganization is expected to be completed by the end of 2008. The key steps in the reorganization transactions are the **JHCC Wind-Up**, which is proposed to be commenced on or about October 16, 2008, pursuant to which (a) all of the assets of JHCC will be conveyed to JHFS, (b) all of the liabilities of JHCC, including its obligations under the JHCC Notes, will be assumed by and become obligations of JHFS, and (c) JHCC will be dissolved under Nova Scotia law and cease to exist; and the **MIC Merger**, which is proposed to take place on or about December 31, 2008, pursuant to which (a) JHFS will merge with MIC under Michigan law, with MIC continuing as the surviving entity, and (b) by operation of law (i) all of the assets of JHFS will become assets of MIC, and (ii) all of the liabilities of JHFS, including its obligations under the JHFS Notes, will become obligations of MIC.

15. It is intended that JHC(LLC) be wound-up into its parent company, JHFS, prior to the JHCC Wind-Up. Shortly thereafter, it is intended that JHCC be wound-up into JHFS, which following the wind-up of JHC(LLC), will be JHCC's immediate parent company.

16. The JHCC Wind-Up will be commenced on or about October 16, 2008 pursuant to the requirements of Nova Scotia law. In connection with the JHCC Wind-Up, all of JHCC's assets will be conveyed to JHFS and all of JHCC's liabilities, including its obligations under the JHCC Notes, will be assumed by and become obligations of JHFS. All necessary steps required under Nova Scotia law will be taken to ensure that JHCC will cease to exist upon completion of the JHCC Wind-Up.

17. On the assumption by JHFS of JHCC's obligations under the JHCC Notes, and the release of JHCC from its obligations, and the dissolution of JHCC under Nova Scotia law the JHCC Notes will become obligations of JHFS and JHCC will have no further liability or obligations to Noteholders. The JHCC Wind-Up will therefore result in Noteholders holding debt securities of JHFS (**JHFS Notes**).

18. Upon the assumption of all the liabilities of JHCC by JHFS pursuant to the JHCC Wind-Up, the JHFS Guarantees will cease to have effect since JHFS will be the primary obligor of the JHFS Notes. However, MFC, as the indirect parent company of JHFS, will replace the MFC-JHCC Guarantees with full and unconditional guarantees of the payments to be made by JHFS under the JHFS Notes (the **MFC-JHFS Guarantees**). As a consequence, Noteholders will continue to be able to look to MFC to pay amounts due and owing under the JHFS Notes under which JHFS is obligated (as they were when they were JHCC Notes under which JHCC was obligated). MFC will be the relevant source of credit support for the JHFS Notes.

19. The MFC-JHFS Guarantees will be substantially similar to the MFC-JHCC Guarantees. As with the MFC-JHCC Guarantees, the MFC-JHFS Guarantees will include a covenant of MFC to furnish to the Trustee and Noteholders MFC's audited annual financial statements including management's discussion and analysis (**MD&A**) thereon and MFC's unaudited interim financial statements including MD&A thereon.

20. In connection with the MFC-JHFS Guarantees, MFC will issue and file a press release on SEDAR which will describe the nature of the MFC-JHFS Guarantees and related matters.

21. As is presently the case with respect to the MFC-JHCC Guarantees, Noteholders will be able to assess the strength of the MFC-JHFS Guarantees by reviewing information prepared and filed by MFC as a reporting issuer, or the equivalent, in each of the provinces and territories of Canada.

22. On or about December 31, 2008, JHFS will merge with MIC pursuant to a transaction to be effected under Michigan law with MIC continuing as the surviving entity. Pursuant to the MIC Merger, by operation of law, all of the assets of JHFS will become assets of MIC and all of the liabilities of JHFS, including its obligations under the JHFS Notes, will become obligations of MIC. The MIC Merger will therefore result in Noteholders holding debt securities of MIC (**MIC Notes**).

23. MFC will replace the MFC-JHFS Guarantees with full and unconditional guarantees of the payments to be made by MIC under the MIC Notes (the

MFC-MIC Guarantees). As a consequence, Noteholders will continue to be able to look to MFC to pay amounts due and owing under the MIC Notes under which MIC is obligated (as they were when they were JHCC Notes under which JHCC was obligated and the JHFS Notes under which JHFS was obligated). MFC will be the relevant source of credit support for the MIC Notes.

24. The MFC-MIC Guarantees will be substantially similar to the MFC-JHCC Guarantees and the MFC-JHFS Guarantees. As with the MFC-JHCC Guarantees and the MFC-JHFS Guarantees, the MFC-MIC Guarantees will include a covenant of MFC to furnish to the Trustee and Noteholders MFC's audited annual financial statements including MD&A thereon and MFC's unaudited interim financial statements including MD&A thereon.

25. In connection with the MFC-MIC Guarantees, MFC will issue and file a press release on SEDAR which will describe the nature of the MFC-MIC Guarantees and related matters.

26. As is presently the case with respect to the MFC-JHCC Guarantees, Noteholders will be able to assess the strength of the MFC-MIC Guarantees by reviewing information prepared and filed by MFC as a reporting issuer, or the equivalent, in each of the provinces and territories of Canada.

27. In accordance with the terms of the 6.672% Indenture, Noteholder approval will be sought for an extraordinary resolution to modify the 6.672% Indenture by way of supplemental indenture to permit the JHCC Wind-Up and the MIC Merger and for amendments to the 6.672% Indenture to provide for, among other changes, a succession right provision whereby a successor entity within the MFC group of companies could assume the obligations under the JHFS Notes or the MIC Notes without the need for further approval of Noteholders, subject to certain conditions being satisfied. The same approval will be sought from holders of the 6.496% Notes in accordance with the terms of the 6.496% Indenture. In connection with pursuing these approvals from Noteholders, a consent solicitation statement will be sent to Noteholders. To be effective, each extraordinary resolution must be passed by the favourable votes of the holders of not less than 662/3% of the aggregate principal amount of the outstanding 6.672% Notes or 6.496% Notes, as the case may be, represented and voted at the applicable Noteholders' meeting or any adjournment thereof.

28. The Filers are requesting that the Principal Regulator grant the JHFS Reporting Issuer Designation because it is uncertain whether the assumption by JHFS of JHCC's obligations under the JHCC Notes pursuant to the JHCC Wind-Up constitutes an exchange of securities in connection with an amalgamation, arrangement or statutory procedure or merger where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least 12 months as set out in section 1(1)(e) of the Legislation. The types of transactions listed in section 1(1)(e) of the Legislation do not expressly include a wind-up or a reorganization, and it is uncertain whether the JHCC Wind-Up constitutes a merger.

29. The Filers are requesting that the Principal Regulator grant the MIC Reporting Issuer Designation because it is uncertain whether the first step of the reorganization described above, the assumption by JHFS of JHCC's obligations under the JHCC Notes pursuant to the JHCC Wind-Up, constitutes an exchange of securities in connection with an amalgamation, arrangement or statutory procedure or merger where one of the amalgamating or merged companies or the continuing company has been a reporting issuer for at least 12 months as set out in section 1(1)(e) of the Legislation. Consequently it is uncertain whether the MIC Merger constitutes an exchange of securities in connection with a merger where one of the merged companies has been a reporting issuer for at least 12 months as set out in section 1(1)(e) of the Legislation.

30. The JHCC Wind-Up, resulting in Noteholders holding JHFS Notes, will include trades in securities to be made in reliance on the exemption in section 2.11 of National Instrument 45-106 — *Prospectus and Registration Exemptions* (**NI 45-106**). A first trade of JHFS Notes acquired in reliance on the exemption in section 2.11 of NI 45-106 is a distribution unless the conditions in section 2.6(3) of National Instrument 45-102 — *Resale of Securities* (**NI 45-102**) are satisfied. JHFS will not satisfy the condition in section 2.6(3)1 of NI 45-102 that the issuer has been a reporting issuer in a jurisdiction in Canada for the four months immediately preceding the trade. Although section 2.9(1) of NI 45-102 sets forth circumstances in which an issuer may count the time another party to the transaction has been a reporting issuer when determining how long the issuer has been a reporting issuer, the types of transactions listed in section 2.9(1) of NI 45-102 do not expressly include a wind-up or a reorganization.

31. The Filers are requesting that the Principal Regulator grant the MIC Prospectus Exemption because it is uncertain whether MIC will satisfy the condition in section 2.6(3)1 of NI 45-102 that the issuer has been a reporting issuer in a jurisdiction in Canada for the four months immediately preceding the trade. Although section 2.9(1) of NI 45-102 permits an issuer to count the time another party to the transaction has been a reporting

issuer in determining how long the issuer has been a reporting issuer, the types of transactions listed in section 2.9(1) of NI 45-102 do not expressly include a wind-up or a reorganization, and it is uncertain whether the first step of the reorganization described in the Application, the JHCC Wind-Up, constitutes a merger.

32. Upon completion of the JHCC Wind-Up, JHFS will satisfy all of the requirements of the exemption from continuous disclosure obligations available for credit support issuers under section 13.4 of NI 51-102 and section 4.4 of MI 52-109, save that the JHFS US Dollar Notes are not one of the permitted types of outstanding securities for a credit support issuer under section 13.4(2)(c) of NI 51-102.

33. Following the JHCC Wind-Up, MFC will continue to meet the disclosure requirements of Rule 3-10(d) of Regulation S-X under U.S. federal securities law by including condensed consolidating financial information regarding JHFS in a note to MFC's financial statements and prepare that note to its financial statements in accordance with U.S. generally accepted accounting principles (**U.S. GAAP**), as permitted under National Instrument 52-107 — *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* (**NI 52-107**), thereby complying with section 13.4(2)(g)(ii) of NI 51-102.

34. Following the MIC Merger, MFC will continue to meet the disclosure requirements of Rule 3-10(d) of Regulation S-X under U.S. federal securities law by including condensed consolidating financial information regarding MIC in a note to MFC's financial statements and prepare that note to its financial statements in accordance with U.S. GAAP, as permitted under NI 52-107, thereby complying with section 13.4(2)(g)(ii) of NI 51-102.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the Principal Regulator under the Legislation is that the JHFS Reporting Issuer Designation is granted provided that:

(a) before the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS, the Noteholders approve the extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and the MIC Merger in accordance with representation 27, above.

The further decision of the Principal Regulator under the Legislation is that the MIC Reporting Issuer Designation is granted provided that:

(a) before the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS, the Noteholders approve the extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and the MIC Merger in accordance with representation 27, above; and

(b) the JHCC Wind-Up has been completed, including JHCC has ceased to exist under Nova Scotia law.

The further decision of the Principal Regulator under the Legislation is that the JHFS Prospectus Exemption is granted provided that:

(a) before the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS, the Noteholders approve the extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and the MIC Merger in accordance with representation 27, above;

(b) in respect of the first trade in JHFS Notes following the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS pursuant to the JHCC Wind-Up, JHFS satisfies all of the conditions set out in section 2.6(3) of NI 45-102, except that JHFS has not been a reporting issuer in a jurisdiction of Canada for the four months immediately preceding the trade as otherwise required under paragraph 1 of subsection 2.6(3) of NI 45-102; and

(c) such JHFS Prospectus Exemption will cease to apply on the earlier of: (i) the date that is four months and one day after the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS pursuant to the JHCC Wind-Up; and (ii) the completion of the MIC Merger.

The further decision of the Principal Regulator under the Legislation is that the MIC Prospectus Exemption is granted provided that:

(a) before the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS, the Noteholders approve the extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and the MIC

Merger in accordance with representation 27, above;

(b) the JHCC Wind-Up has been completed, including JHCC has ceased to exist under Nova Scotia law;

(c) in respect of the first trade in MIC Notes following the MIC Merger, MIC satisfies all of the conditions set out in section 2.6(3) of NI 45-102, except that MIC has not been a reporting issuer in a jurisdiction of Canada for the four months immediately preceding the trade as otherwise required under paragraph 1 of subsection 2.6(3) of NI 45-102; and

(d) such MIC Prospectus Exemption will cease to apply on the date that is four months and one day after the completion of the MIC Merger.

The further decision of the Principal Regulator under the Legislation is that the JHFS Insider Reporting Exemption is granted provided that:

(a) before the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS, the Noteholders approve the extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and the MIC Merger in accordance with representation 27, above;

(b) JHFS satisfies all of the conditions in subsection 13.4(3) of NI 51-102, except the condition in paragraph 13.4(2)(c) of NI 51-102 but only insofar as JHFS has the JHFS US Dollar Notes outstanding; and

(c) such JHFS Insider Reporting Exemption will cease to apply on December 1, 2008, the date the JHFS US Dollar Notes mature.

The further decision of the Principal Regulator under the Legislation is that the Request for Confidentiality in respect of the JHFS Reporting Issuer Designation, the MIC Reporting Issuer Designation, the JHFS Prospectus Exemption, the MIC Prospectus Exemption and the JHFS Insider Reporting Exemption is granted until the earlier of:

(a) the date that MFC, JHFS and JHCC jointly issue a press release, and that press release is filed, announcing that consent is being sought from Noteholders for extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and MIC Merger in accordance with representation 27, above; and

(b) November 30, 2008.

"James E. Turner"
Commissioner

"Lawrence E. Ritchie"
Commissioner

The decision of the Principal Regulator under the Legislation is that the JHFS Continuous Disclosure Exemption is granted provided that:

(a) before the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS, the Noteholders approve the extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and the MIC Merger in accordance with representation 27, above;

(b) JHFS satisfies all of the conditions in section 13.4(2) of NI 51-102, except the condition in paragraph 13.4(2)(c) of NI 51-102 but only insofar as JHFS has the JHFS US Dollar Notes outstanding; and

(c) such JHFS Continuous Disclosure Exemption will cease to apply on December 1, 2008, the date the JHFS US Dollar Notes mature.

The further decision of the Principal Regulator under the Legislation is that the JHFS Insider Profile Exemption is granted provided that:

(a) before the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS, the Noteholders approve the extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and the MIC Merger in accordance with representation 27, above;

(b) JHFS satisfies all of the conditions in subsection 13.4(3) of NI 51-102, except the condition in paragraph 13.4(2)(c) of NI 51-102 but only insofar as JHFS has the JHFS US Dollar Notes outstanding; and

(c) such JHFS Insider Profile Exemption will cease to apply on December 1, 2008, the date the JHFS US Dollar Notes mature.

The further decision of the Principal Regulator under the Legislation is that the JHFS Certification Exemption is granted provided that:

(a) before the conveyance of all of the assets of JHCC to, and the assumption of all the liabilities of JHCC by, JHFS, the

Noteholders approve the extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and the MIC Merger in accordance with representation 27, above;

(b) JHFS satisfies all of the conditions in section 4.4 of MI 52-109, except the condition in paragraph 13.4(2)(c) of NI 51-102 but only insofar as JHFS has the JHFS US Dollar Notes outstanding; and

(c) such JHFS Certification Exemption will cease to apply on December 1, 2008, the date the JHFS US Dollar Notes mature.

The further decision of the Principal Regulator under the Legislation is that the Request for Confidentiality in respect of the JHFS Continuous Disclosure Exemption, the JHFS Insider Profile Exemption and the JHFS Certification Exemption is granted until the earlier of:

(a) the date that MFC, JHFS and JHCC jointly issue a press release, and that press release is filed, announcing that consent is being sought from Noteholders for extraordinary resolutions to modify the Indentures to permit the JHCC Wind-Up and MIC Merger in accordance with representation 27, above; and

(b) November 30, 2008.

"Lisa Enright"
Manager Corporate Finance

2.1.7 Gentry Resources Ltd. - s. 1(10)

Headnote

National Policy 11-203 Process For Exemptive Relief Applications in Multiple Jurisdictions – application for an order that the issuer is not a reporting issuer.

Ontario Statutes

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10).

October 14, 2008

Burnet, Duckworth & Palmer LLP
1400, 350 - 7th Avenue SW
Calgary, AB T2P 3N9

Attention: Kerri Jacobs

Dear Madam:

Re: Gentry Resources Ltd. (the Applicant) - Application for a decision under the securities legislation of Alberta, Saskatchewan, Manitoba, Ontario, Nova Scotia, New Brunswick, Prince Edward Island and Newfoundland and Labrador (the Jurisdictions) that the Applicant is not a reporting issuer

The Applicant has applied to the local securities regulatory authority or regulator (the **Decision Maker**) in each of the Jurisdictions for a decision under the securities legislation (the **Legislation**) of the Jurisdictions to be deemed to have ceased to be a reporting issuer in the Jurisdictions.

As the Applicant has represented to the Decision Makers that:

(a) the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 security holders in each of the jurisdictions in Canada and fewer than 51 security holders in total in Canada;

(b) no securities of the Applicant are traded on a marketplace as defined in National Instrument 21-101 *Marketplace Operation*;

(c) the Applicant is applying for a decision that it is not a reporting issuer in all of the jurisdictions in Canada in which it is currently a reporting issuer; and

(d) the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer,

each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision

Maker with the jurisdiction to make the decision has been met and orders that the Applicant is deemed to have ceased to be a reporting issuer.

"Blaine Young"
Associate Director, Corporate Finance
Alberta Securities Commission

2.1.8 HMI Nickel Inc. (formerly Skye Resources Inc.)

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – application from subsidiary (Subco) of parent company (Parent) for a decision under section 13.1 of National Instrument 51-102 Continuous Disclosure Obligations (NI 51-102) exempting Subco from the requirements of NI 51-102; for a decision under section 4.5 of Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings (MI 52-109) exempting Subco from the requirements of MI 52-109; for a decision under section 121(2)(a)(ii) of the Securities Act (Ontario) exempting the insiders of Subco from the insider reporting requirements of the Act; and for a decision under section 6.1 of National Instrument 55-102 System for Electronic Disclosure by Insiders exempting the insiders of Subco from the requirement to file an insider profile – Subco is a wholly-owned subsidiary of Parent – Subco is a reporting issuer and has warrants outstanding – Warrants entitle holder to acquire common shares of Parent – Warrants do not qualify as "designated exchangeable securities" under exemption in section 13.3 of NI 51-102 – relief granted on conditions substantially similar to the conditions contained in section 13.3. of NI 51-102.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 107, 121(2)(a)(ii).
National Instrument 51-102 Continuous Disclosure Obligations , ss. 13.1, 13.3.
Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings, s. 4.5.
National Instrument 55-102 System for Electronic Disclosure by Insiders , s. 6.1.

October 21, 2008

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(THE JURISDICTION)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
HMI NICKEL INC. (FORMERLY SKYE RESOURCES INC.)
(THE FILER)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the Legislation) that:

(a) the Filer be exempt from continuous disclosure obligations under National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) and related Legislation (the Continuous Disclosure Requirements);

(b) the Filer be exempt from requirements for the certification of disclosure in annual and interim filings under Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (MI 52-109) (the Certification Requirements);

(c) the insiders of the Filer be exempt from the requirement to file an insider profile under National Instrument 55-102 *System for Electronic Disclosure by Insiders* (NI 55-102) (the Insider Profile Requirement) in respect of securities of the Filer; and

(d) the insiders of the Filer be exempt from the insider reporting requirements under the Legislation (the Insider Reporting Requirements) in respect of securities of the Filer,

(collectively, the Exemption Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation existing under the laws of the Province of British Columbia and was formed by the amalgamation (the Amalgamation) of Skye Resources Inc. (Old Skye) and 0828275 B.C. Ltd. (HudBay Subco), which was a wholly-owned subsidiary of HudBay Minerals Inc. (HudBay), pursuant to the plan of arrangement (the Arrangement) between Old Skye, HudBay and HudBay Subco. The Arrangement was completed at 12:01 a.m. (Vancouver time) (the Effective Time) on August 26, 2008 (the Effective Date) under Section 288 of the *Business Corporations Act* (British Columbia). The Filer's head office is located at 1 Adelaide Street East, Suite 2501, Toronto, Ontario M5C 2V9. The Filer is authorized to issue an unlimited number of common shares (the New Skye Shares), of which all of the issued and outstanding New Skye Shares are owned by HudBay. As of September 26, 2008, the Filer also had outstanding 3,105,000 common share purchase warrants (the New Skye Warrants) expiring January 26, 2009, each New Skye Warrant currently exercisable at a price of $15.13 into 0.61 of a HudBay Share and cash of $0.001. The Filer has no outstanding securities other than the New Skye Shares and the New Skye Warrants. The Filer is a reporting issuer or the equivalent in each of the Provinces of Canada (the Reporting Issuer Jurisdictions) and the New Skye Warrants are listed and traded on the Toronto Stock Exchange (the TSX) under the symbol "HBM.WT".

2. HudBay, the parent company of the Filer, is a corporation existing under the laws of Canada. HudBay is authorized to issue an unlimited number of HudBay Shares and an unlimited number of preference shares, of which, as at September 26, 2008, 152,995,125 HudBay Shares were issued and outstanding. As at September 26, 2008, HudBay also had 22,521 non-listed common share purchase warrants outstanding, each 30 of which are exercisable for one HudBay Share. HudBay is a reporting issuer or the equivalent in each of the Reporting Issuer Jurisdictions and the HudBay Shares are listed and traded on the TSX under the symbol "HBM".

3. Immediately prior to the Effective Time, Old Skye was a corporation existing under the laws of British Columbia and had the following issued and outstanding securities:

   (a) 63,983,667 common shares (the Old Skye Shares);

   (b) 3,531,400 options (the Old Skye Options), each exercisable into one Old Skye Share;

   (c) 3,105,000 common share purchase warrants (the Old Skye Warrants) expiring January 26, 2009, each Old Skye Warrant exercisable at a price of $15.13 into one Old Skye Share; and

   (d) 146,367.50 deferred share units (the Old Skye DSUs), each whole Old Skye DSU exercisable into one Old Skye Share or the cash equivalent.

4. Old Skye was a reporting issuer or the equivalent in each of the Reporting Issuer Jurisdictions immediately prior to the Effective Time and the Old Skye Shares and Old Skye Warrants were listed and traded on the TSX under the symbols "SKR" and "SKR.WT.A", respectively.

5. Immediately prior to the Effective Time, HudBay Subco was a corporation existing under the laws of British Columbia and was a wholly-owned subsidiary of HudBay.

6. At the Effective Time, HudBay acquired all of the issued and outstanding Old Skye Shares (other than those held by HudBay) pursuant to the Arrangement.

7. Under the Arrangement, in addition to other matters, the following occurred as of the Effective Time:

   (a) HudBay acquired all of the issued and outstanding Old Skye Shares held by the holders of the Old Skye Shares (the Old Skye Shareholders) (other than HudBay) in exchange for the payment thereto of 0.61 of a HudBay Share and $0.001 in cash for each Old Skye Share and HudBay was recorded as the registered holder of the Old Skye Shares so transferred and was deemed to be the legal owner of such Old Skye Shares;

   (b) each Old Skye Option outstanding immediately prior to the Effective Time, whether or not vested, was exchanged for an option (a Converted HudBay Option) of HudBay to acquire (on the same terms and conditions as were applicable to such Old Skye Option immediately before the Effective Time under the Skye stock option plan and the agreement evidencing the grant except to the extent that such Converted HudBay Option will expire on the expiry date for such option) 0.61 of a HudBay Share (rounded down to the nearest whole number). The exercise price per HudBay Share subject to such Converted HudBay Option was adjusted in accordance with the terms of the Arrangement;

   (c) the Old Skye DSU Plan was amended, as of the Effective Time, to provide that each outstanding Old Skye DSU shall thereafter relate to 0.61 of a HudBay Share, all references to "Shares" in the Old Skye DSU Plan were deemed to be references to HudBay Shares or to the number of HudBay Shares so determined and such other changes were made to give effect to the foregoing and to ensure that it qualifies as a plan described in regulation 6801(d) under the Income Tax Act (Canada). The Old Skye DSUs have subsequently been settled for cash and are no longer outstanding;

   (d) each Old Skye Share held by HudBay, including the Old Skye Shares acquired pursuant to the Arrangement, were transferred to HudBay Subco in consideration of the issue by HudBay Subco to HudBay of one common share (a Subco Share) of HudBay Subco for each Old Skye Share so transferred;

   (e) Old Skye and HudBay Subco amalgamated to form one corporate entity, the Filer; and

   (f) HudBay received on the Amalgamation one New Skye Share in exchange for each Subco Share previously held and all of the issued and outstanding Old Skye Shares were cancelled.

8. On August 26, 2008, 31,295,685 additional HudBay Shares were listed and posted for trading on the TSX as a result of the Arrangement, and 4,048,204 HudBay Shares were reserved for issuance upon exercise of the New Skye Warrants and the Converted HudBay Options. The Old Skye Shares and Old Skye Warrants were delisted from the TSX at the close of business on August 27, 2008. The New Skye Warrants commenced trading on the TSX at the opening of business on August 28, 2008.

9. The Arrangement was approved at a special meeting of Old Skye Shareholders, holders of Old Skye Options and holders of Old Skye DSUs held on August 19, 2008, and the Supreme Court of British Columbia granted its final approval of the Arrangement on August 22, 2008.

10. On completion of the Arrangement, the Filer became a reporting issuer as Old Skye, one of the amalgamating companies, was a reporting issuer for a period of at least twelve months prior to the Amalgamation. Consequently, as a result of the Arrangement, the Filer is required to comply with the Continuous Disclosure Requirements and Certification Requirements.

11. Upon completion of the Arrangement, the Old Skye Warrants became the New Skye Warrants, which are the only securities of the Filer that are held publicly held.

12. Pursuant to the terms of the indenture governing the Old Skye Warrants (the Indenture), each holder of an Old Skye Warrant outstanding immediately prior to the Effective Date became entitled upon completion of the Arrangement, to receive, upon the exercise of such holder's warrant, for the same aggregate consideration payable for the Old Skye Warrants (being $15.13 per warrant) in lieu of each Old Skye Share to which such holder was previously entitled, 0.61 of a HudBay Share plus $0.001 cash for each Old Skye Warrant, subject to adjustment.

13. In accordance with the terms of the Indenture, HudBay and the Filer entered into a supplemental warrant indenture (the Supplemental Indenture) dated as of the Effective Date whereby the Filer covenanted, acknowledged and agreed, among other things, that it remains liable for, and shall continue to perform its obligations under the Indenture.

14. Pursuant to the terms of the Supplemental Indenture, HudBay covenanted, acknowledged and agreed, among other things, that it is liable for, and shall perform the obligations of the Filer under the Indenture with respect to the issuance of HudBay Shares on the exercise of the New Skye Warrants.

15. The Indenture included a covenant of Old Skye that it would remain a reporting issuer in such of the provinces of Canada in which Old Skye was a reporting issuer for so long as the Old Skye Warrants remained outstanding. The same covenant applies to the New Skye Warrants.

16. Neither the terms of the Indenture or the Supplemental Indenture include any obligation of Old Skye or any successor thereof such as the Filer to deliver to holders of warrants any continuous disclosure materials of Old Skye or its successor.

17. However, as a consequence of remaining a reporting issuer, the Filer is required to prepare financial statements and other continuous disclosure materials pursuant to NI 51-102.

18. The Filer cannot rely on the exemption available in section 13.3 of NI 51-102 for issuers of exchangeable securities because the New Skye Warrants are not "designated exchangeable securities" as defined in NI 51-102. The New Skye Warrants do not provide their holders with voting rights in respect of HudBay.

19. The Filer has no intention of accessing the capital markets in the future by issuing any further securities to the public, and has no intention of issuing any securities other than those that were outstanding on completion of the Arrangement.

20. The Filer and HudBay are not in default of any requirement under securities legislation in the Reporting Issuer Jurisdictions.

21. It is the continuous disclosure information relating to HudBay, and not to the Filer, that is of importance to holders of New Skye Warrants as the New Skye Warrants are exercisable into HudBay Shares, along with a nominal amount of cash. In addition, the Filer became a wholly-owned subsidiary of HudBay on completion of the Arrangement. HudBay will consolidate the Filer with HudBay for purposes of financial statement reporting. As such, the disclosure required by the Continuous Disclosure Requirements and the Insider Reporting Requirements would not be meaningful or of any significant benefit to the holders of the New Skye Warrants and would impose a significant cost on the Filer.

Decision

The principal regulator is satisfied that the decision meets the test contained in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

1. in respect of the Continuous Disclosure Requirements,

   (a) HudBay is the beneficial owner of all of the issued and outstanding voting securities of the Filer;

   (b) HudBay is a reporting issuer in a designated Canadian jurisdiction (as defined in NI 51-102) and has filed all documents it is required to file under NI 51-102;

   (c) the Filer does not issue any securities, and does not have any securities outstanding other than:

      (i) the New Skye Warrants;

      (ii) securities issued to and held by HudBay or an affiliate of HudBay;

      (iii) debt securities issued to and held by banks, loan corporations, loan and investment corporations, savings companies, trust corporations, treasury branches, savings or credit unions, financial services cooperatives, insurance companies or other financial institutions; or

      (iv) securities issued under exemptions from the registration requirement and prospectus requirement in section 2.35 of National Instrument 45-106 *Prospectus and Registration Exemptions*;

   (d) the Filer files in electronic format,

      (i) a notice indicating that it is relying on the continuous disclosure documents filed by HudBay and setting out where those documents can be found in electronic format; or

(ii) copies of all documents HudBay is required to file under securities legislation, other than in connection with a distribution, at the same time as the filing by HudBay of those documents with a securities regulatory authority or regulator;

(e) the Filer concurrently sends to all holders of the New Skye Warrants all disclosure materials that would be required to be sent to holders of any similar warrants of HudBay in the manner and at the time required by securities legislation;

(f) HudBay

(i) complies with Canadian securities legislation in respect of making public disclosure of material information on a timely basis; and

(ii) immediately issues in Canada and files any news release that discloses a material change in its affairs; and

(g) the Filer issues in Canada a news release and files a material change report in accordance with Part 7 of NI 51-102 for all material changes in respect of the affairs of the Filer that are not also material changes in the affairs of HudBay.

2. in respect of the Certification Requirements,

(a) the Filer is not required to, and does not, file its own interim filings and annual filings (as those terms are defined under MI 52-109);

(b) the Filer files in electronic format under its SEDAR profile either (i) copies of HudBay's annual certificates and interim certificates at the same time as HudBay is required under MI 52-109 to file such documents; or (ii) a notice indicating that it is relying on HudBay's annual certificates and interim certificates and setting out where those documents can be found for viewing on SEDAR; and

(c) the Filer is exempt from or otherwise not subject to the Continuous Disclosure Requirements and the Filer and HudBay are in compliance with the conditions set out in paragraph 1 above.

3. in respect of the Insider Profile Requirement and the Insider Reporting Requirements,

(a) if the insider is not HudBay,

(i) the insider does not receive, in the ordinary course, information as to material facts or material changes concerning HudBay before the material facts or material changes are generally disclosed; and

(ii) the insider is not an insider of HudBay in any capacity other than by virtue of being an insider of the Filer;

(b) HudBay is the beneficial owner of all of the issued and outstanding voting securities of the Filer;

(c) if the insider is HudBay, the insider does not beneficially own any New Skye Warrants other than securities acquired through the exercise of the New Skye Warrants and not subsequently traded by the insider;

(d) HudBay is a reporting issuer in a designated Canadian jurisdiction (as defined in NI 51-102); and

(e) the Filer has not issued any securities, and does not have any securities outstanding, other than:

(i) the New Skye Warrants;

(ii) securities issued to and held by HudBay or an affiliate of HudBay;

(iii) debt securities issued to and held by banks, loan corporations, loan and investment corporations, savings companies, trust corporations, treasury branches, savings or credit unions, financial services cooperatives, insurance companies or other financial institutions; or

(iv) securities issued under exemptions from the registration requirement and prospectus requirement in section 2.35 of National Instrument 45-106 *Prospectus and Registration Exemptions*; and

(f) the Filer is exempt from or otherwise not subject to the Continuous Disclosure Requirements and the Filer and HudBay are in compliance with the conditions set out in paragraph 1 above.

As to the Exemption Sought (other than from the statutory Insider Reporting Requirements):

"Margo Paul"
Director, Corporate Finance

As to the Exemption Sought from the statutory Insider Reporting Requirements:

"David L. Knight"
Commissioner
Ontario Securities Commission

"Paul K. Bates"
Commissioner
Ontario Securities Commission

2.1.9 Interinvest Consulting Corporation of Canada Ltd.

Headnote

Application for an order, pursuant to section 147 of the Act, for an exemption from the requirement in section 139 of Regulation 1015 made pursuant to the Act that the Applicant deliver its audited annual financial statements to the Commission by no later than 90 days following the end of its 2008 financial year.

Statute Cited

Securities Act, R.S.O. 1990, c. S.5, as am., s. 147.

Regulation Cited

R.R.O. 1990, Regulation 1015, am. to O. Reg. 500/06, s. 139.

October 17, 2008

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
QUEBEC AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
INTERINVEST CONSULTING CORPORATION OF
CANADA LTD.
(the Filer)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) that the filing of the annual financial statements of the Filer, together with the auditor's report, be delayed, provided that such documents are filed by October 30, 2008 (the Exemptive Relief Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a coordinated review application):

(a) the Autorité des marchés financiers is the principal regulator for this application, and

(b) the decision is the decision of the principal regulator and evidences the decision of each other Decision Maker.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer was founded in Montreal in 1974. The Filer's head office is located in Montréal, Quebec.

2. The Filer is registered as a securities adviser with an unrestricted practice with the principal regulator. The Filer is registered as an extra-provincial investment counsel and portfolio manager with the Ontario Securities Commission.

3. The Filer's financial year-end is June 30.

4. The President of the Filer is a director and owns 20% of the common shares of Interinvest (Bermuda) Limited.

5. By agreement of loan dated July 1, 2004, Interinvest (Bermuda) Limited lended the sum of $8,549,658.00 to Interinvest (the Loan).

6. On June 30, 2008, the Filer and Interinvest (Bermuda) Limited agreed to extend the term of repayment of the Loan and all interest accrued on that date until June 30, 2011, the whole without novation or derogation from the terms and conditions of the original Loan other than the new term of repayment. The repayment of the Loan is subordinated to the repayment of other creditors.

7. The Filer may, with the authorization of the principal regulator, borrow funds, provided that their repayment is subordinated to the repayment of other creditors. The Filer did not request the authorization of the principal regulator at the time the loan was made. The application and necessary documents to obtain the authorization were filed with the principal regulator thereafter. A hearing is scheduled for October 24, 2008 in order to determine whether an administrative penalty should be imposed.

8. The Filer is in the process of obtaining the required authorization from the principal regulator. Since the Loan has not been authorized by the principal regulator yet, the Filer is not in a position to have its annual financial statements for the June 30, 2008 year end finalized. The Filer's annual financial statements were due on September 30, 2008. The extension of the term of repayment of the Loan, if approved by the principal regulator, must be incorporated into the Filer's annual financial statements for the period ended June 30, 2008.

9. The Filer requested a 30-day extension period for the filing of its annual financial statements, together with the auditor's report in order to obtain the authorization of the principal regulator with respect to the Loan.

10. Subject to paragraph 8 above, the Filer is not in default with the securities legislation in any jurisdiction.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemptive Relief Sought is granted provided that the annual financial statements of the Filer, together with the auditor's report, is filed by October 30, 2008.

"Claude Prévost"
Assistant Executive Director, Registrant Services,

2.2 Orders

2.2.1 Robert Kasner

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
ROBERT KASNER

ORDER

WHEREAS on June 25, 2008, Staff ("Staff") of the Ontario Securities Commission (the "Commission") issued a Statement of Allegations with respect to Robert Kasner ("Kasner");

AND WHEREAS on June 26, 2008 the Commission issued a Notice of Hearing pursuant to sections 127 and 127.1 of the Securities Act, R.S.O. 1990, c. S.5, as amended (the "Act") to consider whether it is in the public interest to make certain orders against Kasner;

AND WHEREAS on July 23, 2008, counsel for Staff and counsel for Kasner attended before the Commission and requested that the matter be adjourned to October 14, 2008 at 2:30 p.m. to hold a pre-hearing conference;

AND WHEREAS on July 23, 2008, the Commission ordered on consent that this matter be adjourned to a pre-hearing conference on October 14, 2008 at 2:30 p.m. for the purpose of setting a hearing date and addressing any other pre-hearing issues;

AND WHEREAS on October 14, 2008, counsel for Staff and counsel for Kasner attended before the Commission and a pre-hearing conference was conducted;

AND WHEREAS the Commission considers it to be in the public interest to make this order;

IT IS HEREBY ORDERED on consent of counsel for Staff and counsel for Kasner that a hearing on the merits in this matter is scheduled to commence on June 1, 2009 at 10:00 a.m. and proceed through June 3, 2009, or on such other dates as are agreed by the parties and determined by the Office of the Secretary.

DATED at Toronto this 15th day of October, 2008.

"Paul K. Bates"

2.2.2 Conrad M. Black and John A. Boultbee - s. 17

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
CONRAD M. BLACK AND JOHN A. BOULTBEE

AMENDED CONFIDENTIAL ORDER
(Section 17 of the Securities Act)

WHEREAS an application (the "Application") has been made by Conrad M. Black and John A. Boultbee (the "Applicants"), for an order pursuant to subsection 17(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), authorizing the Applicants to use and disclose testimonial and documentary evidence of persons identified as A, B, C, D, E, F, G, H, I and J (the "Respondents") that was obtained by Staff of the Ontario Securities Commission ("Staff") under an order of the Ontario Securities Commission (the "Commission") made pursuant to section 11 of the Act, in order to provide the Applicants with the ability to make full answer and defence to criminal charges against them in the United States District Court for the Northern District of Illinois, Eastern Division proceeding entitled *United States of America v. Conrad M. Black, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis and The Ravelston Corporation Limited*, No. 05 CR 727 (the "U.S. Criminal Proceeding");

AND WHEREAS the Applicants are the subject of a Commission proceeding in Ontario, entitled *In the Matter of Hollinger, Inc. et al.* (the "Commission Proceeding"), commenced by a Notice of Hearing issued on March 18, 2005, by the Commission pursuant to sections 127 and 127.1 of the Act, and accompanied by a Statement of Allegations issued by Staff with respect to Hollinger Inc. ("Hollinger"), Conrad M. Black ("Black"), F. David Radler ("Radler"), John A. Boultbee ("Boultbee") and Peter Y. Atkinson ("Atkinson");

AND WHEREAS the specific materials that are the subject of the Application are transcripts of examinations conducted under section 13 of the Act, documents that were the subject of the examinations, and documents produced at these examinations (the "Evidence");

AND WHEREAS the Applicants provided a draft order with their Application, which outlines conditions for the use and disclosure of the Evidence in order to attempt to minimize the harm to the Respondents;

AND WHEREAS the respondent H, Ravelston Corporation Limited ("Ravelston") did not appear at the hearing;

AND WHEREAS by letter dated January 9, 2007, Ravelston, through counsel for RSM Richter Inc. in its capacity as receiver and manager, interim receiver and monitor of Ravelston, stated that it had no objection to the order sought by the Applicants in respect of the documents produced by, and on behalf of Ravelston, to the Commission and provided by Staff to the Applicants in connection with the Commission Proceeding (the "Ravelston Documents");

AND WHEREAS the Commission heard the Application at a hearing held *in camera* on January 10 and 11, 2007;

AND UPON CONSIDERING the written and oral submissions of the Applicants, the written and oral submissions of the respondents (except for Ravelston), the written and oral submissions of Staff, and the letter dated January 9, 2007, from Ravelston, through counsel for RSM Richter Inc.;

AND WHEREAS in our Confidential Reasons and Decision dated February 7, 2007, we determined that it would be in the public interest to grant the Applicants' request for use and disclosure of the Ravelston Documents for the purposes of the Applicants' full answer and defence in the U.S. Criminal Proceeding;

AND WHEREAS we made a Confidential Order under paragraph 17(1)(b) of the Act on February 13, 2007;

AND WHEREAS counsel for the Applicants filed a letter on February 14, 2007 requesting that some amendments be made to the Confidential Order dated February 13, 2007;

AND WHEREAS Ravelston filed a letter on February 22, 2007, confirming that it had no objection to the Applicants' requested amendments, and a letter on March 1, 2007, setting out possible concerns in respect of the scope of the relief granted in the Confidential Order under paragraph 17(1)(b) of the Act on February 13, 2007;

AND WHEREAS counsel for the Applicants filed a letter on March 2, 2007, in response to the letter filed by Ravelston on March 1, 2007;

AND UPON having considered these letters;

AND UPON being satisfied that the requested amendments are appropriate in the circumstances;

IT IS ORDERED THAT, pursuant to paragraph 17(1)(b) of the Act:

1. The Applicants or their counsel may make disclosure of and use the Ravelston Documents solely for purposes relating to their defence of the charges in the U.S. Criminal Proceeding and for no other purpose and in connection with no other proceeding.

2. Disclosure and use of the Ravelston Documents will be on the basis that:

   (a) the Applicants and their counsel will not use the Ravelston Documents other than in connection with their making full answer and defence to the charges against them in the U.S. Criminal Proceeding;

   (b) any use of the Ravelston Documents other than in connection with their making full answer and defence to the charges against the Applicants in the U.S. Criminal Proceeding will constitute a violation of this Order;

   (c) the Applicants and their counsel shall maintain custody and control over the Ravelston Documents so that copies of the Ravelston Documents are not disseminated for any purpose other than in connection with their making full answer and defence to the charges in the U.S. Criminal Proceeding;

   (d) if any of the Ravelston Documents are disclosed in connection with the trial in the U.S. Criminal Proceeding, the Applicants and their counsel will take all steps reasonably available to obtain a protective order from the United States District Court that requires all parties to the U.S. Criminal Proceeding and others to comply with the conditions in this Order;

   (e) the Ravelston Documents shall not be used for any collateral or ulterior purpose;

   (f) the Applicants and their counsel shall, promptly after the completion of the trial and any appeals in the U.S. Criminal Proceeding, return all copies of the Ravelston Documents to Staff or confirm under oath that they have been destroyed; and

   (g) defence counsel for the Applicants in the U.S. Criminal Proceeding shall provide an undertaking to the Commission that they will comply with the conditions specified in paragraph 2 of this Order.

3. For greater certainty,

   (a) this Order shall not preclude disclosure or use of the Ravelston Documents by the Applicants or their counsel in connection with the Commission Proceeding; and

   (b) paragraph 2(f) of this Order shall not apply prior to the completion of the Commission Proceeding and any appeals of the decision in the Commission Proceeding, except with respect to U.S. defence counsel who are not providing representation to the Applicants in connection with the Commission Proceeding.

DATED at Toronto this 5th day of March, 2007.

“Patrick J. LeSage”

“Wendell S. Wigle, Q.C.”

“Carol S. Perry”

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
HOLLINGER INC., CONRAD M. BLACK AND
JOHN A. BOULTBEE

CONFIDENTIAL UNDERTAKING TO THE
ONTARIO SECURITIES COMMISSION

I, _____, represent John A. Boultbee who is a defendant in a U.S. criminal proceeding in the United States District Court for the Northern District of Illinois, Eastern Division entitled *United States of America v. Conrad M. Black, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis and The Ravelston Corporation Limited*, No. 05 CR 727.

I hereby undertake to the Ontario Securities Commission that I shall comply with all of the conditions contained in the Order of the Commission dated March 5, 2007, a copy of which is attached hereto.

_____ _____
Witness
Date: Date:

Acknowledged as Received by,

_____

John Stevenson, Secretary to the
Ontario Securities Commission

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
HOLLINGER INC., CONRAD M. BLACK AND
JOHN A. BOULTBEE

CONFIDENTIAL UNDERTAKING TO THE
ONTARIO SECURITIES COMMISSION

I, _____, represent Conrad M. Black who is a defendant in a U.S. criminal proceeding in the United States District Court for the Northern District of Illinois, Eastern Division entitled *United States of America v. Conrad M. Black, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis and The Ravelston Corporation Limited*, No. 05 CR 727.

I hereby undertake to the Ontario Securities Commission that I shall comply with all of the conditions contained in the Order of the Commission dated March 5, 2007, a copy of which is attached hereto.

_____ _____
Witness
Date: Date:

Acknowledged as Received by,

_____
John Stevenson, Secretary to the
Ontario Securities Commission

2.2.3 Irwin Boock et al. – ss. 127(1), (5)

**IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED**

AND

**IN THE MATTER OF
IRWIN BOOCK, SVETLANA KOUZNETSOVA,
VICTORIA GERBER,
COMPUSHARE TRANSFER CORPORATION,
FEDERATED PURCHASER, INC.,
TCC INDUSTRIES, INC., FIRST NATIONAL
ENTERTAINMENT CORPORATION,
WGI HOLDINGS, INC. AND
ENERBRITE TECHNOLOGIES GROUP**

**TEMPORARY ORDER
(Sections 127(1) and (5))**

WHEREAS on May 5, 2008, the Ontario Securities Commission (the "Commission") made an order, pursuant to subsections 127(1) and (5) of the *Securities Act*, R.S.O. 1990, c. S.5., as amended (the "Act"), that all trading in any securities by Irwin Boock ("Boock"), Victoria Gerber ("Gerber") and Svetlana Kouznetsova ("Kouznetsova") shall cease and further, that trading in the securities of WGI Holdings, Inc. ("WGI Holdings"), Federated Purchaser, Inc. ("Federated Purchaser"), First National Entertainment Corporation ("First National"), TCC Industries, Inc. ("TCC Industries") and Enerbrite Technologies Group ("Enerbrite Technologies") shall cease (the "Temporary Cease Trade Order");

A**ND WHEREAS** on May 14, 2008, the Commission amended the Temporary Cease Trade Order to order that all trading in any securities by Compushare shall cease;

AND WHEREAS on May 15, 2008, the Commission ordered pursuant to subsection 127(8) of the Act, that the Temporary Cease Trade Order, as amended, be extended until June 11, 2008 or until further order of the Commission;

AND WHEREAS on September 9, 2008, the Commission extended the hearing and the Temporary Cease Trade Order, as amended, to October 17, 2008;

AND WHEREAS Staff advise that no proceedings are currently being commenced against Svetlana Kouznetsova ("Kouznetsova") or Victoria Gerber ("Gerber");

AND UPON HEARING submissions from counsel for Staff of the Commission, with no one appearing for WGI Holdings, Federated Purchaser, First National, TCC Industries, Enerbrite Technologies and Compushare;

AND UPON BEING ADVISED by counsel for Staff of the Commission that Boock, consents to an extension of the Temporary Cease Trade Order, as amended, to November 25, 2008;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this order;

IT IS ORDERED THAT in relation to all Respondents, except Gerber and Kouznetsova:

1. the hearing to extend the Temporary Cease Trade Order, as amended, is adjourned until November 24, 2008 at 10:00 a.m.;

2. pursuant to subsection 127(8) of the Act, the Temporary Cease Trade Order, as amended, is extended until November 25, 2008 or until further order of the Commission.

DATED at Toronto this 17th day of October, 2008.

"James E. A. Turner"

"David L. Knight"

2.2.4 Stanton De Freitas – ss. 127(1), (5) and (8)

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
STANTON DE FREITAS

TEMPORARY ORDER
(Sections 127(1), (5) and (8))

WHEREAS on May 30, 2007, the Commission made a Temporary Order pursuant to subsections 127(1) and (5) of the *Securities Act*, R.S.O. 1990, c. S.5., as amended (the "Act"), that trading in any securities by Stanton De Freitas ("De Freitas") shall cease and that any exemptions contained in Ontario securities law do not apply to him (the "Temporary Order");

WHEREAS the Temporary Order has been modified and extended from time to time by order of the Commission;

AND WHEREAS the hearing to extend the Temporary Order, as modified and extended by the Commission, was held on September 9, 2008 when it was ordered that the hearing to extend the Temporary Order was adjourned to October 17, 2008 and the Temporary Order, as varied, was extended to the same date;

AND UPON HEARING submissions from counsel for Staff and counsel for De Freitas, and upon being advised that De Freitas does not object to the making of this Order;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order;

IT IS ORDERED THAT:

1. the hearing to extend the Temporary Order, as modified, is adjourned until November 24, 2008 at 10:00 a.m.; and

2. pursuant to subsection 127(8) of the Act, the Temporary Order, as modified, is extended until November 25, 2008 or until further order of the Commission.

DATED at Toronto this 17th day of October, 2008.

"James E. A. Turner"

"David L. Knight"

2.2.5 David Watson et al. - ss. 127(1), (5), (8)

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
DAVID WATSON, NATHAN ROGERS,
AMY GILES, JOHN SPARROW,
LEASESMART, INC.,
ADVANCED GROWING SYSTEMS, INC.
(a Florida corporation),
PHARM CONTROL LTD., THE BIGHUB.COM, INC,,
UNIVERSAL SEISMIC ASSOCIATES INC.,
POCKETOP CORPORATION, ASIA TELECOM LTD.,
INTERNATIONAL ENERGY LTD.,
CAMBRIDGE RESOURCES CORPORATION,
NUTRIONE CORPORATION AND
SELECT AMERICAN TRANSFER CO.

TEMPORARY ORDER
(Sections 127(1), (5) and (8))

WHEREAS on May 18, 2007, the Ontario Securities Commission (the "Commission") made an order, pursuant to subsections 127(1) and (5) of the *Securities Act*, R.S.O. 1990, c. S.5., as amended (the "Act"), that:

i) trading in the securities of the following companies shall cease and that any exemptions contained in Ontario securities law do not apply to them: The Bighub.Com, Inc. ("Bighub.Com"); Advanced Growing Systems, Inc. (a Florida corporation) ("Advanced Growing Systems"); LeaseSmart, Inc. ("Lease-Smart"); Cambridge Resources Corporation ("Cambridge Resources"); NutriOne Corporation ("NutriOne"); International Energy Ltd. ("International Energy"); Universal Seismic Associates Inc. ("Universal Seismic"); Pocketop Corporation ("Pocketop"); Asia Telecom Ltd. ("Asia Telecom"); and Pharm Control Ltd. ("Pharm Control"); and

ii) all trading in any securities by Jason Wong, David Watson, Nathan Rogers, Amy Giles, John Sparrow and Kervin Findlay shall cease;

AND WHEREAS on May 22, 2007, by further order of the Commission made pursuant to subsections 127(1) and (5) of the Act, it was ordered that trading in any securities by Select American Transfer Co. ("Select American") shall cease and that any exemptions contained in Ontario securities law do not apply to it;

AND WHEREAS the temporary orders dated May 18 and May 22, 2007 (the "Temporary Orders") were

modified and extended from time to time by the Commission;

AND WHEREAS the Temporary Orders were extended and amended on June 25, 2007 to remove Jason Wong and Kervin Findlay as Respondents from the style of cause;

AND WHEREAS the hearing to extend the Temporary Orders, as modified and extended by the Commission, was held on September 9, 2008 and on that date, the Commission adjourned the hearing and ordered that the Temporary Orders, as modified, be extended until October 17, 2008;

AND WHEREAS Staff advise that no proceedings are currently being commenced against David Watson ("Watson"), Nathan Rogers ("Rogers"), Amy Giles ("Giles") and John Sparrow ("Sparrow");

AND UPON HEARING submissions from counsel for Staff of the Commission and upon being advised of the consents of NutriOne and Pharm Control to the issue of this Order, with no one appearing for the remainder of the Respondents;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this order;

IT IS ORDERED THAT in relation to all Respondents, except Watson, Rogers, Giles and Sparrow:

1. the hearing to extend the Temporary Orders, as modified, is adjourned until November 24, 2008 at 10:00 a.m.; and

2. pursuant to subsection 127(8) of the Act, the Temporary Orders, as modified, are extended until November 25, 2008 or until further order of the Commission.

DATED at Toronto this 17th day of October, 2008.

"James E. A. Turner"

"David L. Knight"

2.2.6 Bank of New York and Northgate Minerals Corporation - s. 46(4) of the OBCA

Headnote

Order pursuant to subsection 46(4) of the Business Corporations Act (Ontario) - trust indenture to be governed by the United States Trust Indenture Act of 1939, as amended, in connection with a proposed public offering of debt securities of an issuer in the United States and Canada - trustee to be appointed under the trust indenture undertakes to file with the Commission and on SEDAR a submission to the non-exclusive jurisdiction of the courts and administrative tribunals of Ontario and appointment of an agent for service of process in Ontario - any pricing supplement or prospectus supplement under which the debt securities will be offered in Ontario will include disclosure about the existence of this order and a statement regarding the risks associated with the purchase of debt securities of the issuer under the trust indenture by a holder in Ontario as a result of the absence of a local trustee appointed under the trust indenture - trust indenture exempted from the requirements of Part V of the Business Corporations Act (Ontario).

Applicable Legislative Provisions

Business Corporations Act , R.S.O. 1990, c. B.16, as am., ss. 46(2), 46(3), 46(4), Part V.
Securities Act , R.S.O. 1990, c. S.5, as am..
Trust Indenture Act of 1939 , 53 Stat. 1149 (1939), 15 U.S.C., Secs. 77aaa-77bbb, as am.

June 27, 2008

IN THE MATTER OF
THE BUSINESS CORPORATIONS ACT,
R.S.O. 1990, CHAPTER B. 16, AS AMENDED
(THE "OBCA")

AND

IN THE MATTER OF
THE BANK OF NEW YORK AND
NORTHGATE MINERALS CORPORATION

ORDER
(Subsection 46(4) of the OBCA)

UPON the application of The Bank of New York (the "Applicant") to the Ontario Securities Commission (the "Commission") for an order that:

a) pursuant to subsection 46(4) of the OBCA exempting a trust indenture to be entered into between Northgate Minerals Corporation ("Northgate") and the Applicant from the requirements of Part V of the OBCA; and

b) the Application and this order be kept confidential by the Commission until the earlier of: (i) the date on which Northgate

announces its intention to file a supplemental short form prospectus; (ii) the date on which the Applicant advises the Commission that there is no longer any need for the application for this order and this order to remain confidential; and (iii) the date which is 60 days from the date of this order.

AND UPON considering the application and the recommendation of the staff of the Commission;

AND UPON it being represented by Northgate and the Applicant to the Commission that:

1. The Applicant is a banking corporation organized under the laws of New York and is neither resident nor authorized to do business in Ontario and will be the trustee under an indenture (the "Indenture") to be entered into between Northgate and the Applicant.

2. Northgate is a corporation amalgamated under the laws of British Columbia and is a reporting issuer not in default under the *Securities Ac*t, R.S.O. 1990, c. S.5, as amended (the "Act") or the regulations promulgated thereunder. Northgate's head office is located at Suite 406, 815 Hornby Street, Vancouver, British Columbia, Canada, V6Z 2E6.

3. Any sales of debt securities (the "Debt Securities") by Northgate will be under the Indenture. The Indenture is governed by the laws of the State of New York. A final form of the Indenture was filed with the United States Securities and Exchange Commission (the "SEC") as an exhibit to the Amendment No. 1 to the registration statement (the "Registration Statement") of Northgate on Form F-10, dated June 5, 2008, that contains a final base shelf prospectus dated June 5, 2008 under which Debt Securities of Northgate may be offered for sale in the United States.

4. A short form base shelf prospectus has been filed by Northgate with the Commission pursuant to National Instrument 44-101 *Short Form Prospectus Distributions* and National Instrument 44-102 *Shelf Distributions* to qualify the distribution of the Debt Securities in each of the provinces and territories of Canada. The Indenture will be filed by Northgate with the Commission in connection with the filing of the prospectus.

5. Public offers and sales of the Debt Securities, if any, will be made in the United States and in each of the provinces and territories of Canada.

6. Unless otherwise specified in the applicable prospectus supplement, the Debt Securities issued in Canada will not be listed on any stock exchange in Canada.

7. Since a prospectus has been filed under the Act, Part V of the OBCA applies to the Indenture by virtue of subsection 46(2) of the OBCA.

8. As a result of the filing of the Registration Statement with the SEC, the Indenture is subject to and governed by the provisions of the United States *Trust Indenture Act of 1939* (the "TIA"). Upon the receipt of requested exemptions under the OBCA pursuant to this order, the Indenture will continue to be subject to the TIA. The Indenture provides that there shall always be a trustee thereunder that satisfies the requirements of sections 310(a)(1), 310(a)(2) and 310(b) of the TIA and that the terms of such Indenture will be consistent with the requirements of the TIA.

9. As the TIA regulates trustees and trust indentures of publicly offered debt securities in the United States in a manner that is consistent with Part V of the OBCA, holders of Debt Securities in Ontario will not, subject to paragraph 10, derive any additional material benefit from having the Indenture be subject to Part V of the OBCA.

10. The Applicant has filed with the Commission and will file on SEDAR a submission to the non-exclusive jurisdiction of the courts and administrative tribunals of Ontario and appointment of an agent for service of process in Ontario (a "Submission to Jurisdiction and Appointment of Agent for Service of Process").

11. Northgate has advised the Applicant that any pricing supplement or prospectus supplement (a "Supplement") under which Debt Securities will be offered or sold in Canada will disclose the existence of this order and state that the Applicant and the assets of the Applicant and if applicable, all or certain of its officers and directors are located outside of Ontario and, as a result, it may be difficult for a holder of Debt Securities to enforce rights against the Applicant, its officers or directors, or the Applicant's assets and that the holder may have to enforce rights against the Applicant in the United States.

AND UPON the Commission being of the opinion that to do so would not be prejudicial to the public interest;

IT IS ORDERED, pursuant to subsection 46(4) of the OBCA, that the Indenture is exempt from Part V of the OBCA, provided that:

a) the Indenture is governed by and subject to the TIA; and

b) prior to or concurrently with the filing of any Supplement of Northgate, the Applicant, or any trustee that replaces the Applicant under the terms of the Indenture, has filed with the Commission and on SEDAR a "Submission to

Jurisdiction and Appointment of Agent for Service of Process".

IT IS ORDERED that the Application and this order be held in confidence by the Commission until the earlier of (i) the date on which Northgate announces its intention to file a supplemental short form prospectus; (ii) the date on which the Applicant advises the Commission that there is no longer any need for the application for this order and this order to remain confidential; and (iii) the date which is 60 days from the date of this order.

"Paulette Kennedy"
Commissioner
Ontario Securities Commission

"Paul Bates"
Commissioner
Ontario Securities Commission

2.2.7 AGF Management Limited - s. 104(2)(c)

Headnote

Clause 104(2)(c) - Issuer bid - relief from issuer bid requirements in sections 94 to 94.8 and 97 to 98.7 of the Act - Issuer proposes to purchase, at a discounted purchase price, up to 2,000,000 of its Class B Non-Voting Shares from one shareholder - due to discounted purchase price, proposed purchases cannot be made through TSX trading system - but for the fact that the proposed purchases cannot be made through the TSX trading system, the Issuer could otherwise acquire the subject shares in reliance upon the issuer bid exemption available under section 101.2 of the Act and in accordance with the TSX rules governing normal course issuer bid purchases - no adverse economic impact on or prejudice to issuer or public shareholders - proposed purchases exempt from issuer bid requirements in sections 94 to 94.8 and 97 to 98.7 of the Act, subject to conditions.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 94 to 94.8, 97 to 98.7 and 104(2)(c).

October 17, 2008

**IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED
(the Act)**

AND

**IN THE MATTER OF
AGF MANAGEMENT LIMITED**

**ORDER
(Section 104(2)(c))**

UPON the application (the **Application**) of AGF Management Limited (the **Issuer**) to the Ontario Securities Commission (the **Commission**) for an order pursuant to Section 104(2)(c) of the Act exempting the Issuer from the requirements of Sections 94 to 94.8 and 97 to 98.7 of the Act (the **Formal Bid Requirements**) in connection with the proposed purchases by the Issuer of approximately (and in no event greater than) 2,000,000 (the **Subject Shares**) of its class B non-voting shares (the **Class B Shares**) from Royal Bank of Canada and/or such shareholder's affiliates (the **Selling Shareholder**);

AND UPON considering the Application and the recommendation of staff of the Commission;

AND UPON the Issuer having represented to the Commission that:

1. The Issuer is a corporation governed by the *Business Corporations Act* (Ontario).

2. The head office and registered office of the Issuer are located at Suite 3100, 66 Wellington Street West, Toronto-Dominion Bank Tower, Toronto-Dominion Centre, Toronto, Ontario, M5K 1E9.

3. The Issuer is a reporting issuer in each of the provinces and territories of Canada and the Subject Shares of the Issuer are listed for trading on the Toronto Stock Exchange (the **TSX**). The Issuer is not in default of any requirement of the securities legislation in the jurisdictions in which it is a reporting issuer.

4. The authorized share capital of the Issuer consists of an unlimited number of Class B Shares, of which 89,441,992 were issued and outstanding as of September 29, 2008 and an unlimited number of Class A Voting Common Shares, of which 57,600 were issued and outstanding as of September 29, 2008.

5. Pursuant to a Notice of Intention to make a Normal Course Issuer Bid dated and filed with the TSX on February 22, 2007 (the **Notice**), the Issuer is permitted to make normal course issuer bid (the **Bid**) purchase for the period starting February 26, 2008 and ending on February 25, 2009 and for a maximum of 7,253,822 Class B Shares. As at October 1, 2008, no purchases of Class B Shares have been made under the Bid.

6. The Issuer and the Selling Shareholder intend to enter into one or more agreements of purchase and sale (each, an **Agreement**), pursuant to which the Issuer will agree to acquire the Subject Shares from the Selling Shareholder by one or more purchases occurring prior to October 31, 2008 (each such purchase, a **Proposed Purchase**), for a purchase price (the **Purchase Price**) that will be negotiated at arm's length between the Issuer and the Selling Shareholder. The Purchase Price will be at a discount to the prevailing market price and below the prevailing bid-ask price for the Issuer's Class B Shares at the time of each Proposed Purchase.

7. The purchase of Subject Shares by the Issuer pursuant to each Agreement will constitute an "issuer bid" for purposes of the Act, to which the Formal Bid Requirements would otherwise apply.

8. Because the Purchase Price will be at a discount to the prevailing market price and below the prevailing bid-ask price for the Class B Shares at the time of each Proposed Purchase, each trade cannot be made through the TSX trading system and, therefore, will not occur "through the facilities" of the TSX. As a result, the Issuer will be unable to acquire Subject Shares from the Selling Shareholder in reliance upon the exemption from the Formal Bid Requirements that is available pursuant to Section 101.2 of the Act.

9. But for the fact that the Purchase Price will be at a discount to the prevailing market price and below the prevailing bid-ask price for the Class B Shares at the time of each trade, the Issuer could otherwise acquire the Subject Shares as a "block purchase" (a **Block Purchase**) in accordance with Section 629(l)7 Part VI of the TSX Company Manual (the **TSX Rules**) and Section 101.2 of the Act.

10. The Selling Shareholder is at arm's length to the Issuer and is not an "insider" of the Issuer or "associate" of an "insider" of the Issuer, an "associate" or "affiliate" of the Issuer, as such terms are defined in the Act. In addition, the Selling Shareholder is an "accredited investor" within the meaning of National Instrument 45-106 *Prospectus and Registration Exemptions* (**NI 45-106**).

11. For each Proposed Purchase, the Issuer will be able to acquire Subject Shares from the Selling Shareholder in reliance upon the exemption from the dealer registration requirements of the Act that is available as a result of the combined effect of Section 2.16 of NI 45-106 and Section 4.1(a) of Commission Rule 45-501 *Ontario Prospectus and Registration Exemptions*.

12. The Issuer is of the view that the purchase of the Subject Shares at a lower price than the price at which the Issuer would be able to purchase the Class B Shares under the Bid is an appropriate use of the Issuer's funds.

13. The purchase of the Subject Shares will not adversely affect the Issuer or the rights of any of the Issuer's securityholders and it will not materially affect control of the Issuer. The Proposed Purchases will be carried out with a minimum of cost to the Issuer.

14. The market for the Class B Shares is a "liquid market" within the meaning of Section 1.2 of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*. The purchase of the Subject Shares would not have any effect on the ability of other shareholders of the Issuer to sell their Class B Shares in the market.

15. Other than the Purchase Price, no additional fee or other consideration will be paid in connection with the Proposed Purchases.

16. At the time that each Agreement is entered into by the Issuer and a Selling Shareholder and at the time of each Proposed Purchase, neither the Issuer nor the Selling Shareholder will be aware of any undisclosed material change or any undisclosed material fact (each as defined in the Act) in respect of the Issuer.

17. As at the date hereof, to the knowledge of the Issuer after reasonable inquiry, the Selling Shareholder owns the Subject Shares and the Subject Shares were not acquired in anticipation of resale pursuant to the Proposed Purchases.

AND UPON the Commission being satisfied that it would not be prejudicial to the public interest for the Commission to grant the requested exemption;

IT IS ORDERED pursuant to Section 104(2)(c) of the Act that the Issuer be exempt from the Formal Bid Requirements in connection with each Proposed Purchase, provided that:

(a) the Proposed Purchases will be taken into account by the Issuer when calculating the maximum annual aggregate limit for the Bid Purchases in accordance with the TSX Rules;

(b) the Issuer will refrain from conducting a Block Purchase in accordance with the TSX Rules during the calendar week it completes each Proposed Purchase and may not make any further purchases under its Normal Course Issuer Bid for the remainder of that calendar day;

(c) the purchase of Subject Shares by the Issuer will be taken into account by the Issuer when calculating the maximum annual aggregate limit that is imposed upon the Bid for the remainder of that calendar day;

(d) the Purchase Price is not higher than the last “independent trade” (as that term is used in paragraph 629(l)1 of the TSX Rules) of a board lot of Class B Shares immediately prior to the execution of each Proposed Purchase;

(e) the Issuer will otherwise acquire any additional Class B Shares pursuant to the Bid and in accordance with the TSX Rules;

(f) immediately following each purchase of Subject Shares from the Selling Shareholder, the Issuer will report the purchase of such Subject Shares to the TSX;

(g) at the time that each Agreement is entered into by the Issuer and a Selling Shareholder and at the time of each Proposed Purchase, neither the Issuer nor the Selling Shareholder will be aware of any undisclosed "material change" or any undisclosed "material fact" (each as defined in the Act) in respect of the Issuer; and

(h) the Issuer will issue a press release in connection with the Proposed Purchases.

“L. E. Ritchie”
Commissioner/Vice-Chair
Ontario Securities Commission

“Mary Condon”
Commissioner
Ontario Securities Commission

2.2.8 Unbridled Energy Corporation - s. 1(11)(b)

Headnote

Section 1(11) - order that issuer is a reporting issuer for purposes of Ontario securities law - issuer already a reporting issuer in British Columbia and Alberta - issuer's securities listed for trading on the TSX Venture Exchange - continuous disclosure requirements in British Columbia and Alberta are substantially the same as those in Ontario.

Statutes Cited

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(11).

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, CHAPTER S.5, AS AMENDED
(the Act)

AND

IN THE MATTER OF
UNBRIDLED ENERGY CORPORATION

ORDER
(Clause 1(11)(b))

UPON the application of Unbridled Energy Corporation (the **Applicant**) for an order pursuant to clause 1(11)(b) of the Act that the Applicant is a reporting issuer for the purposes of Ontario securities law;

AND UPON considering the application and the recommendations of the staff of the Ontario Securities Commission (the **Commission**);

AND UPON the Applicant representing to the Commission as follows:

1. The Applicant was incorporated under the former *Company Act* (British Columbia) on October 6, 2003 and transitioned under the new British Columbia *Business Corporations Act* on August 23, 2004 with its registered and records office located at 3000 Royal Centre, 1055 West Georgia Street, Vancouver, British Columbia, V6E 3R3.

2. The Applicant's head office is located at Suite 400, 2424 4th Street SW, Calgary, Alberta, T2S 2T4.

3. The authorized capital of the Applicant consists of an unlimited number of common shares without par value, of which 69,933,618 common shares are issued and outstanding, and an unlimited number of preferred shares, none of which are issued and outstanding as at the date hereof.

4. The Applicant has been a reporting issuer under the *Securities Act* (British Columbia) (the **BC Act**) and the *Securities Act* (Alberta) (the **Alberta Act**) since February 7, 2005.

5. As of the date hereof, the Applicant is not on the list of defaulting reporting issuers maintained pursuant to the BC Act or the Alberta Act, and, to the best of its knowledge, is not in default of any of its obligations under the BC Act or the Alberta Act.

6. The Applicant is not currently a reporting issuer or the equivalent in any jurisdiction in Canada other than British Columbia and Alberta.

7. The continuous disclosure requirements of the BC Act and the Alberta Act are substantially the same as the requirements under the Act.

8. The continuous disclosure materials filed by the Applicant under the BC Act and the Alberta Act since November 2004 are available on the System for Electronic Document Analysis and Retrieval.

9. The Applicant's securities are traded on the TSX Venture Exchange (**TSXV**) under the symbol "UNE", the Frankfurt Stock Exchange under the symbol "O4U" and the OTC Bulletin Board under the symbol "UNEFF". The Applicant's securities are not traded on any other stock exchange or trading or quotation system.

10. The Applicant is not in default of any of the rules or regulations of the TSXV and is not designated as a capital pool company by the TSXV.

11. The Applicant has a significant connection to Ontario in that, as of August 1, 2008, 54.6% of the Applicant's issued and outstanding common shares are held directly and indirectly by Ontario residents.

12. Neither the Applicant nor any of its predecessor entities, nor any of their officers, directors or controlling shareholders, has:

    (a) been the subject of any penalties or sanctions imposed by a court relating to Canadian securities legislation or by a Canadian securities regulatory authority;

    (b) entered into a settlement agreement with a Canadian securities regulatory authority; or

    (c) been subject to any other penalties or sanctions imposed by a court or regulatory body that would be likely to be considered important to a reasonable investor making an investment decision;

    except as follows:

    (d) Mr. Craig Steinke, presently a director and officer of the Applicant,

        (i) while employed as an investment advisor with the firm of Brink Hudson & Lefevre Ltd. ("Brink Hudson") during the period from 1989 to 1991, became involved with an issuer then known as Braner Resources Inc. ("Braner"). With the express consent of Brink Hudson management, Mr. Steinke purchased securities of Braner from his clients through his personal account. In addition, Mr. Steinke participated for his own account in investment transactions with certain of his family members. Subsequent to his departure from the investment industry, principals of Braner and Brink Hudson were investigated by the Vancouver Stock Exchange ("VSE") concerning trading in securities of Braner. Out of that investigation, the VSE concluded that Mr. Steinke's above-described trading activities were not appropriate. In 1994, Mr. Steinke agreed to settled the matter by paying a $7,500 administrative penalty; and

        (ii) while serving as the Chief Executive Officer of Range Petroleum Corporation ("Range"), an issuer with shares listed for trading on the predecessor of the TSX Venture Exchange, was made subject to a cease trade order issued by the BC Securities Commission (the "BCSC"). The BCSC had brought to Mr. Steinke's attention some errors in his insider report filings, but was not satisfied with his initial efforts to rectify those errors. On December 10, 1999, the BCSC ordered that Mr. Steinke cease trading in securities of Range. On December 17, 1999, after Mr. Steinke had satisfactorily addressed the BCSC's concerns, the BCSC revoked its cease trade order.

13. Neither the Applicant nor any of its predecessor entities, nor any of their officers, directors or controlling shareholders, is or has been subject to:

    (a) any known ongoing or concluded investigations by a Canadian securities regulatory authority, or a court or regulatory body, other than a Canadian securities regulatory authority, that would be likely to be considered important to a reasonable investor making an investment decision; or

    (b) any bankruptcy or insolvency proceedings, or other proceedings, arrangements or compromises with creditors, or the appointment of a receiver, receiver-manager or trustee, within the preceding 10 years.

14. None of the officers, directors, or controlling shareholders of the Applicant is or has been at the time of such event an officer or director of any other issuer which is or has been subject to:

    (a) any cease trade or similar order, or order that denied access to any exemptions under Ontario securities law, for a period of more than 30 consecutive days, within the preceding 10 years; or

    (b) any bankruptcy or insolvency proceedings, or other proceedings, arrangements or compromises with creditors, or the appointment of a receiver, receiver-manager or trustee, within the preceding 10 years.

15. The Applicant will remit all participation fees due and payable by it pursuant to Commission Rule 13-502 *Fees* by no later than two business days from the date of this Order.

AND UPON the Commission being satisfied that to do so is in the public interest;

IT IS ORDERED pursuant to clause 1(11)(b) of the Act that the Applicant is a reporting issuer for the purposes of Ontario securities law.

DATED October 21, 2008

"Margo Paul"
Director, Corporate Finance

Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions, Orders and Rulings

3.1.1 Conrad M. Black and John A. Boultbee - s. 17

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
CONRAD M. BLACK AND JOHN A. BOULTBEE

AMENDED CONFIDENTIAL REASONS AND DECISION
(Section 17 of the Securities Act)

In Camera Hearing:	January 10-11, 2007		
Panel:	Patrick J. LeSage	-	Commissioner (Chair of the Panel)
	Wendell S. Wigle, Q.C.	-	Commissioner
	Carol S. Perry	-	Commissioner
Counsel:	Johanna Superina Melanie Adams	-	For Staff of the Ontario Securities Commission
	Edward L. Greenspan, Q.C. Todd B. White	-	For Conrad M. Black
	Philip Anisman Don H. Jack Lisa C. Munro	-	For John A. Boultbee
	James D. G. Douglas Kara L. Beitel	-	For Witness A
	James Doris	-	For Witnesses B, C, E and F
	J. L. McDougall, Q.C. Norman J. Emblem Matthew Fleming	-	For Witnesses D, G and J
	C. Clifford Lax, Q.C. Paul Michell	-	For Witness I

NOTE

On January 10 and 11, 2007, the Commission heard an *in camera* application brought by Conrad M. Black and John A. Boultbee, for an order pursuant to subsection 17(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended, authorizing the Applicants to use and disclose testimonial and documentary evidence of persons identified as A, B, C, D, E, F, G, H, I and J that was obtained by Staff of the Commission under an order of the Commission made pursuant to section 11 of the Act, in order to provide the Applicants with the ability to make full answer and defence to criminal charges against them in the United States District Court for the Northern District of Illinois, Eastern Division proceeding entitled *United States of America v. Conrad M. Black, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis and The Ravelston Corporation Limited*, No. 05 CR 727.

On February 7, 2007, the Commission issued its Reasons and Decision on a confidential basis and denied the application, with the exception of granting limited relief to permit use of certain documents in the U.S. criminal proceeding, subject to terms and conditions.

Subsequently, the Confidential Reasons and Decision issued on February 7, 2007 was amended after receiving submissions from counsel. On March 5, 2007, the Commission issued its Amended Confidential Reasons and Decision in this matter along with an Amended Confidential Order dated March 5, 2007.

On April 3, 2007 the Commission held an *in camera* hearing to consider written and oral submissions in relation to the publication of the Amended Confidential Reasons and Decision.

On April 10, 2007, the Commission issued an order stating that the Commission will issue a summary of the Reasons and Decision for immediate publication, subject to the following terms:

(i) the full Reasons will be published at the completion of the U.S. Criminal Proceeding (i.e., the completion of the U.S. criminal trial, and for greater clarity, all matters up to the sentencing process, if any); and

(ii) further application to the Commission may be made at any time, including prior to the completion of the U.S. Criminal Proceeding, on notice to counsel for the Applicants and Respondent I, for an order for publication of the full Reasons or a redacted version of the Reasons.

The Order dated April 10, 2007 including the summary of the Reasons and Decision was published in the Ontario Securities Commission Bulletin as *In the Matter of X and Y* (2007), 30 O.S.C.B. 3513.

On October 16, 2008, the Commission published the Amended Confidential Reasons and Decision issued on March 5, 2007 and the Amended Confidential Order issued on March 5, 2007, in accordance with the Commission's Order dated April 10, 2007.

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REASONS AND DECISION

I. Overview

A. Background

[1] On January 10 and 11, 2007, we heard an application (the "Application") brought by Conrad M. Black and John A. Boultbee (the "Applicants"), for an order pursuant to subsection 17(1) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), authorizing the Applicants to use and disclose testimonial and documentary evidence of persons identified as A, B, C, D, E, F, G, H, I and J (the "Respondents") that was obtained by Staff of the Ontario Securities Commission ("Staff") under an order of the Ontario Securities Commission (the "Commission") made pursuant to section 11 of the Act, in order to provide the Applicants with the ability to make full answer and defence to criminal charges against them in the United States District Court for the Northern District of Illinois, Eastern Division proceeding entitled *United States of America v. Conrad M. Black, John A. Boultbee, Peter Y. Atkinson, Mark S. Kipnis and The Ravelston Corporation Limited*, No. 05 CR 727 (the "U.S. Criminal Proceeding").

[2] The Applicants are the subject of a regulatory proceeding in Ontario, entitled *In the Matter of Hollinger, Inc. et al.* (the "Commission Proceeding"), commenced by a Notice of Hearing issued on March 18, 2005, by the Commission pursuant to sections 127 and 127.1 of the Act, and accompanied by a Statement of Allegations issued by Staff with respect to Hollinger Inc. ("Hollinger"), Conrad M. Black ("Black"), F. David Radler ("Radler"), John A. Boultbee ("Boultbee") and Peter Y. Atkinson ("Atkinson").

[3] The Statement of Allegations in the Commission Proceeding sets out a variety of allegations regarding the conduct of Hollinger, Black, Radler, Boultbee and Atkinson, which include: diversion of funds from Hollinger International Inc. to Hollinger in connection with sales of certain U.S. community newspapers by the former; non-compliance by Hollinger with its continuous disclosure obligations; misstatements and omissions in the continuous disclosure filings of Hollinger; failure to disclose the interests of insiders in material transactions; failure to make the required disclosure of executive compensation arrangements; failure to file the required financial statements; failure to implement effective conflict of interest practices; and breach of the fiduciary duties owed by Black, Radler, Boultbee and Atkinson to Hollinger and Hollinger International Inc.

[4] The U.S. Criminal Proceeding against the Applicants and the Commission Proceeding involve similar and overlapping allegations arising out of substantially the same transactions. The Applicants seek to use and disclose, in the U.S. Criminal Proceeding, material the Commission disclosed to them in the course of the Commission Proceeding. The specific materials that are the subject of the Application are transcripts of examinations conducted under section 13 of the Act, documents that were the subject of the examinations, and documents produced at these examinations (the "Evidence").

[5] The Applicants seek an order that authorizes them and their counsel to use and disclose the Evidence solely for purposes relating to their defence of the charges in the U.S. Criminal Proceeding.

[6] In their Application, the Applicants submit that they anticipate the following possible uses of the Evidence: (1) to introduce some of the documents as part of the defence in the criminal trial or to cross-examine witnesses for the prosecution based on the documents and the transcripts; (2) to refer to the Evidence in connection with interviews of proposed prosecution witnesses or attempts by defence counsel to obtain cooperation from persons who were examined in the course of Staff's investigation; and (3) for any other use necessary to make full answer and defence in the U.S. Criminal Proceeding.

[7] However, in their written reply submissions and in oral submissions, the Applicants submitted that the Evidence will only be used at the criminal trial in two ways:

1) If one of the Respondents testifies as a witness at the criminal trial, his evidence to the Commission may be used in cross-examination to identify contradictions with the respondent's testimony in court.

2) If a respondent does not testify, his evidence to the Commission may only be used to refresh the memory of another witness.

[8] Accordingly, the Applicants seek an order authorizing them to use the Evidence for purposes relating to the trial and any appeals of the trial decision in the U.S. Criminal Proceeding, subject to certain safeguards. In order to obtain such authorization, the Applicants have filed a draft order reflecting proposed conditions that, they submit, should be placed on them and on the use of this information. In particular, they request that the Commission Order, if granted:

1. prohibit them from disclosing or using the Evidence for any other purposes;

2. require them to return all copies of the Evidence to Staff or to destroy them after the completion of the trial and any subsequent appeals; and

3. require their defence counsel to take all steps reasonably available to obtain protective orders from the United States District Court for the Northern District of Illinois, Eastern Division, that would require all parties to the U.S. Criminal Proceeding and others to comply with the conditions set out in clauses 2 and 3, if it becomes necessary to disclose all or part of the Evidence in the U.S. Criminal Proceeding.

[9] At the close of the hearing, we requested that the Applicants file a revised draft order that would alleviate some of the concerns that the Panel had identified at the hearing, in the event that we would authorize the request. We discuss the draft order and the revised draft order in detail below at paragraphs 228 to 237 and 250 to 264 of these Reasons.

[10] The question of whether the Commission should authorize the Applicants to use and disclose in the U.S. Criminal Proceeding information obtained pursuant to the Commission processes as part of its investigation in furtherance of the Commission Proceeding is the essence of this hearing. The issues that we have to decide are whether we have jurisdiction to authorize the request, and whether it is in the public interest under subsection 17(1) of the Act to authorize the Applicants to use and disclose the Evidence for the purposes of providing a full answer and defence in the U.S. Criminal Proceeding.

B. The Parties

[11] The Applicants are Black and Boultbee, who face potential criminal convictions in the U.S. Criminal Proceeding.

[12] The Respondents to this Application are:

- Witness “A”;
- Witness “B”;
- Witness “C”;
- Witness “D”;
- Witness “E”;
- Witness “F”;
- Witness “G”;
- Witness “H”, The Ravelston Corporation Limited (“Ravelston”);
- Witness “I”, Atkinson, a director of Hollinger from 1996 to 2004. During the period of 1996 through 2001, Atkinson was also the Vice-President and General Counsel of Hollinger. Atkinson then became the Executive Vice President of Hollinger and remained in that position until January 9, 2004, when he resigned as an officer and director of Hollinger. Atkinson is a co-accused in the U.S. Criminal Proceeding and he is also a respondent in the Commission Proceeding; and
- Witness “J”, KPMG LLP (Canada), the Canadian member firm of KPMG, a global network of professional firms providing audit, tax, and advisory services (“KPMG”).

[13] The Applicants filed an amended Application on December 12, 2006, in which Atkinson was added as a respondent to the Application.

[14] KPMG was added as a respondent to the Application at the beginning of the hearing.

[15] Counsel for Ravelston did not appear at the hearing, however, by letter dated January 9, 2007, Ravelston, through counsel for RSM Richter Inc. in its capacity as receiver and manager, interim receiver and monitor of Ravelston, stated that it had no objection to the order sought by the Applicants in respect of the documents produced by Ravelston and on behalf of Ravelston provided to Staff in connection with the Commission Proceeding.

[16] Staff is also a party to this proceeding. Staff indicated that it did not oppose the relief requested by the Applicants.

C. The Facts

[17] The facts that gave rise to this Application can be summarized as follows: on March 15, 2004, the Commission made an order under section 11 of the Act authorizing an investigation into specific conduct relating to Hollinger and its directors and

officers. Pursuant to this investigation order, Staff obtained documents and testimony under section 13 of the Act from the Respondents.

[18] Between April 2, 2004 and May 6, 2005, Staff examined and obtained documents from witnesses A to G, Ravelston, and Atkinson.

[19] Following the investigation by Staff, a Notice of Hearing and a related Statement of Allegations were issued on March 18, 2005, naming Hollinger, Black, Boultbee, Radler and Atkinson as respondents in the Commission Proceeding.

[20] Following the issuance of the Notice of Hearing, Staff provided disclosure to the respondents in the Commission Proceeding pursuant to Staff's disclosure obligations and the Commission's *Rules of Practice* (1997), 20 O.S.C.B. 1947. The compelled documents and transcripts from respondents' examinations were included in this disclosure.

[21] On June 29, 2005, Staff sent a letter to counsel for the respondents in the Commission Proceeding to notify them of the delivery of the first part of Staff's disclosure. The letter stated that respondents who receive information further to Staff's disclosure obligations in regulatory proceedings commenced under section 127 of the Act may not, without leave of the Commission, use the information for any purpose collateral or ulterior to the Commission Proceeding.

[22] On November 17, 2005, criminal indictments were brought against Black, Boultbee, Atkinson, Mark S. Kipnis and Ravelston in the U.S. Criminal Proceeding. The indictments alleged, *inter alia*, that they engaged in fraudulent schemes relating to non-competition agreements, misappropriated assets of Hollinger International Inc., breached their fiduciary duty by failing to disclose matters to Hollinger International Inc.'s audit committee and board of directors, engaged in misrepresentation, and failed to disclose required information in Hollinger International Inc.'s disclosure documents filed with the United States Securities and Exchange Commission (the "SEC").

[23] The Commission's decision *Re Hollinger Inc. et al.* (2006), 29 O.S.C.B. 847 ("*Re Hollinger (2006)*"), dated January 24, 2006, addressed the setting of dates for the hearing on the merits of the Commission Proceeding, and the Commission described the Commission Proceeding and the U.S. Criminal Proceeding at paragraph 40 as having "[…] similar and overlapping allegations arising out of substantially the same transactions". The panel observed:

> The practical reality is that all of the individual Respondents have been criminally indicted in the U.S. and face the possibility of incarceration if convicted. Additional indictments were recently issued against the Respondent Black which include charges of racketeering and obstruction of justice. There is significant overlap in the nature of the allegations in the two proceedings albeit they are not identical. (*Re Hollinger (2006)*, *supra* at para. 53.)

[24] Two of the witnesses, D and G, have voluntarily been interviewed by the SEC and the U.S. Attorney, and have stated their willingness to testify in the U.S. Criminal Proceeding.

[25] The trial in the U.S. Criminal Proceeding is scheduled to commence on March 14, 2007.

D. Preliminary Orders

[26] Prior to the hearing of this Application, a panel heard and determined an application brought pursuant to subsection 17(1) of the Act to permit counsel for the Applicants and counsel for the Respondents to disclose to all counsel participating in the Application the identity of the witnesses and the Evidence that is relevant to the hearing of the Application.

[27] That panel determined that it would be in the public interest to grant the request on certain terms and conditions. An order was issued on December 5, 2006.

II. The Issues

[28] The issues that we have to determine are:

1. Does the Commission have jurisdiction pursuant to subsection 17(1) of the Act to grant the Applicants' request for use and disclosure of the Evidence obtained from Staff in the context of the Commission Proceeding so that the Applicants may make full answer and defence in the U.S. Criminal Proceeding?

2. Is the request for use and disclosure of the Evidence in the public interest pursuant to subsection 17(1) of the Act?

    a) What is the public interest?

b) What are the factors to consider when making a determination as to whether disclosure is in the public interest?

c) What are the unique and exceptional circumstances of this Application?

d) Should the Commission authorize the use and disclosure of the Evidence when weighing all the relevant factors?

3. If use and disclosure of the Evidence is in the public interest, what should be the appropriate safeguards in a Commission Order to protect the rights of the Respondents?

III. Evidence

A. Staff's Letters to the Applicants and Respondents

[29] In the written submissions and at the hearing, references were made to three letters from Staff. As part of its investigation, Staff issued a summons under section 13 of the Act compelling witnesses A to G, Ravelston and Atkinson to attend before a senior investigator and answer questions under oath. In serving the summonses, Staff included a covering letter which advised these respondents that there was a "high degree of confidentiality associated with this matter" and advised them expressly of the confidentiality requirements set out in section 16 of the Act.

[30] On July 22, 2004, Staff sent a letter to some of the respondents asking them to consent to the disclosure of the transcripts of their compelled testimony to the SEC. These respondents were advised that any information and documentation in the SEC's file may be made available to criminal law enforcement agencies in the United States and that, consequently, the consent of the witnesses was required pursuant to subsection 17(3) of the Act. These respondents refused to provide their consent.

[31] On June 29, 2005, Staff sent a letter to the respondents in the Commission Proceeding, including the Applicants, setting out the disclosure obligations of Staff in accordance with the Commission's *Rules of Practice*. The Applicants were provided with the first tranche of Staff's disclosure. In this letter, Staff advised counsel that in the event that an application is brought before the Commission for disclosure of the compelled evidence, it is not likely that Staff would consent to such an application.

B. Newman's Affidavit

[32] The Applicants submit that there can be no question about their need for the Evidence for the purposes of making full answer and defence to the charges against them in the U.S. Criminal Proceeding.

[33] The Applicants rely on the affidavit of Gustave H. Newman, Esq. ("Newman"), sworn on January 3, 2007. Newman is a member of the law firm Newman & Greenberg located in New York City, and he is the defence counsel for Boultbee in the U.S. Criminal Proceeding. Newman's affidavit was filed on behalf of Boultbee in support of the Application (copies of the Evidence had already been provided to Boultbee's Canadian counsel).

[34] In his affidavit, Newman describes the process and procedures in the U.S. federal criminal practice relating to government disclosure and the use of prior testimony of a trial witness.

[35] Witnesses D and G argued during the hearing that the Newman affidavit should be either ignored or struck from the record. First, they claimed that it is so vague as to be useless and could legitimately be ignored. Second, they argued that Newman is not qualified to give an opinion because he is representing one of the Applicants in the U.S. Criminal Proceeding. They argued that an advocate, either present or former, for one of the parties, is not in a position to give the kind of evidence that tribunals and courts require; that is unbiased opinion evidence, on which the tribunal can rely. They argue that there is a minimum requirement for an expert to be independent.

[36] The Applicants argue that the Newman affidavit should be accepted, and that the Panel should give it the weight it believes appropriate. They argue that the Newman affidavit should not be ignored because Newman was not giving an opinion on the issue before the Commission in this Application; all he was doing was describing U.S. criminal procedures with respect to disclosure and the use of prior statements. This evidence was given to respond to the Respondents' submission that there was no evidence as to whether a will-say statement would be provided in the U.S.

[37] In our view the Newman affidavit is admissible. The Applicants first referred to the affidavit in their opening submissions, and any objection to its admissibility should have been made at that time. Witnesses D and G did not challenge the admissibility of the affidavit until after all the parties had made their submissions. Further, they did not bring a motion to

strike the affidavit. Having found that the affidavit is admissible in evidence, we nevertheless keep in mind the concerns raised by some of the respondents when considering the weight to be attributed to the Newman affidavit.

IV. Analysis

A. Does the Commission Have Jurisdiction Pursuant to Subsection 17(1) of the Act to Grant the Applicants' Request for Use and Disclosure of the Evidence Obtained from Staff in the Context of the Commission Proceeding so that the Applicants may Make Full Answer and Defence in the U.S. Criminal Proceeding?

1. Submissions

a. Applicants' Submissions

[38] The Applicants make four arguments to suggest that the Commission has jurisdiction to authorize the use and disclosure of the Evidence:

1) Subsection 17(1) is contained in Part VI of the Act. Thus, the public interest jurisdiction referred to in subsection 17(1) must be determined in the context of Part VI;

2) Subsection 17(1) of the Act is not limited to proceedings commenced under the Act;

3) The Act is not limited to conduct in Ontario, and the inter-jurisdictional co-operation and the regulation of capital markets is a purpose of the Act; and

4) Inter-jurisdictional co-operation and the regulation of capital markets are also reflected in Part VI.

[39] First, the Applicants submit that subsection 17(1) is contained in Part VI of the Act; thus, the public interest jurisdiction referred to in subsection 17(1) of the Act must be determined in the context of Part VI of the Act. They submit that the Respondents "misconceive" the Commission's public interest jurisdiction under subsection 17(1) by equating it with the Commission's enforcement mandate under the Act. The Applicants acknowledge that the Commission's enforcement jurisdiction is necessarily limited by the purposes of the Act, as the Commission cannot impose discipline for conduct that has no relationship to the integrity of the securities markets and the protection of investors in securities. The mandate under Part VI is different from the enforcement mandate. Accordingly, the Applicants submit that the public interest referred to in subsection 17(1) of the Act must be determined in the context of Part VI of the Act.

[40] Second, the Applicants submit that subsection 17(1) of the Act is not limited to proceedings commenced under the Act because a Commission order made under subsection 17(1) is not necessary for disclosure in such proceedings. In regulatory proceedings under the Act (section 127), Staff is entitled to make disclosure to respondents in such proceedings without applying to the Commission under 17(1) of the Act. Further, they point out that in provincial offences proceedings initiated under the Act (section 122), either Staff can make disclosure or the court presiding over the proceeding can order disclosure. The Applicants argue that in such circumstances, there is no need for an application under subsection 17(1). Accordingly, subsection 17(1) of the Act is necessary for disclosure in proceedings other than those commenced under the Act (e.g. criminal proceedings in a foreign jurisdiction such as the U.S. Criminal Proceeding).

[41] Third, the Applicants also argue that the Act is not limited to conduct in Ontario. They submit that inter-jurisdictional co-operation and the regulation of the capital markets is one of the underlying purposes of the Act. They argue that this is demonstrated through: the purposes and principles of the Act, several of the Act's provisions, the fact that the Commission frequently engages in inter-jurisdictional investigations and in proceedings with other Canadian securities commissions and with the SEC.

[42] The Applicants refer to the purposes and principles of the Act set out in sections 1.1 and 2.1 which read as follows:

> 1.1 The purposes of this Act are,
>
> (a) to provide protection to investors from unfair, improper or fraudulent practices; and
>
> (b) to foster fair and efficient *capital markets* and confidence in *capital markets*.
>
> 2.1 In pursuing the purposes of this Act, the Commission shall have regard to the following fundamental principles:
>
> 1. Balancing the importance to be given to each of the purposes of this Act may be required in specific cases.

2. The primary means for achieving the purposes of this Act are,

   i. requirements for timely, accurate and efficient disclosure of information,

   ii. restrictions on fraudulent and unfair market practices and procedures, and

   iii. requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

3. Effective and responsive securities regulation requires timely, open and efficient administration and enforcement of this Act by the Commission.

4. The Commission should, subject to an appropriate system of supervision, use the enforcement capability and regulatory expertise of recognized self-regulatory organizations.

5. The integration of capital markets is supported and promoted by the sound and responsible harmonization and *co-ordination of securities regulation regimes*.

6. Business and regulatory costs and other restrictions on the business and investment activities of market participants should be proportionate to the significance of the regulatory objectives sought to be realized.

[Emphasis added.]

[43] The Applicants point out that paragraph (b) of section 1.1 of the Act refers to "capital markets", not only Ontario capital markets. They also note that subsection 2.1(5) of the Act refers to jurisdictions outside of Ontario.

[44] The Applicants also refer to several provisions in the Act that contemplate inter-jurisdictional co-operation and the regulation of the capital markets. In particular, they refer to: (i) section 143.10 of the Act, which permits the Commission to enter into a Memorandum of Understanding with foreign authorities; (ii) section 153 of the Act, which permits information sharing with foreign authorities, including law enforcement authorities; and (iii) subsection 126(1) of the Act, which permits the Commission to make an order to preserve property even if there is no misconduct or harm to investors in Ontario.

[45] Further, they assert that the Commission frequently engages in inter-jurisdictional investigations and proceedings with other Canadian securities commissions and with the SEC.

[46] Fourth, they submit that provisions in Part VI of the Act reflect that inter-jurisdictional co-operation and the regulation of capital markets are purposes of the Act.

[47] The Applicants refer to subsection 11(1) of the Act which authorizes the Commission to make investigation orders "for the due administration of Ontario securities law or the regulation of the capital markets in Ontario", or "to assist in the due administration of securities laws or the regulation of the capital markets *in another jurisdiction*". [Emphasis added.]

[48] The Applicants also refer to subsection 17(3) of the Act which states that the Commission cannot order disclosure under subsection 17(1) of the Act where it would involve disclosure to a law enforcement authority, including a person responsible for the enforcement of criminal law in Canada or in any other country or jurisdiction. This contemplates the possibility that subsection 17(1) of the Act could permit disclosure for the purposes of conduct in another country; otherwise subsection 17(3) would be unnecessary. The Applicants argue that these provisions demonstrate that Part VI of the Act contemplates inter-jurisdictional cooperation and the regulation of capital markets.

b. Respondents' Submissions

[49] Witness A submits that the Commission does not have the jurisdiction to order the requested disclosure to the Applicants under subsection 17(1) of the Act. Witness A argues that the relief request by the Applicants is beyond the Commission's jurisdiction, and that although the Commission has a broad jurisdiction, it does not have unlimited jurisdiction. Witness A submits that the Commission has no powers other than those granted by the Act.

[50] Witness A asserts that the Legislature attempted to define and assist the Commission in exercising its powers by setting out the purposes of the Act in section 1.1. Witness A argues that the Applicants provide no evidence as to how the requested disclosure falls within the purposes of the Act. Further, section 2.1 also provides assistance in the form of principles to consider when pursuing the purposes of the Act. Witness A argues that subsection 2.1(3) of the Act makes no reference to

the law of any other jurisdiction, and that subsection 2.1(5) of the Act makes no reference to anything other than securities regulation regimes. Neither refers to the enforcement of criminal law in a foreign jurisdiction.

[51] Witness A argues that the Applicants' requested disclosure attempts to bring U.S. criminal law into the Commission's jurisdiction. He agrees with the Applicants that the Commission's jurisdiction is not limited to conduct in Ontario. The Commission has jurisdiction where Ontario residents are acting in capital markets outside of Ontario and the Commission has jurisdiction where non-residents are acting in Ontario capital markets. Thus, Witness A accepts that the Commission has jurisdiction over the activity of capital market players and the regulation of securities law in Ontario and outside of Ontario. However, he argues this jurisdiction does not extend to other areas of law such as criminal law and environmental law. Accordingly, the Commission does not have jurisdiction to authorize the use and disclosure of the Evidence in the U.S. Criminal Proceeding.

[52] Witness A agrees that the jurisdiction under section 17 of the Act is to be determined in the context of Part VI of the Act. However, Witness A argues that the Commission's jurisdiction under Part VI must be informed by the purposes of Act, and that there is nothing in Part VI to suggest that the purposes of the Act relate to criminal proceedings in the U.S. For example, section 11 investigation orders under Part VI of the Act are only available for the due administration of Ontario securities law or the regulation of the capital markets in Ontario, or to assist in the due administration of securities law or regulation of the capital markets in another jurisdiction. This is consistent with the Commission's jurisdiction being limited to capital market players and the regulation of securities law in and outside of Ontario. The Commission's jurisdiction under section 11 does not extend to the investigation, prosecution or defence of criminal law, and it never will because section 11 would violate the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 (the "Charter") if it was used for investigating or prosecuting criminal law. (*British Columbia Securities Commission v. Branch*, [1995] 2 S.C.R. 3.)

[53] Witness A also refers to subsection 16(2) of the Act, which states that compelled evidence is for the exclusive use of the Commission or such other regulator as the Commission may specify under section 11, such as the SEC. This is again consistent with the purposes of the Act.

[54] Finally, Witness A refers to subsection 17(3) of the Act, which prohibits disclosure of a witness's compelled evidence to criminal law authorities without the witness's consent. He argues this demonstrates a limit to the Commission's jurisdiction and that the legislature intended that limit to be determined by the Commission's mandate set out in the Act.

[55] Witnesses B, C, E and F assert that the Applicants' requested disclosure is not necessary for the Commission to carry out its mandate as this Application relates to actions affecting a different jurisdiction from the Ontario jurisdiction to which the Act relates. They argue that using the Evidence in the U.S. Criminal Proceeding, though it may be similar in nature to that of the Commission Proceeding, is completely unrelated to the Commission's mandate under the Act. They argue that there is nothing in the Commission's mandate that requires it to ensure that defendants in a foreign criminal proceeding are fully able to exercise their right to make full answer and defence in the foreign proceeding.

2. Discussion

[56] This Application requires us to consider whether the Commission has jurisdiction under subsection 17(1) of the Act to make an order authorizing the Applicants' request for use and disclosure of the Evidence obtained by Staff and disclosed to the Applicants in connection with the Commission Proceeding, so that the Applicants may make full answer and defence in the U.S. Criminal Proceeding.

[57] As subsection 17(1) is contained within Part VI of the Act, the Commission's public interest jurisdiction under that provision must be read in the context of Part VI:

> Section 17, unlike s. 127, is part of Part VI of the Act which has a narrow purpose relating to investigations and compelled testimony. Accordingly, *the term "public interest" in s. 17 of the Act should be interpreted in the context of Part VI of the Act*: to enable the Commission to conduct fair and effective investigations and to give those investigated assurance that investigations will be conducted with due safeguards to those investigated, thus encouraging their cooperation in the process. (*Re X and A Co.* (2007), 30 O.S.C.B. 327 at para. 28.) [Emphasis added.]

[58] Accordingly, to understand the context of Part VI, it is necessary to review the provisions of Part VI of the Act. "Part VI of the Act sets out the statutory scheme for investigations and examinations by [Staff]". (*Re X and A Co.*, *supra* at para. 18.) The relevant provisions are sections 11 through 18 of the Act.

[59] Under section 11, the Commission may appoint persons to investigate any matter so long as it relates to either:

(a) the due administration of Ontario securities law or the regulation of the capital markets in Ontario, or

(b) the due administration of the securities laws or the regulation of the capital markets in another jurisdiction.

[60] Once the Commission makes an order under section 11, the investigators have broad powers to "examine any documents or other things, whether they are in the possession or control of the person or company in respect of which the investigation is ordered or of any other person or company" (subsection 11(4) of the Act). Furthermore, these investigators may summon and enforce the attendance of any person, and compel him or her to testify under oath and to produce documents and other things (subsection 13(1) of the Act).

[61] Section 16 of the Act provides confidentiality protections in relation to compelled testimony and documents collected under an investigation order:

> Section 16 of the Act provides that, except in accordance with s. 17, no person shall disclose at any time, except to his or her counsel, the nature or content of an order under s. 11 or any testimony given under s. 13. Section 16 also provides that all testimony given under s. 13 and all documents and other things obtained under that section relating to an investigation or examination are for the exclusive use of the Commission and shall not be disclosed or produced to any other person or in any other proceeding except as permitted under s. 17. (*Re X and A Co.*, *supra* at para. 22.)

[62] However, despite section 16, section 17 of the Act sets out circumstances where disclosure of compelled testimony and documents is permissible.

[63] Subsection 17(1) of the Act permits the Commission to authorize disclosure of compelled testimony or documents to any person or company where it would be in the public interest. However, the Commission may not authorize disclosure unless it has, where practicable, given reasonable notice and an opportunity to be heard to the person or company that gave the testimony (subsection 17(2) of the Act). The Commission is also prohibited from authorizing disclosure of testimony to a municipal, provincial, federal or other police force or to a member of a police force or a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction without the consent of the person from whom the testimony was obtained (subsection 17(3) of the Act).

[64] Subsection 17(5) of the Act provides that a court having jurisdiction over a prosecution under the *Provincial Offences Act*, R.S.O. 1990, c. P.33, initiated by the Commission may compel production to the court of any compelled testimony or documents. After inspecting the testimony, document or thing and providing all interested parties with an opportunity to be heard, the court may order the release of the testimony, document or thing to the defendant if the court determines that it is: (a) relevant to the prosecution; (b) not protected by privilege; and (c) necessary to enable the defendant to make full answer and defence.

[65] Subsection 17(6) of the Act permits investigators appointed under section 11 to disclose or produce compelled testimony or documents, but only in connection with a proceeding commenced or proposed to be commenced by the Commission under the Act or an examination of a witness under section 13 of the Act. Investigators are prohibited from disclosing compelled testimony to a municipal, provincial, federal or other police force, member of a police force or a person responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction without the consent of the person from whom the testimony was obtained (subsection 17(7) of the Act).

[66] Finally, section 18 of the Act states that compelled testimony shall not be admitted in evidence against the person from whom the testimony was obtained in a prosecution for an offence under section 122 or in any other prosecution governed by the *Provincial Offences Act*.

3. Conclusion

[67] We agree with the Applicants that the purposes of the Act include inter-jurisdictional co-operation and the regulation of capital markets and that Part VI reflects this purpose.

[68] However, the issue in this Application is not whether the Applicants can disclose the Evidence to the U.S. Attorney; that would be prohibited by subsection 17(3) of the Act. The issue is whether the Applicants can use and disclose the Evidence in the U.S. Criminal Proceeding for the purposes of making full answer and defence.

[69] The Commission has jurisdiction over evidence it obtains, but no jurisdiction over any other evidence not in its control. The Evidence that the Applicants seek to use and disclose in the U.S. Criminal Proceeding was obtained under Part VI of the Act pursuant to a section 11 investigation order and section 13 of the Act. These sections provide the Commission jurisdiction over the Evidence.

[70] Subsection 17(1) of the Act provides the Commission with discretion to "make an order authorizing the disclosure to any person or company". The Commission has the discretion to authorize disclosure of the Evidence to anyone. Indeed,

subsection 17(1) contains no restrictions with respect to either whom disclosure can be made or the purposes and jurisdiction where the information can be used and disclosed. The Commission is only limited by how it exercises that discretion, that is, it must do so in the public interest.

[71] Accordingly, the Commission has jurisdiction pursuant to subsection 17(1) of the Act to grant the Applicants' request for use and disclosure of the Evidence obtained by Staff in the context of the Commission Proceeding so that the Applicants may make full answer and defence in the U.S. Criminal Proceeding. We must now determine whether the request for use and disclosure of the Evidence is in the public interest.

B. Is the Request for Use and Disclosure of the Evidence in the Public Interest Pursuant to Subsection 17(1) of the Act?

[72] The Applicants submit that a consideration of the public interest includes their right to make full answer and defence in the U.S. Criminal Proceeding. Before we can consider this issue, it is necessary to establish what is the public interest under subsection 17(1) of the Act.

1. What is the Public Interest Under Subsection 17(1) of the Act?

a. The Meaning of Public Interest

[73] The Commission recently considered the meaning of the public interest in subsection 17(1) of the Act in *Re X and A Co.*, *supra* at paras. 27-31. In this decision, the Commission relied on paragraph 41 of *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario Securities Commission*, [2001] 2 S.C.R. 132 ("*Asbestos*"), which states:

> […] the public interest jurisdiction of the OSC is not unlimited. Its precise nature and scope should be assessed by considering s. 127 in context. Two aspects of the public interest jurisdiction are of particular importance in this regard. First, it is important to keep in mind that the OSC's public interest jurisdiction is animated in part by both of the purposes of the Act described in s. 1.1, namely "to provide protection to investors from unfair, improper or fraudulent practices" and "to foster fair and efficient capital markets and confidence in capital markets." Therefore, in considering an order in the public interest, it is an error to focus only on the fair treatment of investors. The effect of an intervention in the public interest on capital market efficiencies and public confidence in the capital markets should also be considered.

[74] In *Re X and A Co.*, *supra* at paragraph 28, the Commission made the following comments regarding *Asbestos*:

> Justice Iacobucci was speaking of the Commission's jurisdiction under s. 127 of the Act, which is a broad jurisdiction. Section 17, unlike s. 127, is part of Part VI of the Act which has a narrow purpose relating to investigations and compelled testimony. Accordingly, the term "public interest" in s. 17 of the Act should be interpreted in the context of Part VI of the Act: to enable the Commission to conduct fair and effective investigations and to give those investigated assurance that investigations will be conducted with due safeguards to those investigated, thus encouraging their cooperation in the process.

[75] The Commission also referred to *Deloitte & Touche LLP v. Ontario Securities Commission*, [2003] 2 S.C.R. 713 ("*Deloitte & Touche (SCC)*") where at paragraph 29, Iacobucci, J., made the following observation:

> I believe the OSC properly balanced the interests of disclosure to Philip and the officers, along with the protection of confidentiality expectations and interest of Deloitte. In this respect I am of the view that in making a disclosure order in the public interest under s. 17, the OSC has a duty to parties like Deloitte to protect its privacy interests and confidences. That is to say that the OSC is obligated to order disclosure only to the extent necessary to carry out its mandate under the Act.

[76] Also, in *Re X and A Co.*, *supra* at paragraph 31, the Commission described the functions and the limitations of section 13 of the Act:

> The power of compulsion in s. 13 of the Act is extraordinary. It gives the Commission meaningful and powerful tools to use in its investigation of matters. Part VI, however, has limitations and protections with respect to confidentiality, and the possible use of compelled testimony. From this, we discern that the public interest referred to in s. 17 relates to a balancing of the integrity and efficacy of the investigative process and the right of those investigated to their privacy and confidences, all in the context of certain proceedings taken or to be taken by the Commission under the Act.

[77] In summary, the Commission's public interest requires balancing the rights of individuals and companies that have been investigated against the Commission's mandate under the Act.

[78] The Applicants accept that they have the onus of demonstrating that the requested use and disclosure of the Evidence is in the public interest under subsection 17(1) of the Act. There is a high expectation of privacy with respect to all testimony under section 13 of the Act which renders satisfying this onus a heavy burden:

> The OSC held that confidentiality was the expressed intent of the Act and that the onus was on the applicant to justify disclosure as being in the public interest. That is clearly consistent with the scheme and intent of the legislation as well as with existing jurisprudence […]. (*Coughlan v. Ontario Securities Commission* (2000), 143 O.A.C. 244 at para. 38 (Div. Ct.) ("*Coughlan*").)

[79] In addition, the Commission must be satisfied on the basis of the evidence filed by the Applicants that the proposed use and disclosure of the transcripts of section 13 testimony will not result in a contravention of subsection 17(3) of the Act. Under subsection 17(3) of the Act, no order can be made by the Commission authorizing disclosure of section 13 testimony to persons responsible for the enforcement of criminal law of Canada or any other jurisdiction absent the written consent of the person who gave the section 13 testimony.

b. The Test Under Subsection 17(1) of the Act

[80] Historically, the Commission did not consent to disclosure of compelled evidence for any purposes. This was based on the predecessor provision to section 16 of the Act (section 14) and former *OSC Policy Statement No. 2.8: Applications for Ontario Securities Commission Consent to Obtain Transcripts of Evidence Taken During Investigations of Hearings*, (July-December 1982) Volume 4 Part 3 O.S.C.B. 394E. This Policy Statement stated at paragraph A.3 that:

> […] the Commission does not view it as being in the public interest and the conduct of effective investigations, to consent to the release of information or evidence obtained through an investigation order issued under sections 11 or 13 of the Act.

[81] However, *OSC Policy Statement No. 2.8* was rescinded in 1997 (*Notice re Rules of Practice* (1997), 20 O.S.C.B. 1825). As a result, the Court of Appeal found that the rescission of *OSC Policy Statement No. 2.8* "significantly affected the public interest calculus required by s. 17(1)". It also found that the Commission had recalibrated its approach regarding disclosure. (*Deloitte & Touche v. Ontario Securities Commission* (2002), 159 O.A.C. 257 at paras. 37-38 (C.A.) ("*Deloitte & Touche (C.A.)*").)

[82] The Court of Appeal's decision in *Deloitte & Touche (C.A.)* is the leading authority on the test for disclosure under subsection 17(1) of the Act, and it refers to the test set out in *Coughlan*, *supra* at paragraph 38. Pursuant to this test the Commission must consider:

> […] the purpose for which the evidence is sought and the specific circumstances of the case […] in determining whether to order disclosure [the Commission] must balance the continued requirement for confidentiality with its assessment of the public interest at stake, including harm to the person whose testimony is sought. (*Deloitte & Touche (C.A.)*, *supra* at para. 15.)

[83] In *Deloitte & Touche (C.A.)*, Staff sought to disclose compelled testimony and documents from Deloitte to respondents in a Commission proceeding in accordance with Rule 3.3(2) of the Commission *Rules of Practice*. Deloitte opposed this disclosure, but the Commission disagreed and found that disclosure was in the public interest. The Court of Appeal reviewed the Commission's findings and found that it was reasonable for it to interpret subsection 17(1) of the Act using the test set out above from *Coughlan*. The Court stated that the Commission correctly recognized that it must "[…] evaluate the extent to which the policies of the Act were served by the purpose for which disclosure was sought and the harm done by disclosure to confidentiality interests or other individual interests". (*Deloitte & Touche (C.A.)*, *supra* at para. 31.) It stated the Commission must weigh and balance competing interests to determine whether it is in the public interest to permit disclosure under section 17. The Supreme Court agreed with these findings, but added that:

> […] the OSC has a duty to [a compelled witness] to protect its privacy interests and confidences. […] the OSC is obligated to order disclosure [to a respondent] only to the extent necessary to carry out its mandate under the Act. (*Deloitte & Touche (SCC)*, *supra* at para. 29.)

c. Relevance of the Evidence

[84] The Commission must also consider the relevance of disclosure sought in the public interest under subsection 17(1) of the Act:

> Obviously, the tribunal cannot rule on the ultimate admissibility of the evidence at trial. That is a matter for the trial judge. However, that does not mean that relevancy is not a matter for the tribunal to consider in determining whether disclosure is warranted in the public interest. It is not sufficient to say that disclosure of

> the material "may" be the best way to resolve disputes. That is nothing more than speculation. Such a standard is not even sufficient to meet a minimum threshold to warrant reviewing the material itself to determine if there may be some relevance. It certainly is not sufficient to warrant disclosure. To do so is to sanction what is nothing more than a fishing expedition in material statutorily deemed to be confidential. (*Coughlan*, *supra* at para. 52.)

[85] Accordingly, we must consider the relevance of the Evidence to the U.S. Criminal Proceeding in our consideration of the public interest.

[86] None of the parties disputed that the Evidence would be relevant to the U.S. Criminal Proceeding. In light of the similar and overlapping allegations between the U.S. Criminal Proceeding and the Commission Proceeding, we accept that the Evidence would be relevant.

d. Commission's Discretion Under 17(1) of the Act is Limited by the Charter

[87] Both the Applicants and Respondents make reference to the Charter to advance their arguments. The Commission recognizes that it must exercise its discretion under subsection 17(1) within the parameters of the Act and the Charter. With respect to the discretionary decisions of administrative agencies, the Supreme Court stated:

> Incorporating judicial review of decisions that involve considerable discretion into the pragmatic and functional analysis for errors of law should not be seen as reducing the level of deference given to decisions of a highly discretionary nature. […] However, though discretionary decisions will generally be given considerable respect, *that discretion must be exercised in accordance with the boundaries imposed in the statute, the principles of the rule of law, the principles of administrative law, the fundamental values of Canadian society, and the principles of the Charter.* (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 56 ("*Baker*") cited in *Deloitte & Touche (C.A.)*, *supra* at para. 29.) [Emphasis added.]

[88] The Court of Appeal in *Deloitte & Touche (C.A.)* relied on this passage from *Baker* to explain the limits on the exercise of the Commission's discretion in making orders under subsection 17(1) of the Act. The Charter imposes "boundaries" on the Commission's discretion to make orders in the public interest.

2. What are the Factors to Consider When Making a Determination as to Whether Disclosure is in the Public Interest?

a. Submissions

i. Applicants' Submissions

[89] The Applicants submit that they have a real and compelling need to use the Evidence for their defence in the U.S. Criminal Proceeding because there is no equivalent in the U.S. to the disclosure principles established in *R v. Stinchcombe*, [1991] 3 S.C.R. 326 ("*Stinchcombe*").

[90] The Applicants accept that the Respondents are entitled to have reasonable expectations with regards to their compelled testimony. However, they submit that the Respondents can have no reasonable expectation under the Act that their evidence will not be used for purposes of cross-examination to make full answer and defence in criminal or regulatory proceedings.

[91] The Applicants, as defendants to criminal charges, submit that they are entitled to use the evidence disclosed to them as part of the Commission's disclosure obligations for any purpose relating to making a full answer and defence. This includes using the Evidence for the purpose of cross-examining witnesses in the U.S. Criminal Proceeding.

[92] The Applicants submit that the Charter values that protect the Applicants' right to make full answer and defence to the criminal charges against them prevail over the Respondents' confidentiality interest in preventing such use.

[93] Further, the Applicants argue witnesses A, B, C, E and F will suffer little harm if the Commission authorizes the requested use and disclosure of the Evidence. They point out that there has been an investigation by the SEC, the Commission, and the U.S. Attorney and that witnesses A, B, C, E and F have not been charged with an offence in Canada or in the U.S. None of them is subject to a regulatory proceeding in Canada or elsewhere, and none of them is a defendant in any of the civil proceedings in Canada or in the U.S. relating to Hollinger and Hollinger International Inc.

[94] The Applicants also argue that witnesses D and G will suffer little harm if the Commission authorizes the requested use and disclosure of the Evidence. They point out that witnesses D and G have been interviewed by the SEC, the U.S. Attorney,

and the Special Committee of Hollinger International Inc. Witnesses D and G have also agreed to testify at the trial in the U.S. Criminal Proceeding. Thus, they argue that the SEC and likely the U.S. Attorney both have a copy of witnesses D and G's evidence. However, despite this, neither Witness D nor G is subject to criminal or regulatory proceedings, and neither is a defendant in any civil proceeding relating to the allegations against the Applicants. Accordingly, they argue that there is no likelihood that either Witness D or G will be the subject of an indictment or other charge as a result of the Commission authorizing the use and disclosure of the Evidence.

[95] With respect to harm to KPMG, the Applicants argue that there are only 17 material documents at issue in this Application. The Applicants assert that KPMG provided these documents to Staff and to the SEC. The Applicants argue that in view of the fact that KPMG already shared these 17 documents with the SEC, there can be no harm involved in allowing the Applicants to use the copies Staff disclosed to the Applicants. In these circumstances, the possibility of harm to KPMG is no different than if the Evidence had already been disclosed during regulatory proceedings.

[96] Finally, with respect to all of the Respondents including Atkinson, the Applicants argue that the limitations in their draft order concerning the use of the Evidence will be effective in ensuring that there will be little harm, if any, to the Respondents. They argue that the likelihood that the transcripts will be filed in court or introduced in evidence is low or nonexistent. They argue that the Evidence can only be admitted into evidence in the U.S. Criminal Proceeding in one very limited and uncommon circumstance, namely, if a respondent testifies and directly contradicts his prior evidence before the Commission, and refuses to acknowledge this contradiction when confronted with it. Accordingly, they argue that there is little risk to the Respondents since there is no likelihood that the Evidence will fall into the hands of the U.S. Attorney.

ii. Respondents' Submissions

[97] The Respondents focus on their reasonable expectations of privacy in relation to their examinations. These expectations arise from the provisions in the Act governing the use and disclosure of compelled evidence, namely section 16 of the Act. They submit that the Act's confidentiality provisions should prevail in these circumstances since it was not within their reasonable expectations that disclosure be made in the absence of adequate safeguards for their constitutional, statutory and common law rights.

[98] Witnesses B, C, E and F submit that they have the following reasonable expectations:

(a) their evidence would be kept confidential;

(b) there would be strict limitations on the use of their compelled testimony, as provided in Part VI of the Act;

(c) their rights against self-incrimination would be protected under the Charter, section 5 of the *Canada Evidence Act*, R.S.C. 1985, c. C-5 and section 9 of the *Evidence Act* (Ontario), R.S.O. 1990, c. E.23; and

(d) their evidence would not be disclosed to persons responsible for the enforcement of the criminal law of Canada or of any other country or jurisdiction.

[99] The Respondents were aware that their transcript would be disclosed to the Applicants for the purpose of responding to any regulatory proceedings commenced by the Commission. However, they submit that they could not have had any reasonable expectation that the testimony they provided during their section 13 examinations would be made available for purposes outside the scope of the regulatory proceedings commenced under the Act. Witnesses B, C, E and F submit that the Commission has never authorized the type of use and disclosure requested by the Applicants.

[100] The Respondents argue that the Applicants' request is contrary to their privacy expectations. When individuals are summoned under section 13, they are typically reminded of the high degree of confidentiality associated with the investigative process. The Respondents in this case were advised by letter from Staff, prior to giving their compelled testimony that the process was confidential, and relied upon this advisement in providing statements under oath to the Commission. The Respondents were asked by Staff to consent to the disclosure of their compelled testimony to the SEC and criminal enforcement agencies in the U.S. However, the Respondents refused to provide their consent.

[101] The Respondents submit it is inconceivable that they could have reasonably expected their compelled testimony would be used in connection with a criminal proceeding in a foreign jurisdiction, and disclosed to persons other than the Applicants who might be adverse to their interest. There are no statutory provisions, policies or rules requiring or recommending disclosure of compelled evidence in foreign proceedings. This suggests, according to the Respondents, that the presumption in favour of confidentiality must govern and reflect the public interest.

[102] In addition to the reasonable expectations of the Respondents, witnesses B, C, E and F argue that there is a serious risk of harm to them if the Commission authorizes the use and disclosure of the Evidence in the U.S. Criminal Proceeding. They argue that they will suffer harm because their rights against self-incrimination will be eviscerated. They note that there is a

difference between Canadian and U.S. self-incrimination protections. Accordingly, they argue that if the Commission authorizes disclosure they will not enjoy U.S. or Canadian protections against self-incrimination. They would not enjoy the protections against self-incrimination provided in the Charter, the *Canada Evidence Act* and the Ontario *Evidence Act*.

[103] Witnesses B, C, E and F also argue that they face the risk of prosecution or civil liability even though it may be a small risk at this point in time. They point out that they have received no immunity from the Commission or from any U.S. authorities. They argue that it would not be in the public interest to increase this risk of prosecution or civil liability by authorizing the use and disclosure of the Evidence. To do so would be to deny them the protection they received in return for assisting the Commission by providing compelled evidence.

[104] KPMG argues that it is in a different position than the other respondents with respect to harm because it is currently a defendant in civil class proceedings in Ontario, Saskatchewan and Quebec. KPMG also argues that it is a defendant to various claims for contribution and indemnity made by the Applicants and others arising from the various class proceedings. Moreover, KPMG argues that statements made on behalf of the Applicants suggest that their defence counsel in the U.S. Criminal Proceeding will attempt to lay blame on their professional advisors, which include KPMG.

[105] With respect to the proposed limits in the draft order, the respondents argue that the Commission cannot constrain the U.S. Attorney or others who may come to possess the Evidence. Once the Evidence is filed in the U.S. Criminal Proceeding, all Canadian protections against self-incrimination, use and derivative use will cease to exist.

[106] Accordingly, the respondents argue that it would not be in the public interest to order disclosure of their compelled testimony in these circumstances since they would not enjoy the protections against self-incrimination provided in the Charter, the *Canada Evidence Act* and the Ontario *Evidence Act*.

iii. Atkinson's Submissions

[107] Atkinson argues that the Act provides a detailed mechanism for the conduct of examinations of witnesses under oath. He submits that the non-disclosure provisions of the Act are central to the efficacy of the investigative process and that the Commission's investigations must be kept confidential in order to be effective.

[108] Atkinson also submits that since he is a defendant in the U.S. Criminal Proceeding, facing potentially serious sanctions, he has a direct interest in having the Commission protect his right against self-incrimination.

[109] Further, Atkinson does not accept that the use of his evidence would be as limited as the Applicants suggest. He argues that there are no assurances that the jury in the U.S. Criminal Proceeding will not draw negative inferences about Atkinson's guilt or innocence from the use of the Evidence to either cross-examine him or refresh a witness's memory, even if it is never admitted into evidence.

iv. Staff's Submissions

[110] Staff submits that the Commission may consider all factors that are relevant in making a disclosure order in the public interest under subsection 17(1) of the Act. In doing so, Staff submits that the Commission must in each case consider the purpose for which the evidence is sought and balance the continued requirement for confidentiality against the public interest at stake, including harm to the witness whose evidence is sought. Staff agrees that the Respondents' reasonable expectations of privacy and the integrity of the Commission's investigative powers are also factors for the Panel to consider.

[111] Staff submits that they do not oppose the relief requested by the Applicants, and that there would be little likelihood of harm to the Respondents if the Commission grants the requested order.

b. Discussion of Relevant Legal Principles

i. Compelled Evidence Under the Act

[112] The power of the Commission to compel a person to come forward and give statements under oath is a broad and unusual power afforded by the Legislature to the Commission to enable it to carry out its responsibilities to the public under the Act. The Court of Appeal has recognized that the right to compel a witness to make a statement under oath is "perhaps the most important tool which Staff has in conducting investigations". (*Biscotti v. Ontario Securities Commission* (1991), 1 O.R. (3d) 409 at para. 10 (C.A.).)

(1) High Degree of Confidentiality

[113] As explained above at paragraphs 56 to 66 of these Reasons, the broad coercive powers available to an investigator under section 13 of the Act are balanced by the non-disclosure and confidentiality protections set out in section 16 of the Act.

Section 16 provides, except in accordance with section 17, that no person shall disclose at any time, except to his or her counsel, the nature or content of an order under section 11 or any testimony given under section 13. Section 16 also provides that all testimony given under section 13 and all documents and other things obtained under that section relating to an investigation or examination are for the exclusive use of the Commission and shall not be disclosed or produced to any other person or in any other proceeding except as permitted under section 17.

[114] The confidentiality provisions in section 16 of the Act assist Staff in both conducting effective investigations and protecting the privacy interests of persons compelled to produce documents and give testimony. In *Coughlan*, the Court approved the Commission's description of the competing interests that must be balanced:

> Commission investigations, whether conducted under sections 11 or 13 of the Act […] are performed by Commission Staff on a confidential basis. Confidentiality is essential in order to facilitate the investigation and in order to avoid, either prejudicing a person's right to fair process in the event that the findings of the investigation justify proceedings, or damaging a person's reputation when the results of the investigation do not support further proceedings. The effective functioning of the Commission depends upon the reliance which parties affected by its operations can place upon the confidentiality of the Commission's administrative proceedings. (*Coughlan*, *supra* at para. 57 citing *Norcen Energy Resources* (April 29, 1983) O.S.C.B. 759 at page 2 of the attached letter.)

(2) Strict Limitations on the Use of the Evidence

[115] Section 17 of the Act creates limited exceptions to the non-disclosure and confidentiality regime established in section 16 of the Act. For example, subsection 17(1) of the Act permits the Commission to authorize disclosure of the confidential materials obtained under Part VI of the Act where it would be in the public interest.

[116] However, there are limits to these exceptions. Subsections 17(3) and (7) of the Act provide that compelled evidence cannot be disclosed to a person responsible for the enforcement of the criminal law of Canada or another country or jurisdiction without the written consent of the witness.

[117] Section 18 of the Act provides that testimony given under section 13 shall not be admitted into evidence against the person from whom the testimony was obtained in a prosecution for an offence under section 122 or in any other prosecution governed by the *Provincial Offences Act*.

[118] In summary, Part VI of the Act provides the power to compel persons to testify and produce documents or other things, however Part VI also protects against misuse of compelled testimony and documents, and it imposes controls on the use of compelled testimony under section 13. Part VI of the Act also provides the Commission with the ability to depart from the protection and controls, where in the Commission's opinion it would be in the public interest to authorize such departure. (*Re X and A Co.*, *supra* at paras. 18-26.)

ii. Reasonable Expectations of Witnesses

[119] A witness is entitled to expect that the confidentiality provisions set out in section 16 of the Act will be respected and that compelled evidence will only be released where disclosure is in the public interest or for the purposes of a regulatory proceeding under the Act.

[120] In determining whether it is in the public interest to order disclosure under subsection 17(1), the Commission is not bound by the doctrine of reasonable expectations, but instead is required to consider a witness's expectations as one of the factors to be weighed in the balance. (*Coughlan*, *supra* at para. 61.)

[121] In addition to the confidentiality provisions included in the Act, the Respondents submit that they also relied on the existence and application of the implied undertaking rule. The Respondents assert that there is an implied undertaking to the Commission that a party will not use in collateral proceedings materials disclosed for regulatory proceedings pursuant to subrule 3.3(2) of the Commission's *Rules of Practice*.

[122] The implied undertaking rule is a recognized principle of law in Ontario and it applies to Commission proceedings. The primary rationale for the imposition of the implied undertaking rule is the protection of privacy. The implied undertaking rule prohibits the use of information obtained in a proceeding's discovery process for "any purpose collateral or ulterior to the resolution of the issues in that proceeding". (*A. Co. v. Naster* (2001), 143 O.A.C. 356 at paras. 22-23 (Div. Ct.) and *Re Melnyk* (2006), 29 O.S.C.B. 7875 at para. 37.)

[123] As the Divisional Court held in *A. Co. v. Naster*, this means that "while under *Stinchcombe* principles, the respondents in the proceedings can demand to inspect the words of and the documents produced by [a witness], they are bound under pain of sanction by the Commission not to use the information for any purpose outside the matter of the investigation." (*A. Co. v.*

Naster, supra at para. 24 and *Re Melnyk*, *supra* at para. 37.) Therefore, we conclude that a witness's reasonable expectations of privacy and confidentiality are a significant factor in our public interest jurisdiction.

iii. Potential Harm From Disclosure

[124] The Commission must also consider the harm and prejudice to the witnesses if their testimony is disclosed. In *Coughlan*, the Divisional Court observed that:

> […] the existence of specific harm is clearly a relevant factor to take into account in deciding whether the public interest warrants disclosure. However, the absence of any evidence of specific harm cannot be taken as proof, or even as inference, that no such harm exists. To require the affected individual to provide evidence of harm, failing which disclosure will be made, is to put him in an untenable position. In order to avoid the harm of disclosure he will have to disclose the existence of the harmful material. Care must be taken not to place an onus on the individual to prove harm. It is clear from the statutory scheme that the presumption is in favour of protecting confidentiality, not the other way around. (*Coughlan*, *supra* at para. 63.)

This too is a significant factor in our consideration.

iv. Protection Against Self-Incrimination

[125] The Supreme Court has established that two types of protection are afforded under the Charter to an individual compelled to give evidence:

> […] the principle against self-incrimination, one of the principles of fundamental justice protected by s. 7 of the Canadian Charter of Rights and Freedoms, requires that persons compelled to testify be provided with subsequent "derivative use immunity" in addition to "use immunity" guaranteed by s. 13 of the Charter. (*British Columbia Securities Commission v. Branch*, *supra* at para. 2.)

[126] In both Canada and the U.S., the right to protection from self-incrimination is an important right that is safeguarded. However, the Canadian approach differs from the American approach. The differences between Canadian and American protections against self-incrimination was recently canvassed by the Court of Appeal in *Catalyst Fund General I Inc. v. Hollinger Inc.* (2005), 79 O.R. (3d) 70 (C.A.) ("*Catalyst (C.A.)*") in the following terms:

> In Canada, a person has the right not to have any incriminating evidence that the person was compelled to give in one proceeding used against him or her in another proceeding except in a prosecution for perjury or for the giving of contradictory evidence. Thus, in Canada, a witness cannot refuse to answer a question on the grounds of self-incrimination, but receives full evidentiary immunity in return. In the United States, a witness can claim the protection of the Fifth Amendment and refuse to answer an incriminating question. Once the answer is given, however, there is no protection. (*Catalyst (C.A.)*, *supra* at para. 4.)

[127] As such, witnesses compelled to testify in Canada cannot refuse to answer questions on the basis that the answer may incriminate them, but they are afforded evidentiary protections under the Charter, as well as under the provisions of the *Canada Evidence Act* and the Ontario *Evidence Act*, which prevent their testimony from being used against them.

[128] This arrangement has been described as a *quid pro quo* – the state (the Commission in this case) provides protection against the subsequent use of compelled evidence against the witness in exchange for his or her full and frank testimony. The Supreme Court in *R. v. Noël* recognized that there is a societal benefit in encouraging witnesses to come forward and provide evidence to the state in return for the *quid pro quo* of statutory protection. This interest is not served where witnesses in testifying in other proceedings expose themselves to the danger of self-incrimination because of such testimony. (*R. v. Noël*, [2002] 3 S.C.R. 433 ("*R. v. Noël (SCC)*") at paras. 21-25.) Thus, we accept that protection against self-incrimination is an important factor in our determination.

v. Integrity of the Commission's Investigative Powers

[129] The Applicants and Staff argue that this Application would not bring any negative impact to the integrity of Staff's investigations, given the unique and exceptional circumstances of this case that would warrant disclosure and the limited uses of the Evidence proposed by the Applicants.

[130] The Respondents submit that the confidentiality protections set out in section 16 of the Act are not only essential for the protection of the rights of persons compelled to give evidence; they are also central to the efficacy of the investigative process. The Commission's investigations must be subject to the highest degree of confidentiality in order to be effective.

[131] The Respondents further submit that it is in the public interest to encourage witnesses to comply with summonses issued under section 13 of the Act and to give evidence under oath. Suggesting otherwise, according to the Respondents, would dissuade a witness from volunteering compelled testimony to an investigator and this would undermine the integrity of the Commission's investigative powers.

[132] In *Re X and A Co.*, the panel commented that public interest concerns under Part VI of the Act involve various considerations including whether disclosure would undermine the integrity of Staff's investigations and the ability of Staff investigators to secure co-operation from witnesses. (*Re X and A Co.*, *supra* at para. 28.)

[133] As a general principle, we concur that the Commission is required to consider whether disclosure would undermine the integrity of the investigations conducted under Part VI of the Act. This consideration is particularly relevant in circumstances where parties may suffer harm and where the Commission will no longer have control over the evidence. The Commission's mandate includes fostering confidence in the integrity of the investigation procedures undertaken pursuant to the Act.

[134] Accordingly, we need to consider the extent to which witnesses who may be summoned in the future to give evidence in the context of an investigation by the Commission could be dissuaded from cooperating if they believed their testimony would be disclosed in U.S. criminal proceedings without their consent.

c. Conclusion

[135] We must consider the following factors in weighing the public interest under subsection 17(1) of the Act in this Application:

1) The high degree of confidentiality associated with compelled evidence and the strict limitations on its use imposed by sections 16, 17 and 18 of the Act;

2) The reasonable expectations of witnesses compelled to provide evidence;

3) The potential harm to witnesses as a result of the Commission authorizing use and disclosure of their compelled evidence;

4) The protections against self-incrimination provided by the Charter, the *Canada Evidence Act*, and the Ontario *Evidence Act*; and

5) The integrity of Commission investigations.

[136] This is not meant to be an exhaustive list of factors to consider in determining the public interest under subsection 17(1):

> In appropriate cases, there may be other interests that will have to be balanced against the safeguards in Part VI for those investigated, in making a determination of the public interest under s. 17 […]. (*Re X and A Co.*, *supra* at para. 34.)

[137] As we stated above, the challenge faced by the Commission in applications under Part VI of the Act involves striking a balance between the continued requirement for confidentiality and our assessment of the public interest at stake.

[138] In exercising the Commission's public interest discretion under subsection 17(1) of the Act, we must also consider the specific purpose for which the evidence is sought and the unusual or exceptional circumstances of the case and determine whether the disclosure of the evidence would serve a useful public purpose.

[139] It is therefore useful at this stage to set out the other interests proposed by the Applicants, and summarize the alleged unique and exceptional circumstances of this Application.

3. What are the Unique and Exceptional Circumstances of this Application?

[140] In addition to the factors identified above, the Applicants submit there are unique and exceptional circumstances that should be considered when making our determination under section 17(1) of the Act. They submit that the Panel should also consider the following as other considerations relevant to this Application:

1) There is no likelihood that the Evidence will be filed in the U.S. Criminal Proceeding or introduced in evidence. The U.S. Attorney will not get access to the Evidence;

2) The Commission must consider Charter values – specifically the right to make full answer and defence – in its determination of the public interest under subsection 17(1) of the Act;

3) This Application is only necessary because – as a matter of mere timing – the U.S. Criminal Proceeding will take place before the Commission Proceeding; and

4) The Applicants could have used the Evidence for their defence in a Canadian criminal proceeding had they been charged with similar crimes in Canada.

[141] We review each of these considerations below.

a. Limited use of the Evidence

i. Submissions

(1) Applicants' Submissions

[142] The Applicants argue that the Evidence will not come into the hands of the U.S. Attorney. They argue that there is no likelihood that the Evidence will be filed in court or introduced in evidence. They claim that the Evidence will be used at the trial in the U.S. Criminal Proceeding only in two ways:

1) If one of the Respondents testifies as a witness in the U.S. Criminal Proceeding, his evidence to the Commission may be used in cross-examination to identify contradictions with the respondent's testimony in court.

2) If a respondent does not testify, his evidence to the Commission may only be used to refresh the memory of another witness.

[143] The Applicants further argue that the Evidence could only be admitted into evidence in the U.S. Criminal Proceeding in one very limited and uncommon circumstance which is, if a respondent testifies and directly contradicts his prior evidence before the Commission, and refuses to acknowledge the contradiction when confronted with it. They argue that in no event would the entire transcript of any of the Respondents' evidence be introduced or received in evidence. With respect to the use to refresh a witness's memory, they argue that they could put a respondent's evidence to a witness without identifying the respondent.

(2) Witness A's Submissions

[144] The Applicants provided a draft order that purports to limit the use and disclosure of the Evidence to allow the Applicants to make full answer and defence in the U.S. Criminal Proceeding. Draft undertakings have also been made by the Applicants' counsel to provide an assurance that the terms of an order by the Commission will be adhered to.

[145] Witness A submits that the difficulty with the draft order and draft undertakings is that neither the Commission nor the Applicants' counsel will have any control over the use made of the Evidence once it is disclosed to the U.S. Attorney, or otherwise made public upon filing it in the U.S. criminal court. Further, the Applicants have provided no evidence that they attempted to secure a commitment from the U.S. Attorney that the Evidence will not be used for any purpose other than the prosecution of the Applicants or that use or derivative use of the Evidence would be otherwise constrained by the U.S. court.

(3) Atkinson's Submissions

[146] Atkinson is a co-accused in the U.S. Criminal Proceeding, and thus, argues he is in a unique position as compared to the other individual Respondents.

[147] Atkinson argues that it would be rather naïve to accept that the use of his evidence would be limited in a manner suggested by the Applicants and Boultbee's U.S. counsel, Newman.

[148] With respect to cross-examination, Atkinson argues that a witness does not have to completely contradict prior testimony in order to be impeached with it and that he should not have to justify minor deviations from his prior testimony when his liberty is at risk. He also notes that the U.S. Criminal Proceeding will have a jury and argues there are no assurances that the jury will not draw negative inferences about his guilt or innocence from an attack on his credibility. Further, Atkinson argues that it is necessary to establish an evidentiary basis in order to impeach a witness's credibility, and thus, a portion of his evidence will necessarily be entered into evidence in the U.S. Criminal Proceeding. He argues that this portion of his evidence will not be as narrow as the Applicants suggest because it will be necessary to give context to it. Atkinson argues that there is a very fine distinction between impeachment and incrimination. Thus, he argues the Commission should not accept that Atkinson's evidence would only be used to impeach him – an impeachment of his credibility may result in his ultimate conviction.

[149] With respect to refreshing the memory of other witnesses, Atkinson argues that it is "surreal to believe" that the Applicants' U.S. defence counsel could put Atkinson's evidence to a witness to refresh his or her memory without identifying to the court what counsel would be to showing the witness or the identity of the person who gave the evidence.

[150] Finally, Atkinson refers to section 18 of the Act, which he suggests prohibits the use of his testimony in Ontario. He questions why it would be permissible to use the transcripts in the U.S. Criminal Proceeding for a purpose that an accused could not use in Ontario.

ii. Discussion and Conclusion

[151] The Applicants rely on the Newman affidavit to support the argument that there would be limited use of the Evidence in the U.S. Criminal Proceeding, and thus, disclosure would be in the public interest.

[152] Although we have determined that the Newman affidavit is admissible in evidence, we find that it has little value. His affidavit is vague and inconsistent at times.

[153] We agree with Witness A, that the draft order and draft undertakings do not provide any assurances that the Commission or the Applicants' defence counsel would maintain control over the use made of the Evidence once it is disclosed to the U.S. court.

[154] Further, we agree with Atkinson that there is a fine distinction between impeaching credibility and incrimination. "Even for those trained in the law, the use in cross-examination of evidence obtained from the accused as a witness in other proceedings involves a firm grasp of a subtle distinction in theory that is often difficult to apply in practice." (*R. v. Noël (SCC)*, *supra* at para. 19, citing Fish J.A.'s dissenting opinion in *R. v. Noël* (2001), 156 C.C.C. (3d) 17 at para. 169 (Que. C.A.).)

[155] The Supreme Court in *R. v. Noël (SCC)* considered this distinction where the Crown sought to cross-examine the accused on the testimony he gave in his brother's trial. In that case, the accused had invoked the protections of section 5 of the *Canada Evidence Act* before giving evidence in his brother's trial. The Court found that the use of prior testimony containing an element of self-incrimination is totally prohibited, even for the purposes of impeaching credibility, unless there is no realistic danger of incrimination. (*R. v. Noël (SCC)*, *supra* at paras. 30 and 54.) The Supreme Court explained that:

> […] a cross-examination on a prior admission of guilt is such that it is asking too much of a jury to ignore the content of the prior admission, particularly when the admission was made under oath in a prior judicial proceeding […] even in the face of the most legally cogent instructions, it is most likely that the jury would not ignore the content of the prior incriminating testimony. (*R. v. Noël (SCC)*, *supra* at para. 55.)

and,

> While this Court has insisted over the years that jurors be made privy to as much evidence as possible, we have also recognized the necessity to exclude evidence in appropriate cases where the prejudicial effect of its use would overshadow its probative value. […] [There is] an overriding concern not to put to the jury evidence that presents an intolerable likelihood of misuse. […] there is also a legitimate societal interest in not eviscerating constitutional protections such as the one provided for in s. 13 of the Charter. (*R. v. Noël (SCC)*, *supra* at para. 57.)

[156] While *R. v. Noël (SCC)* discussed the Crown's ability to cross-examine an accused, the Supreme Court's comments with respect to confusion in the minds of jurors are useful.

b. Application of Charter Rights and Values

i. Submissions

(1) Applicants' Submissions

[157] The Applicants submit that the Commission must consider Charter values in its determination of the public interest under subsection 17(1) of the Act. They argue that the Charter value engaged in this Application is their right to make full answer and defence in criminal proceedings under section 7 of the Charter. The Applicants argue that this Application is not an attempt to impose Charter limitations on a foreign proceeding. Rather, they submit that it is a question of the Applicants' need to use information necessary for them to make full answer and defence. This invokes Charter values that must be considered by the Commission.

[158] The Applicants make four arguments:

1) The right to make full answer and defence has been recognized as a Charter value by the Supreme Court and has been adopted by the Commission;

2) The Commission may consider Charter values to protect Canadians outside of Canada;

3) The Applicants' right to make full answer and defence includes the right to cross- examine a witness or co-accused on prior statements and outweighs witness protections; and

4) The Applicants' right to make full answer and defense in the U.S. Criminal Proceeding is also relevant to the Applicant's right to make full answer and defence in the Commission Proceeding because a conviction in the U.S. Criminal Proceeding would substantially determine the result in the Commission Proceeding.

[159] First, the Applicants refer to the Supreme Court's decision in *Stinchcombe*, where Sopinka J. held that the ability of the accused to make full answer and defence is not only included as one of the principles of fundamental justice under section 7 of the Charter, but is also "one of the pillars of the criminal justice system on which we heavily depend on to ensure that the innocent are not convicted". (*Stinchcombe*, *supra* at para. 17.) The Applicants remind us that the Commission adopted the *Stinchcombe* disclosure principles in *Re Glendale Securities Inc.* (1995), 18 O.S.C.B. 5975, and in the Commission's *Rules of Practice* which requires Staff to make disclosure in Commission proceedings. (Rule 3.3)

[160] The Applicants also argue that *Stinchcombe* was the underpinning of the Commission's decision in *Deloitte & Touche*, and the enactment of subsection 17(6) of the Act which gives Staff discretion to provide disclosure in regulatory and provincial offences proceedings initiated by the Commission under the Act without a public interest disclosure order under subsection 17(1).

[161] Second, the Applicants argue that the Commission may consider Charter values to protect Canadians outside of Canada. They argue that the Supreme Court has held that a government agency should not make a decision that could expose someone to consequences that are unacceptable to fundamental Canadian values.

[162] Third, with respect to the use for cross-examination purposes, the Applicants argue that their right to make full answer and defence outweighs witness protections. They argue that their right to make full answer and defence includes a right to cross-examine any witness on prior statements. They argue that this includes a right to cross-examine a co-accused, such as Atkinson. They argue that once an accused goes into a witness box, he is there in the capacity of a witness, and his co-accused may cross-examine him using any prior statements – voluntary or otherwise. The Applicants argue Atkinson should not be able to get on the stand in the U.S. Criminal Proceeding and give a statement that is completely contradictory to his testimony to the Commission.

[163] Fourth, the Applicants submit that their right to make full answer and defense in the U.S. Criminal Proceeding is also relevant to their right to make full answer and defence in the Commission Proceeding because a conviction in the U.S. Criminal Proceeding would substantially determine the result in the Commission Proceeding.

[164] To this end, the Applicants submit that Staff and the SEC have been co-operating in their investigations into the affairs of Hollinger and Hollinger International Inc. and have been sharing documents. They assert that the Commission has previously characterized the U.S. Criminal Proceeding as a related proceeding, with similar and overlapping allegations arising out of substantially the same transactions. The Applicants submit that a criminal conviction outside of Ontario may form the basis of disciplinary sanctions in regulatory proceedings. A conviction in the U.S. Criminal Proceeding, according to the Applicants, would become indisputable evidence which could substantially determine the result of the Commission Proceeding.

(2) Respondents' Submissions

[165] The respondents collectively argue that their Charter rights will be affected if the Commission orders disclosure. They assert that the Charter provides two protections to compelled witnesses: use immunity under section 13 of the Charter and derivative use immunity under section 7 of the Charter. As such, witnesses compelled to testify cannot refuse to answer questions on the basis that the answer may incriminate them; in return they are afforded evidentiary protections under the Charter, as well as pursuant to section 5 of the *Canada Evidence Act* and section 9 of the Ontario *Evidence Act*, which prevent their testimony from being used against them. They note this constitutional arrangement has been described as a *quid pro quo* – the witness provides evidence and in return it is not used against him. The Respondents argue the Commission obtained the benefit of the compelled evidence and should, in accordance with the *quid pro quo* underlying the Charter protections against self-incrimination, not authorize disclosure of the Respondents' compelled evidence.

[166] Witness A argues that it is manifestly in the public interest to ensure that a witness compelled to give evidence in a Commission investigation receives the protections contained in the Charter, as well as those embodied in the Act prohibiting

disclosure outside the context of Commission proceedings. He argues that because the Respondents were compelled to give testimony and provide other evidence pursuant to a section 13 summons, both their Charter liberty interest and their right against self-incrimination are engaged.

[167] With respect to the similarities between the Commission Proceeding and the U.S. Criminal Proceeding, Witness A argues that the fact that a U.S. criminal proceeding may arise out of the same facts does not bring it within the public interest jurisdiction of the Commission. This merely shows the same facts can give rise to a Commission proceeding in Canada and to a criminal indictment in the U.S. He argues these same facts could possibly give rise to a criminal indictment anywhere in the world or to charges under other legislation, but that doesn't bring any of that within the Commission's mandate.

[168] Witnesses B, C, E and F submit that there is nothing in the Commission's mandate that requires it to ensure that defendants in foreign criminal proceedings are fully able to exercise their right to make full answer and defence in those foreign proceedings.

[169] Witnesses D and G argue that the Commission should respect U.S. criminal procedures even though they differ from those in Canada. They argue that it is inappropriate for the Commission or any Canadian court or regulatory body to pass judgment on the adequacy of U.S. judicial procedures.

[170] Witnesses D and G also argue that the interest in privacy and confidentiality is not automatically superseded by the public interest in disclosure. Rather, both interests are public interests worthy of protection. They argue that the Commission must find a balance that respects the importance of both interests.

[171] Atkinson argues that the Applicants put forward no authority to support their claim that authorizing disclosure for the purpose of making full answer and defence in the U.S. Criminal Proceeding falls within the scope of public interest in subsection 17(1). He submits that the Commission has never held that it is in the public interest to assist persons to defend themselves in foreign criminal proceedings. Atkinson asserts the Commission has recognized the public interest mandate of the Commission is distinct from the mandate of the U.S. Attorney.

[172] Atkinson also argues that the Applicants have no Charter right to make full answer and defence in the U.S. Criminal Proceeding. The Applicants' submissions conflate their right to make full answer and defence in Canadian proceedings with an abstract right to make full answer and defence generally – presumably extending to U.S. criminal proceedings.

[173] Finally, Atkinson submits that the approach to protection against self-incrimination differs in Canada and the U.S. In the U.S., one may decline to answer incriminating questions; whereas in Canada one must answer any question, but enjoys use immunity in return. He argues that the Canadian approach to protection against self-incrimination ensure that investigating authorities benefit from obtaining answers to questions, but requires strict control over what use may be made of these answers. He argues this approach generates a social benefit; it makes compelled evidence available to Canadian investigating authorities where it would be denied to their U.S. counterparts by operation of the Fifth Amendment to the U.S. Constitution. Atkinson claims the Applicants are seeking to exploit this difference in protection against self-incrimination.

ii. Discussion

[174] The Applicants rely on section 7 of the Charter to argue that their right to full answer and defence is engaged because their liberty is at stake in a foreign jurisdiction. Indeed, convictions may result in significant penalties, such as imprisonment and fines.

[175] Some of the respondents rely on sections 7 and 13 of the Charter to argue that their right against self-incrimination is engaged because disclosure would eviscerate their rights against self-incrimination in the U.S.

[176] Sections 7 and 13 of the Charter provide:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.
>
> 13. A witness who testifies in any proceedings has the right not to have any incriminating evidence so given used to incriminate that witness in any other proceedings, except in a prosecution for perjury or for the giving of contradictory evidence.

[177] There is no doubt that the Applicants' liberty is at stake as they face the possibility on conviction of 50 years of incarceration. However, the Applicants' liberty is at stake in the U.S., not Canada. This requires us to examine how Charter values apply in this context.

[178] The Applicants refer us to *United States v. Burns*, [2001] 1 S.C.R. 283 ("*Burns*") to argue that the Commission should not make a decision that could expose someone to an unconstitutional result outside of Canada or any result that is unacceptable to Canadian values.

[179] Witnesses D and G on the other hand cite *R. v. Schmidt*, [1987] 1 S.C.R. 500 ("*Schmidt*") to support their arguments that the Commission should respect U.S. criminal procedures even though they differ from those in Canada.

[180] In *Burns*, Burns and Rafay were facing murder charges in the U.S. and potentially faced the death penalty. The Minister of Justice ordered their surrender to U.S. authorities unconditionally – without assurances with respect to the death penalty. Burns and Rafay argued that the failure to seek such assurances violated the Charter. The Supreme Court found that the Minister is constitutionally obligated to seek such assurances except in exceptional cases, and found that extraditing Burns and Rafay to face the death penalty would violate their rights under section 7 of the Charter.

[181] The Supreme Court stated that the principles of fundamental justice are found in the basic tenants of our legal system and that these basic tenants include the following:

1) "[I]ndividuals who choose to leave Canada leave behind Canadian law and procedures and must generally accept the local law, procedure and punishments which the foreign state applies to its own residents […]." (*Burns*, *supra* at para. 72.)

2) "Extradition is based on the principles of comity and fairness to other cooperating states in rendering mutual assistance in bringing fugitives to justice […] subject to the principle that the fugitive must be able to receive a fair trial in the requesting state […]." (*Burns*, *supra* at para. 72.)

3) Capital punishment is unjust and should be stopped; it is not within the appropriate limits of the criminal justice system (*Burns*, *supra* at paras. 77 and 84.)

4) Canadian principles of fundamental justice are influenced by international law and opinion and Canada's international human rights obligations. There is a significant movement towards international acceptance that capital punishment should be abolished. (*Burns*, *supra* at paras. 79-80 and 91.)

[182] In *Schmidt*, Schmidt was facing extradition to the U.S. to face a charge of child-stealing contrary to Ohio state law. Schmidt argued that extradition would violate section 7 of the Charter because she was already acquitted of a kidnapping charge under U.S. federal law and a trial in Ohio would mean double jeopardy.

[183] The Supreme Court accepted that her right to life, liberty and security of the person under section 7 of the Charter was violated and that there were circumstances where a foreign state's treatment of an accused may be contrary to the principles of fundamental justice. However, the Court found Schmidt's extradition would not violate the principles of fundamental justice:

> […] I see nothing unjust in surrendering to a foreign country a person accused of having committed a crime there for trial in the ordinary way in accordance with the system for the administration of justice prevailing in that country simply because that system is substantially different from ours, with different checks and balances. *The judicial process in a foreign country must not be subjected to finicky evaluations against the rules governing the legal process in this country.* A judicial system is not, for example, fundamentally unjust – indeed, it may in its practical workings be as just as ours – because it functions on the basis of an investigatory system without a presumption of innocence or, generally, because its procedural or evidentiary safeguards have none of the rigours of our system. (*Schmidt*, *supra* at para. 48.) [Emphasis added.]

[184] In our consideration of the public interest, we must also balance the Applicants' right to make full answer and defence embodied in section 7 of the Charter against both the Respondents' Charter rights under sections 7 and 13 of the Charter to have protection against self-incrimination (*British Columbia Securities Commission v. Branch*, *supra* at paras. 2 and 7.), and against Atkinson's right to make full answer and defence. If we consider the Charter values at stake for the Applicants, then we must also consider the Charter values at stake for the Respondents.

[185] The Respondents' rights against self-incrimination are at stake because of the differences between the U.S. and Canadian approach to such protections. In Canada, a witness cannot refuse to answer questions because Canadian evidence statutes and the Charter provide protections by preventing any subsequent use of the testimony in civil and criminal proceedings. In the United States, a witness may refuse to answer any incriminating questions, but there is no use immunity if the witness chooses to testify. (*Catalyst (C.A.)*, *supra* at para. 4.) Accordingly, the risk that the Evidence will fall into the hands of the U.S. Attorney and could potentially be used to prosecute the Respondents – especially in the case of Atkinson, requires us to consider how an order authorizing disclosure affects the Respondents' Charter rights.

[186] This creates a situation where the Applicants' right to full answer and defence conflicts with the Respondents' rights against self-incrimination. If we authorize disclosure, then the Respondents are put at risk. If we do not authorize disclosure, then the Applicants are put at risk.

[187] The Supreme Court has previously considered the issue raised by conflicting Charter values. It stated:

> When the protected rights of two individuals come into conflict [...] Charter principles require a balance to be achieved that fully respects the importance of both sets of rights. (*R. v. Mills*, [1999] 3 S.C.R. 668 at para. 61 citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at para. 72.)

[188] The Applicants also argue that their right to make full answer and defence includes the right to cross-examine a witness or a co-accused on any prior statement, voluntary or otherwise. They argue that their right to full answer and defence outweighs witness protections when they choose to testify.

[189] We agree with the Applicants that the right to make full answer and defence includes the right to cross-examine any of the Respondents, including Atkinson, to impeach credibility. (*R. v. Pelletier* (1986), 29 C.C.C. (3d) 533 at para. 13 (B.C.C.A.); *R. v. Logan* (1988), 67 O.R. (2d) 87 at paras. 116-18 (C.A.); *R. v. Crawford*, [1995] 1 S.C.R. 858 at para. 27 and John Sopinka, Sidney N. Lederman & Alan W. Bryant, *The Law of Evidence in Canada*, 2nd ed. (Markham: Butterworths, 1999) at §§ 8.9, 8.105, and 16.115.):

> […] when an accused goes into the witness box he is there in the capacity of a witness. His co-accused may cross-examine him. The only restriction is that the cross-examination should be confined to matters relevant to the issue and to credibility. The co-accused is not under the same restraint as the Crown in that the co-accused need not establish that the statement was voluntary before being permitted to cross-examine upon it. (*R. v. Pelletier*, *supra* at para. 10.)

[190] However, a witness's right against self-incrimination and full answer and defence does not evaporate in these circumstances. "[T]he respective rights of each accused must be balanced […] so as to preserve the overall fairness of the trial." (*R. v. Suzack* (2000), 141 C.C.C. (3d) 449 at para. 111 (Ont. C.A.); and *The Law of Evidence in Canada*, *supra* at § 8.105.)

[191] Accordingly, we must find a balance between the Applicants' right to full answer and defence and the Respondents rights against self-incrimination that respects both Charter values.

[192] With respect to the relevance of a conviction in the U.S. Criminal Proceeding, we will reiterate the comments made by the panel in *Re Hollinger (2006)* that:

> […] the U.S. criminal proceedings in this matter ought not to be viewed as a proxy for the regulatory proceeding before the Commission. (*Re Hollinger (2006)*, *supra* at para. 56.)

iii. Conclusion

[193] The Charter values at stake in this Application require us to consider the Applicants' right to make full answer and defence, the Respondents' right against self-incrimination, the principles of comity, and the principle that an individual entering a foreign state must generally accept the local laws, procedures, and punishments of that foreign state.

c. Timing of the U.S. Criminal Proceeding

i. Submissions

(1) Applicants' Submissions

[194] The Applicants also point out that if the Respondents had already testified in a hearing before the Commission, then each of them could have been fully cross-examined on their previously compelled evidence. If the Respondents had already testified before the Commission, then not only could the Applicants have used this evidence for cross-examination, but this evidence would also have been accessible to the general public.

ii. Discussion and Conclusion

[195] We disagree with the Applicants' submissions because, if accepted, it would weaken the purpose of subsection 17(1) of the Act. Where regulatory proceedings under the Act have not yet been settled, it is understood that compelled evidence obtained under Part VI of the Act could be introduced and weighed in hearings before the Commission.

[196] If we were to accept the Applicants' submissions, the Commission would be forced to order disclosure of compelled evidence obtained under Part VI for collateral proceedings whenever regulatory proceedings under the Act have not yet been resolved. We do not believe this practice follows the Commission's mandate in the manner that was intended by the Legislature.

d. Use of Evidence in Canadian Criminal Proceedings

i. Submissions

(1) Applicants' Submissions

[197] The Applicants argue that subsection 17(5) of the Act and the decision in *R. v. Awde* (1988), 13 O.S.C.B. 2839 (Dist. Ct.) ("*Awde*"), would have permitted them to use the Evidence for their defence in Canadian criminal proceedings had they been charged with similar crimes in Canada. They also argue that subsection 17(5) of the Act was enacted in recognition of a defendant's right to make full answer and defence, and thus, section 16 of the Act not only permits, but contemplates production and the use of compelled evidence in criminal or regulatory proceedings. Therefore, the Applicants argue that it is unreasonable to prohibit them from using the Evidence in the U.S. Criminal Proceeding simply because the criminal charges were brought in the U.S. and not in Canada.

(2) Respondents' Submissions

[198] Witness A points out that all of the cases cited by the Applicants deal with criminal proceedings in Canada in the context of the protections of sections 7 and 13 of the Charter. Witness A argues that this Application is very different because the Applicants seek to use the Evidence in the U.S. Criminal Proceeding.

ii. Discussion and Conclusion

[199] When the entire context of Part VI of the Act is considered, and the words used in subsection 17(5) are read in their grammatical and ordinary sense, disclosure is permitted by "*a court having jurisdiction over a prosecution under the Provincial Offences Act initiated by the Commission*". [Emphasis added.] No other jurisdictions are mentioned in this provision.

[200] As such, subsection 17(5) of the Act only permits a court having jurisdiction over a prosecution under the *Provincial Offences Act*, namely the Ontario Court of Justice to compel production. Any disclosure request from another jurisdiction would have to be considered in the public interest under subsection 17(1).

[201] The Applicants argue it is unreasonable to prohibit them from using the Evidence in the U.S. Criminal Proceeding because they would have been able to use the Evidence had they been similarly charged in Canada. The Applicants rely on subsection 17(5) of the Act and refer to three decisions in support of their argument: *Awde*, *supra*; *Ontario Securities Commission v. Crownbridge Industries Inc.* (1988), 66 O.R. (2d) 242 (H.C.) aff'd (1989) 70 O.R. (2d) 506 (C.A.) ("*Crownbridge*"); and *R. v. Foster* (1994), 18 O.S.C.B. 683 (Ct. J. Prov. Div.) ("*Foster*").

[202] Subsection 17(5) of the Act and these decisions relate to ordering production of compelled testimony in Canadian criminal proceedings where the witness who gave that testimony was protected against the subsequent use of that testimony. They do not relate to foreign criminal proceedings:

- subsection 17(5) of the Act permits a court in Ontario to order the production of compelled testimony. It does not permit a court to order production in a foreign criminal proceeding.

- these decisions related to production of compelled testimony in a Canadian criminal proceeding. None of them considered the production in a foreign criminal proceeding.

[203] The Applicants seek to use and disclose the Evidence in a foreign criminal proceeding, the U.S. Criminal Proceeding. However, witness protections in Canadian and U.S. criminal proceedings differ substantially. As discussed before, Canadian witnesses may be compelled to testify, but enjoy use immunity in return, whereas U.S. witnesses may refuse to testify, but enjoy no use immunity if they choose to testify.

[204] Accordingly, it may be reasonable to permit the Applicants to use the Evidence in Canadian criminal proceedings because Canadian law provides protections against the subsequent use of compelled testimony. (See section 18 of the Act, section 13 of the Charter, section 14 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22, section 5 of the *Canada Evidence Act*, and section 9 of the *Evidence Act* (Ontario).) However in the U.S., where these protections do not exist in the same manner, it may not be so reasonable. The difference between use of the Evidence in Canadian criminal proceedings and U.S. criminal proceedings is that the Respondents are at risk of self-incrimination in the U.S., whereas they are not at risk in Canada.

4. Should the Commission Authorize Disclosure of the Evidence in this Case When Weighing All the Relevant Factors?

a. Submissions

i. Applicants' Submissions

[205] The Applicants submit that they have met the burden to establish that disclosure is in the public interest, and that their right to make full answer and defence outweighs the privacy interests of the Respondents.

[206] The Applicants submit that the draft order meets this threshold and properly balances their interests regarding disclosure and the right to make full answer and defence, against the Respondents' confidentiality interests.

[207] The Applicants submit that the relief requested is quite limited. They maintain that the draft order would not authorize the release of the Respondents' compelled testimony to the U.S. Attorney or other persons responsible for the enforcement of U.S. criminal law. The draft order would merely authorize the Applicants' defence counsel in the U.S. Criminal Proceeding to use the information disclosed to them to assist in the Applicants' defence. Disclosure would only be made to defence counsel.

[208] Although the Applicants argued on several occasions that there was no likelihood that the Evidence will fall into the hands of the U.S. Attorney, the Applicants submit that potential disclosure to the U.S. Attorney will be limited, since only the part of a transcript that is used to contradict the testimony of a witness will be introduced into evidence in the U.S. Criminal Proceeding. They claim a witness's entire transcript would not be filed in court, and it would not come into the hands of the U.S. Attorney as a result of the Commission's order.

[209] The Applicants relied on the Newman affidavit, which states that a witness's transcript will be used at trial and put into evidence only in limited circumstances.

[210] The Newman affidavit contemplates that the transcript would be used to put the contradiction to the witness, and then only if the witness denies the contradiction, will any material be introduced into evidence. Newman swore that only the part of the transcript that shows the contradiction and any related part would be introduced and filed as evidence.

[211] With respect to Atkinson, the Applicants submit that they have a recognized right, as co-accused, to cross-examine Atkinson on the basis of his Commission evidence with respect to the accuracy of his recollection and his credibility, but not to incriminate him.

ii. Witnesses A, B, C, E & F

[212] Witnesses A, B, C, E and F submit that there is a presumption against permitting disclosure under the Act, and that the Applicants have not met their onus. According to witnesses A, B, C, E and F, the Applicants have not shown that their interest in using the Evidence for a collateral purpose outweighs the Respondents' confidentiality expectations and right against self-incrimination.

[213] Witnesses A, B, C, E and F also submit that the Commission does not have the ability to impose conditions to safeguard the use of their compelled testimony. Any order made by the Commission will not have extra-territorial effect, and the Commission would not be able to constrain the U.S. Attorney or others who may come into possession of the Evidence. As a result, all protections against self-incrimination that the Respondents are entitled to under the laws of Canada would be eviscerated once the Evidence is filed in the U.S. Criminal Proceeding.

iii. Witnesses D, G & KPMG

[214] Witnesses D, G and KPMG submit that the Applicants have failed to demonstrate that the Evidence sought is necessary to make full answer and defence. Counsel states that their clients have collaborated and have been active witnesses with respect to the U.S. Criminal Proceeding. They have been interviewed by the SEC in relation to this matter and they have provided a written undertaking to the U.S. court to appear and give evidence in the U.S. Criminal Proceeding if required to do so. In other words, if testimony and documents from witnesses D and G are needed to make full answer and defence, witnesses D and G will participate as witnesses.

[215] Witnesses D, G and KPMG submit that the Applicants request for disclosure is unnecessary because much of the evidence and testimony given to the SEC and the U.S. Attorney has been, or will be, disclosed to the Applicants in the U.S. Criminal Proceeding. Counsel advised the Commission that all KPMG materials were provided to the U.S. Attorney and, in turn, have been disclosed to the Applicants. Once the Applicants receive disclosure, its adequacy is not a matter that should be reviewed by the Commission. Any complaint about the adequacy of the U.S. disclosure process is a matter for the criminal courts in Chicago.

iv. Atkinson's Submissions

[216] Atkinson's submissions focused on the public interest in encouraging persons who have been summoned by Staff of the Commission to appear and make statements under oath. Atkinson submits that unlike him, neither Black nor Boultbee have given a statement under oath to the Commission. He mentions that Atkinson was a cooperative citizen and provided compelled testimony with the expectation that his evidence would be kept confidential and his rights against self-incrimination would be protected.

[217] Atkinson also argues that it would be contrary to the public interest to provide the Applicants with the benefit of the sworn evidence of witnesses who complied with the process on the reasonable expectation that the confidentiality of their evidence would be maintained.

v. Staff's Submissions

[218] Staff advises that the Commission must balance the principles of fairness and Charter values favouring the Applicant's right to make full answer and defence to the criminal charges in the U.S. against the confidentiality interests of the Respondents, and any harm that may result from the use or disclosure of their section 13 testimony.

[219] Staff did not object to the Application and took the view that the relief requested by the Applicants should be permitted in light of the special circumstances in this matter, the limited proposed uses of the compelled testimony, the proposed conditions to use the testimony by the Applicants' defence counsel, and the minimal potential harm to the Respondents.

b. Discussion

i. Disclosure of the Evidence of the Respondents (With the Exception of Ravelston and Atkinson)

[220] Having considered the parties' submissions and the relevant factors to consider in this Application, we are satisfied that an order under subsection 17(1) of the Act will be appropriate only in the "most unusual circumstances" where the public interest in disclosure clearly outweighs the confidentiality protections provided in the Act.

[221] It is clear from the statutory scheme of Part VI of the Act that the presumption is in favour of protecting confidentiality, not the other way around. (*Coughlan*, *supra* at para. 63.) The protections afforded under section 16 of the Act are not only essential for the protection of the rights of persons compelled to give evidence: they are also central to the efficacy of the investigative process. In our view, Staff's investigations and the materials produced under section 13 must be kept confidential to enable the Commission to carry out its responsibilities to the public under the Act.

[222] Part VI of the Act, however, has limitations and protections with respect to confidentiality, and the possible use of compelled testimony. In circumstances where the balance tilts in favour of disclosure, it is in the public interest for the Commission to order disclosure "to the extent necessary to carry our mandate under the Act". (*Deloitte & Touche (SCC)*, *supra* at para. 29.)

[223] The Applicants, therefore, bear the onus to demonstrate that the use of the compelled testimony in the U.S. Criminal Proceeding is in the public interest. The Respondents' interest in confidentiality pursuant to section 16 of the Act is not automatically superseded by the public interest in disclosure; rather both interests are public interests worthy of protection. The Commission must find a balance that respects the importance of both rights. (*R. v. Mills*, *supra* at para. 61.)

[224] In *Deloitte & Touche (C.A.)*, the Court held that the Commission is entitled to substantial leeway in deciding what meaning should be given to the "public interest" in subsection 17(1) of the Act, and in deciding whether the public interest warrants disclosure in the circumstances of the case. (*Deloitte & Touche (C.A.)*, *supra* at para. 30.)

[225] The balancing and the interpretation of rights raised in this Application must be carried out in a contextual manner in light of the particular circumstances. We recognize that the Applicants have submitted that there is a real and compelling need to use the transcripts for the purposes of making full answer and defence in the U.S. Criminal Proceeding.

[226] Our public interest jurisdiction to authorize disclosure under subsection 17(1) was recently addressed by the Supreme Court. In *Deloitte & Touche (SCC)*, Iacobucci J. held that the Commission had properly balanced the interests of disclosure and the protection of confidentiality expectations. The Supreme Court also approved the order granted by the Commission, which contained several conditions including: "The Respondents and their counsel will not use the Evidence for any purposes other than for making full answer and defence to the allegations made against the Respondents in these Proceedings." (*Deloitte & Touche (SCC)*, *supra* at para. 29.)

[227] In that case, the mandate referred to was the holding of a fair hearing under section 127 of the Act. We should reiterate that the general policy and practice of the Commission is that production of confidential materials obtained by the

Commission under Part VI of the Act for use by a party for private purposes is not usually considered to be in and of itself in the public interest. (*Biscotti v. Ontario Securities Commission*, *supra*; *Coughlan*, *supra*; *Weram International Ltd. v. Ontario Securities Commission* (1990) 13 O.S.C.B. 2287 (Div. Ct.); *Re Mr. X* (2004), 27 O.S.C.B. 49; and *Re X and A Co.*, *supra* at para. 32.)

(1) Draft Order Proposed by the Applicants

[228] The Applicants recognize the high threshold that they have to meet in an application under subsection 17(1) of the Act, and have provided a draft order to the Commission which outlines conditions for the use of the Evidence in order to minimize the harm to the Respondents.

[229] The Respondents argue that they provided their evidence to the Commission with the understanding and comfort that their evidence was, and would remain, confidential. The Applicants recognize this concern and have provided a draft order which purports to limit use and disclosure of the Evidence, while still allowing the Applicants to make full answer and defence in the U.S. Criminal Proceeding. The draft order also requires undertakings to be made by the Applicants' defence counsel to provide an assurance that the terms of the Commission's order will be adhered to during the trial in the U.S. Criminal Proceeding.

[230] The difficulty with the draft order and draft undertakings is that neither the Commission nor the Applicants' counsel will have any control over the use made of the Evidence once it is used in the U.S. Criminal Proceeding. Any order made by the Commission will not and cannot have extra-territorial effect and, as such, will not constrain the U.S. Attorney or others who may come into possession of the Evidence. The circumstances faced by the Commission in this Application are different from those in *Catalyst*.

[231] In *Catalyst*, an Inspector of Hollinger appointed under the *Canada Business Corporations Act*, R.S.C., 1985, c. C-44, sought an order to examine under oath Messrs. Black, Radler and Boultbee. They resisted on the grounds that compelling them to submit to an examination would violate their right against self-incrimination because their testimony could be used against them in a criminal investigation in the U.S. The Court granted an order permitting the Inspector to examine the respondents concluding that the respondents' right against self-incrimination was adequately protected by the provisions of the *Canada Business Corporations Act*, prohibiting use of evidence gathered by the Inspector for collateral purposes. In particular, Campbell J. stated:

> Consistent with a process that is at all times subject to Court supervision, I would envisage that any objection made by the respondents to answering any specific question of the Inspector on the basis of its potential for self-incrimination would be subject to review by this Court before the answer was required.
>
> Such process would in my view more than balance the competing principles of compulsion and disclosure in favour of the respondents with respect to both "use" and "derivative use" immunity. (*Catalyst Fund General Partner I Inc. v. Hollinger Inc.* (2005), 255 D.L.R. (4th) 233 at paras. 58 and 59 (Ont. Sup. Ct.).)

[232] In our view, any disclosure of evidence obtained under Part VI of the Act would be appropriate where the Commission or an Ontario court could exercise control over the use and derivative use in order to ensure that the witnesses' rights against self-incrimination would be protected. The Applicants' requested order does not meet this requirement.

[233] As we stated above, section 13 of the Act confers upon an investigator appointed under section 11 a highly intrusive authority to compel by summons the delivery of documents and other things, and the attendance of any person to give evidence under oath. The broad scope of this power is evidenced by the potential penalty for refusal to comply with a summons for this purpose, i.e. committal for contempt by the Superior Court of Justice.

[234] It is an integral part of the Act's investigation and examination scheme that these broad powers are balanced with detailed protections for persons compelled to give materials and evidence under oath. The Commission is responsible for maintaining all evidence obtained under Part VI of the Act in the highest degree of confidence. This responsibility is the *quid pro quo* in return for the broad and unusual power afforded by the Legislature to the Commission to enable it to carry out its responsibilities to the public under the Act.

[235] As Campbell J. held recently in *Mr. A. v. Ontario Securities Commission*, "[…] there is an important public interest in the oversight by the [Commission] of its own process, which includes protection of *Charter* rights of those being investigated under the Securities Act". (*Mr. A. v. Ontario Securities Commission*, (2006) 141 C.R.R. (2d) 79 at para. 57 (Sup. Ct.).)

[236] We are not convinced that the Applicants' request falls within the public interest purpose of the Act, namely the protection of investors and the regulation of the capital markets. Any use of compelled evidence, obtained under section 13 of the Act, for purposes that are outside the scope of the Act and the supervisory role of the Commission, will not generally be

considered to be in the public interest. Accordingly, we are not satisfied that the Application is in the public interest and we decline to grant the Applicants' requested order with respect to the Respondents other than Ravelston.

[237] Further, we are of the view that KPMG requires special consideration, because KPMG is currently a defendant in civil class proceedings in Ontario, Saskatchewan and Quebec. Unlike the other Respondents, KPMG's exposure to civil liability is not hypothetical; it is very real. While the order proposed by the Applicants limits the use of the Evidence, an order from the Commission cannot prevent third parties who are adverse in interest from using the Evidence for collateral purposes once it is disclosed in the U.S. Criminal Proceeding. Accordingly, an order authorizing the use and disclosure of the Evidence related to KPMG poses a real risk of harm and weighs against the public interest.

ii. Disclosure of Atkinson's Evidence

[238] This brings us to the Respondent Atkinson. The Applicants acknowledge that Atkinson is not in the same category as the other Respondents because he is a co-accused in the U.S. Criminal Proceeding. As a co-accused in the U.S. Criminal Proceeding, Atkinson's reasonable expectations are stronger than those of the other Respondents. His interest in having the Commission protect his right against self-incrimination is direct.

[239] The principles of fairness and Charter values relied upon by the Applicants also apply to the interests of Atkinson. In keeping with the *quid pro quo*, in our view, the Applicants should not be permitted to introduce, in cross-examination, Atkinson's compelled testimony for the purpose of impeaching his credibility. Atkinson cooperated with the Commission by requesting a summons from Staff to appear and make statements under oath. In exchange for his compelled testimony, Atkinson invoked all of the rights against self-incrimination that were available to him in Canada.

[240] The Applicants argue that they require protection against the possibility that a co-accused may give inconsistent testimony without them being able to cross-examine him on a prior statement. The Applicants submit that they won't be able to cross-examine Atkinson during the trial if his testimony is inconsistent with his prior statements, unless they are authorized to use and disclose the Evidence. We understand this concern. On the other hand, we are mindful that attempts to impeach a witness' credibility by use of prior transcripts can often involve non-direct contradictions, but rather relatively minor differences in phrasing or expression. Accordingly, we are of the view that Atkinson should not run the risk of having to explain and justify his use of language in previous examinations, which in turn could undermine his credibility in proceedings in which his own freedom is at stake. The distinction between incriminating and impeaching a co-accused in criminal proceedings before a jury may well be a question of degree in these circumstances.

[241] For the reasons set out above, we do not authorize the Applicants to use and disclose the evidence of Atkinson, collected in connection with the Commission Proceeding, for the purposes of making full answer and defence in the U.S. Criminal Proceeding.

iii. Disclosure of Ravelston's Evidence

[242] Unlike the other respondents, RSM Richter Inc., the receiver and manager of Ravelston, does not object to the order sought by the Applicants in respect of the documents produced by, and on behalf of Ravelston. However, although Ravelston did not object, the Applicants may not use or disclose its evidence without a Commission order under subsection 17(1) of the Act. Accordingly, we must consider the public interest in authorizing disclosure of documents produced by Ravelston.

[243] Given that Ravelston has not objected, the balance of factors in the public interest is very different from the other Respondents: (1) there is no concern for Ravelston's confidentiality and self-incrimination because, by not objecting to disclosure, it impliedly waived its right to confidentiality and self-incrimination for the purposes of this Application; and (2) the integrity of Commission investigations is maintained because Staff can continue to assure future witnesses that their evidence will remain confidential unless they consent.

[244] Accordingly, it would be in the public interest to authorize the use and disclosure of documents produced by, and on behalf of Ravelston, for the purposes of the Applicants' full answer and defence in the U.S. Criminal Proceeding.

iv. Notice of this Application to Persons or Companies who Provided the Evidence

[245] Before we make a decision as to whether we authorize the use and disclosure of any transcripts or documents forming part of the Evidence, we must ensure that notice of this Application has been given to all persons and companies entitled to notice pursuant to subsection 17(2) of the Act.

[246] Subsection 17(2) of the Act provides that no order shall be made authorizing disclosure under subsection 17(1) of the Act unless the Commission has, where practicable, given reasonable notice and an opportunity to be heard to,

(a) persons and companies named by the Commission; and

(b) in the case of disclosure of testimony given or information obtained under section 13, the person or company that gave the testimony or from which the information was obtained.

[247] As discussed above, we have determined that it would only be in the public interest under subsection 17(1) of the Act to authorize the use and disclosure of documents produced by, and on behalf of Ravelston. Accordingly, we must ensure the Commission has given the required notice in subsection 17(2) of the Act with respect to these documents before we authorize their use and disclosure.

[248] Ravelston was given notice of this Application and an opportunity to be heard; in fact it made written submissions. However, the documents produced by, or on behalf of Ravelston may include documents Ravelston obtained from third persons who have not received notice of this Application. If we determine that these third persons are entitled to notice, subsection 17(2) of the Act would prevent us from authorizing the use and disclosure of the documents.

[249] In our view, subsection 17(2) of the Act does not require notice to be given to these third persons. Staff obtained these documents from Ravelston and gave notice to Ravelston. Thus, we are able to authorize the use and disclosure of documents produced by, and on behalf of Ravelston without further notice. We differentiate these circumstances from those where documents obtained by Staff from third parties are used in an examination of a witness and form part of the witness's testimony. We would then expect notice to be given to those third parties prior to authorizing disclosure of their documents.

C. If Disclosure is in the Public Interest, What Should be the Appropriate Safeguards in an Order of the Commission to Protect the Rights of the Respondents?

1. Submissions

a. Applicants' Submissions

[250] The Applicants submit that they seek to use the Evidence for the purpose of making full answer and defence in the U.S. Criminal Proceeding and for no other purpose. They submit that the order requested would impose limitations on the use defence counsel could make of the Evidence.

[251] The order requested would require the Applicants to return all copies of the Evidence to Staff of the Commission or to destroy the Evidence after the completion of the trial or any subsequent appeals in the U.S. Criminal Proceeding. The order would also require defence counsel to seek a protective order from the U.S. District Court sealing the disclosure at the trial of the criminal matter of any portion of the compelled testimony and prohibiting its use in any other forum or for any other purpose other than the full answer and defence of the Applicants in the U.S. Criminal Proceeding. The Applicants assert that the protective order in the United States will be sought prior to the Respondents taking the stand to be cross-examined.

[252] Finally, defence counsel for the Applicants have agreed to provide an undertaking to the Commission that they will comply with the terms and conditions specified in the Order.

i. The Applicants' Revised Draft Order

[253] At the request of the Panel, the Applicants provided a revised draft order to the Commission following the hearing of this Application. The revised draft order was intended to address the concerns expressed by the Panel during the hearing of this Application and the concerns raised by the Respondents. The Applicants proposed further limitations in the revised draft order and they submit that:

a. The Applicants and their counsel would maintain custody and control over the Evidence.

b. The Applicants and their counsel would not take the transcripts, related documents or copies of any part of the Evidence outside of Canada.

c. The transcripts would be used only for purposes of cross-examination in circumstances where a witness testifies in the U.S. Criminal Proceeding and gives evidence at trial which contradicts the earlier testimony given to Staff. The Applicants' counsel would accept the witness's answer to any such question without further reference to the transcripts.

d. The Applicants' counsel would be precluded from disclosing the identity of any respondent and from showing any of the Evidence, other than a witness's own evidence, used for seeking the testimony of a witness on behalf of the defence.

[254] With respect to the possible cross-examination of Atkinson, the Applicants have agreed to provide additional safeguards. In the event that Atkinson testifies in the U.S. Criminal Proceeding and contradicts the compelled testimony given

under section 13 of the Act, the Applicants would be permitted to return to the Commission, on an emergency basis, to request an order under subsection 17(1) in light of the contradictory testimony at the trial.

[255] The proposed conditions in the revised draft order with respect to an "emergency hearing" would require the Applicants to give two hours notice to the Secretary, Atkinson's counsel and Staff. The parties would agree to waive the requirements in the Commission's *Rules of Practice* with respect to the convening and holding of a hearing. The hearing would be conducted by telephone conference-call in accordance with Rule 4 of the Commission's *Rules of Practice*, at a time determined by the Secretary, and the Applicants submit that they would pay the costs for the hearing.

b. Respondents' Submissions

i. Submissions During the Hearing

[256] Witness "A" argues that the Applicants have put the "substantive cart before the procedural horse" and submits that the Applicants have not attempted to secure a commitment from the U.S. Attorney that use or derivative use of the Evidence will be constrained by the U.S. District Court. Witness A submits that his Charter rights should not be subject to the vagaries of "I will try" to obtain a protective order. The Applicants should have secured a protective order from the U.S. District Court before asking the Commission for a public interest disclosure order.

[257] In the event that this Commission determines that disclosure would be in the public interest, Witness A requests that we grant a limited section 17 order permitting the Applicants to disclose that various witnesses have been examined by Staff in order to persuade the U.S. District Court to issue a protective order that will ensure use and derivative use protection for the witnesses examined under oath in Canada.

[258] Witnesses B, C, E and F assert that an order will not and cannot have extra-territorial effect. They argue that the Commission cannot constrain the U.S. Attorney or others who may come to possess the Evidence. They argue that once the Evidence is filed in the a U.S. court, all Canadian protections against self-incrimination, use and derivative use will cease to exist.

ii. Submissions in Response to the Applicants' Revised Draft Order

[259] The Respondents unanimously refused to provide their consent to the Applicants' revised draft order.

[260] Witnesses A, B, C, E and F submit that the revised draft order does not alleviate their concerns regarding the disclosure of their compelled evidence or change their opposition to the relief requested. In addition, they submit that the revised draft order is unworkable.

[261] Witnesses D, G and KPMG submit that the revised draft order does not provide a workable solution and does not address the substantive submissions made during the hearing.

[262] Atkinson submits that the revised draft order is significantly different than the order originally sought in the Application and does not address the substantive issues during the hearing.

2. Discussion and Conclusion

[263] The Applicants provided a draft order, which included an undertaking that the Applicants and their defence counsel would take all steps reasonably available to obtain a protective order from the U.S. District Court requiring all parties to the U.S. Criminal Proceeding to comply with the conditions in the draft order. At the hearing, the Applicants provided no evidence to assure the Panel that such protective orders would be granted by the U.S. District Court and the extent to which they would protect the Respondents. The Applicants' revised draft order does not make any reference to obtaining a protective order, but provides an undertaking to the Commission that the Applicants' defence counsel will comply with the terms and conditions specified in the revised draft order. We acknowledge that the Applicants have attempted to address our concerns by including additional restrictive conditions in their revised draft order. However, we are still not convinced that any of these best efforts undertakings would ultimately protect the Respondents from having their testimony potentially used in criminal or civil proceedings in the U.S.

[264] We agree with the Respondents that the draft order and the conditions included in the revised draft order do not address the substantive issues and our concerns discussed in our reasons above. Accordingly, we decline to grant the Applicants' request set out in their original draft order as well as the revised draft order.

V. Conclusions

[265] Our analysis of this request was conducted in light of the alleged unique and exceptional circumstances of this case.

[266] We affirm that the statutory scheme of Part VI of the Act provides a presumption in favour of protecting confidentiality of compelled evidence from witnesses under section 13 of the Act. An order under subsection 17(1) of the Act will be appropriate only in the "most unusual circumstances" where the public interest in disclosure clearly outweighs the confidentiality rights provided in the statute. We are not convinced that granting this Application would be in the public interest, and accordingly, we decline to grant the Applicants' requested order, except for Ravelston.

[267] An order under subsection 17(1) of the Act will be issued shortly with respect to Ravelston.

DATED at Toronto this 5th day of March, 2007.

"Wendell S. Wigle, Q.C."	"Carol S. Perry"
Wendell S. Wigle, Q.C.	Carol S. Perry

VI. Reasons and Decision of Patrick J. LeSage (in dissent)

[268] I have read and considered the very thorough and complete Reasons of the majority. I agree with their decision with respect to Ravelston and Atkinson. I am, respectfully, not able to agree with the majority's dismissal of the Applicants' request regarding the evidence of witnesses A, B, C, D, E, F, G and KPMG.

[269] At the outset, it is important to note that pursuant to Canadian disclosure laws and practices, the Applicants are already in possession of the testimony and documentary evidence that forms the subject matter of this Application. This Application therefore relates not to whether they may possess the testimony and related exhibits, but rather whether they may, if circumstances require, use that evidence in a "parallel" proceeding in the U.S., namely, the U.S. Criminal Proceeding, in which the Applicants are the accused.

[270] I am satisfied that the Applicants' request falls squarely within the supervisory role of this tribunal over the operation of the Act, specifically section 17. The question therefore is whether the Applicants' request is … "in the public interest" having regard to all the circumstances? This is not, as some have characterized it, an Application for a purely private purpose, nor a request made so that the Applicants can personally gain. Rather, the request is for use of the evidence in a very public action in which the State is seeking to convict and incarcerate the Applicants. That is not a private purpose.

[271] If the identical or similar criminal prosecution occurred anywhere in Canada, I am sure we would authorize the requested use of the sought after Evidence, so as to enable the Applicants to make full answer and defence. However, in such a case, I am mindful that Canadian laws would apply protecting the witnesses against self-incrimination.

[272] This Application is not to be determined on the basis of the adequacy of the disclosure rules in U.S. criminal courts, and in particular, this specific U.S. Criminal Proceeding, rather, on the basis of the Application of Canadian law to determine whether an Order authorizing the use and disclosure of the Evidence should be made having regard to all the relevant factors.

[273] At paragraph 232 the majority write in part as follows:

> […] any disclosure of evidence obtained under Part VI of the Act would be appropriate *where the Commission or an Ontario court could exercise control over the use* and derivative use in order to ensure that the witnesses' rights against self-incrimination would be protected. The Applicants' requested Order does not meet this requirement. [Emphasis is my own.]

[274] I do not accept, as will be seen in these Reasons, that the Respondents' right to privacy and right against self-incrimination trumps all other rights, including the right of the Applicants to make full answer and defence. I also believe, with an appropriate Order, that the Commission can exercise a significant degree of control over the permitted use of the Evidence.

[275] The Applicants have been criminally indicted in the U.S. and face the possibility of long term incarceration if convicted. There have been numerous investigations concerning the conduct of the affairs of Hollinger and Hollinger International Inc. The Special Committee of Hollinger International Inc. conducted an investigation; Staff of the Commission conducted an investigation; and the S.E.C. conducted an investigation. The U.S. Attorney conducted an investigation and invoked a Grand Jury. None of witnesses A, B, C, E and F has been charged as a result of these investigations. In addition, none of these witnesses has been named in a regulatory proceeding, nor is any of them named as a defendant in any of the civil actions that have arisen out of the Hollinger investigations.

[276] Witnesses D and G, and their employer, KPMG, have been interviewed by the Special Committee of Hollinger International Inc., and the S.E.C. None of them is the subject of a criminal or regulatory proceeding and neither D nor G is a defendant in any of the civil proceedings relating to the allegations against the Applicants, although KPMG is a defendant in Canadian class proceedings.

[277] Witnesses D, G and KPMG representatives have been interviewed by the U.S. authorities and have agreed to cooperate as witnesses in the U.S. Criminal Proceeding.

[278] Given the stage and the number of investigations completed over a lengthy period, there is not now, in my view, a realistic likelihood of criminal, civil or regulatory risk to these respondents (other than KPMG in the class proceedings) if their evidence before the Commission is used for the purpose of cross-examination on the limited terms that I would allow.

[279] The right to make full answer and defence has been referred to by the Supreme Court of Canada in *Stinchcombe* as "one of the pillars of criminal justice on which we heavily depend to ensure that the innocent are not convicted". (*Stinchcomb*e, *supra* at para. 17.) It would seem, therefore, to be not only reasonable, but eminently fair, to permit counsel for the Applicants at the U.S. Criminal Proceeding to cross-examine witnesses D and G and any KPMG witnesses on testimony they provided in Canada that is contradictory to the evidence they have willingly agreed to provide for the U.S. prosecution. Certainly, any expectation of privacy or confidentiality or freedom from self-incrimination that they may have reasonably anticipated when they provided their evidence in Canada has been diluted, if not negated, by their cooperation and willingness to provide statements to, and to attend as witnesses for (it appears), the prosecution against the Applicants.

[280] In light of the remoteness of any risk to witnesses D, G or KPMG, and having regard to their willingness to cooperate and provide statements to the U.S. prosecutorial authorities, I believe it would be both unfair and unreasonable not to grant the Applicants' request, subject to the terms I will set out.

[281] If the Applicants' request regarding witnesses D, G and KPMG is not granted, and D, G or a KPMG representative provides evidence in the U.S. trial that contradicts evidence they provided the Commission, counsel for the accused Applicants would be prohibited from cross-examining them on the contradictory evidence. If, of course, as one would reasonably expect, they did not give contradictory evidence, then the sought after Evidence would not be relied on and no possible harm could befall anyone as a result of the Order I would make. Therefore, if an Order is made permitting the Applicants the right to use the Evidence, it would be utilized only in the, hopefully unlikely situation, that the evidence of witnesses D, G and KPMG at the trial in the United States is contradictory to the evidence they provided the Commission. The balance of the rights of D, G and KPMG, against self-incrimination, as compared to the accused Applicants' rights to make full answer and defence is overwhelmingly in favour of the Applicants.

[282] Witnesses A, B, C, E and F are in a somewhat different position, however, the likelihood of them being adversely affected in a civil, criminal or regulatory sense is slight, if not remote, having regard to the late stage of the proceedings, both in the U.S. and here in Canada. Accepting as I do, that section 17 of the Act creates a public interest exception to the non-disclosure and confidentiality regime established in section 16 of the Act, I am satisfied that a balance must be achieved between the respective rights of the Applicants and the respective rights of A, B, C, E and F. When one weights the slight, if not remote, risk of harm that could befall A, B, C, E or F if the restricted use requested by the Applicants was permitted, against the very significant harm that could befall the Applicants if they are curtailed in their right to make full answer and defence, I conclude the balance is tilted significantly in favour of the Applicants.

[283] In so finding I am not, of course, ordering or directing that their evidence be used, but rather permitting it to be used in very limited circumstances. The Applicants are bound by the restrictions that this Commission will impose.

[284] Atkinson, however, is in a totally different position than the other Respondents. He is an accused facing the same serious criminal charges with the same significant penal consequences. In balancing the respective rights of the Applicants and Atkinson, it is necessary to take into consideration that he is facing not a perceived, but a real, risk with significant consequences. In that circumstance, his right to be free against self-incrimination is at least equal to the Applicants' right to full answer and defence. The Applicants therefore have not met their onus. As a result, I agree with the majority, the Applicants may not use the testimony of Atkinson for any purpose.

[285] In determining that it is appropriate to authorize restricted use of the testimony of witnesses A, B, C, D, E, F and G and KPMG, I am influenced by the firm belief that this will not impede the Commission's ability to conduct future investigations. This Application raises unique and exceptional circumstances that call for a unique and exceptional discrete disclosure Order. I am mindful of criminal cases in the past where wrongful convictions have occurred because the State failed to disclose relevant evidence. In arriving at my conclusion, I am also mindful that Canadian values espouse the right of an accused to make full answer and defence.

[286] I therefore conclude that the Applicants' rights in this circumstance outweigh the witnesses A, B, C, D, E, F, G and KPMG's reasonable expectations of privacy in the compelled evidence. I am satisfied, given the terms I would impose, that the

risk of harm and the nature of self incrimination is minimal and that it is in the public interest to authorize the restricted use of the Evidence on terms as follows:

1. The Applicants or their counsel may make disclosure and use of the evidence and the documents of witnesses A, B, C, D, E, F, G and KPMG solely for the purpose relating to their defence of the outstanding charges in the U.S. Criminal Proceeding and for no other purpose.

2. Disclosure and use of the evidence of witnesses A, B, C, D, E, F, G and KPMG will be on condition that:

   (a) the Applicants and their counsel will not use the evidence or the documents other than in connection with their making full answer and defence to the charge against them in the U.S. Criminal Proceeding;

   (b) the Applicants and their counsel shall maintain custody and control over the evidence in the documents so that the copies of the evidence are not disseminated to other persons in their employ or for any purpose other than in connection with their making full answer and defence to the charges in the outstanding U.S. Criminal Proceeding;

   (c) the Applicants and their counsel shall not take the evidence or copies of any part of the evidence outside of Canada;

   (d) the Applicants and their counsel may use the evidence only for the purposes of cross-examination of a witness at the trial in the U.S. Criminal Proceeding by asking questions based on the evidence, but shall accept the witness's answer to any such question without further reference to the evidence in respect of that question;

   (e) if any of the evidence is used as a basis for seeking the testimony of an individual on behalf of the defence, other than a witness with respect to his or her own evidence, the identity of the witnesses shall not be disclosed and no part of the evidence shall be shown to any such individual, except, of course, unless ordered to do so by the presiding judge in the U.S. court. If so compelled, counsel must take every step available to them to ensure the spirit of this order is adhered to. This includes ensuring, to the extent possible, in the United States courts, the compelled statements, if utilized, not be used in an incriminating manner against the witnesses or their employer;

   (f) the evidence and the documents shall not be used for any collateral or ulterior purpose;

   (g) defence counsel for the Applicants in the U.S. Criminal Proceeding shall undertake that they will comply with the terms and conditions specified in this Order.

DATED at Toronto this 5th day of March, 2007.

"Patrick J. LeSage"
Patrick J. LeSage

Chapter 4

Cease Trading Orders

4.1.1 Temporary, Permanent & Rescinding Issuer Cease Trading Orders

Company Name	Date of Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Revoke
Viacorp Technologies Inc.	08 Oct 08	20 Oct 08	20 Oct 08	
Uniserve Communications Corporation	08 Oct 08	20 Oct 08	20 Oct 08	

4.2.1 Temporary, Permanent & Rescinding Management Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/ Expire	Date of Issuer Temporary Order
EnGlobe Corp.	18 Aug 08	29 Aug 08	29 Aug 08	17 Oct 08	

4.2.2 Outstanding Management & Insider Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/ Expire	Date of Issuer Temporary Order
CoolBrands International Inc.	30 Nov 06	13 Dec 06	13 Dec 06		
Hip Interactive Corp.	04 July 05	15 July 05	15 July 05		
EnGlobe Corp.	18 Aug 08	29 Aug 08	29 Aug 08	17 Oct 08	

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Chapter 5

Rules and Policies

5.1.1 NI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings

NATIONAL INSTRUMENT 52-109
CERTIFICATION OF DISCLOSURE IN ISSUERS' ANNUAL AND INTERIM FILINGS

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Form 52-109F1 – AIF	Certification of annual filings in connection with voluntarily filed AIF
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Form 52-109F2R	Certification of refiled interim filings

PART 1 – DEFINITIONS AND APPLICATION

1.1 **Definitions** – In this Instrument,

"AIF" has the meaning ascribed to it in NI 51-102;

"accounting principles" has the meaning ascribed to it in NI 52-107;

"annual certificate" means the certificate required to be filed under Part 4 or section 6.1;

"annual filings" means an issuer's AIF, if any, its annual financial statements and its annual MD&A filed under securities legislation for a financial year, including, for greater certainty, all documents and information that are incorporated by reference in the AIF;

"annual financial statements" means the annual financial statements required to be filed under NI 51-102;

"certifying officer" means each chief executive officer and each chief financial officer of an issuer, or in the case of an issuer that does not have a chief executive officer or a chief financial officer, each individual performing similar functions to those of a chief executive officer or chief financial officer;

"DC&P" means disclosure controls and procedures;

"disclosure controls and procedures" means controls and other procedures of an issuer that are designed to provide reasonable assurance that information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted by it under securities legislation is recorded, processed, summarized and reported within the time periods specified in the securities legislation and include controls and procedures designed to ensure that information required to be disclosed by an issuer in its annual filings, interim filings or other reports filed or submitted under securities legislation is accumulated and communicated to the issuer's management, including its certifying officers, as appropriate to allow timely decisions regarding required disclosure;

"financial period" means a financial year or an interim period;

"ICFR" means internal control over financial reporting;

"internal control over financial reporting" means a process designed by, or under the supervision of, an issuer's certifying officers, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP and includes those policies and procedures that:

(a) pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer;

(b) are designed to provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with the issuer's GAAP, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer; and

(c) are designed to provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the annual financial statements or interim financial statements;

"interim certificate" means the certificate required to be filed under Part 5 or section 6.2;

"interim filings" means an issuer's interim financial statements and its interim MD&A filed under securities legislation for an interim period;

"interim financial statements" means the interim financial statements required to be filed under NI 51-102;

"interim period" has the meaning ascribed to it in NI 51-102;

"issuer's GAAP" has the meaning ascribed to it in NI 52-107;

"marketplace" has the meaning ascribed to it in National Instrument 21-101 *Marketplace Operation*;

"material weakness" means a deficiency, or a combination of deficiencies, in ICFR such that there is a reasonable possibility that a material misstatement of the reporting issuer's annual or interim financial statements will not be prevented or detected on a timely basis;

"MD&A" has the meaning ascribed to it in NI 51-102;

"NI 51-102" means National Instrument 51-102 *Continuous Disclosure Obligations*;

"NI 52-107" means National Instrument 52-107 *Acceptable Accounting Principles, Auditing Standards and Reporting Currency*;

"non-venture issuer" means a reporting issuer that is not a venture issuer;

"proportionately consolidated entity" means an entity in which an issuer has an interest that is accounted for by combining, on a line-by-line basis, the issuer's *pro rata* share of each of the assets, liabilities, revenues and expenses of the entity with similar items in the issuer's financial statements;

"reverse takeover" has the meaning ascribed to it in NI 51-102;

"reverse takeover acquiree" has the meaning ascribed to it in NI 51-102;

"reverse takeover acquirer" has the meaning ascribed to it in NI 51-102;

"Sarbanes-Oxley Act" means the Sarbanes-Oxley Act of 2002 of the United States of America, Pub.L. 107-204, 116 Stat. 745 (2002), as amended from time to time;

"SOX 302 Rules" means U.S. federal securities laws implementing the annual report certification requirements in section 302(a) of the Sarbanes-Oxley Act;

"SOX 404 Rules" means U.S. federal securities laws implementing the internal control report requirements in sections 404(a) and (b) of the Sarbanes-Oxley Act;

"U.S. marketplace" has the meaning ascribed to it in NI 51-102;

"variable interest entity" has the meaning ascribed to it in the issuer's GAAP; and

"venture issuer" means a reporting issuer that, as at the end of the period covered by the annual or interim filings, as the case may be, did not have any of its securities listed or quoted on any of the Toronto Stock Exchange, a U.S. marketplace, or a marketplace outside of Canada and the United States of America other than the Alternative Investment Market of the London Stock Exchange or the PLUS markets operated by PLUS Markets Group plc.

1.2 **Application**

(1) This Instrument applies to a reporting issuer other than an investment fund.

(2) This Instrument applies in respect of annual filings and interim filings for financial periods ending on or after December 15, 2008.

PART 2 – CERTIFICATION OBLIGATION

2.1 **Certifying officers' certification obligation** – Each certifying officer must certify the matters prescribed by the required form that must be filed under Part 4 or Part 5.

PART 3 – DC&P AND ICFR

3.1 **Establishment and maintenance of DC&P and ICFR** – A non-venture issuer must establish and maintain DC&P and ICFR.

3.2 **MD&A disclosure of material weakness** – Despite section 3.1, if a non-venture issuer determines that it has a material weakness which exists as at the end of the period covered by its annual or interim filings, as the case may be, it must disclose in its annual or interim MD&A for each material weakness

(a) a description of the material weakness;

(b) the impact of the material weakness on the issuer's financial reporting and its ICFR; and

(c) the issuer's current plans, if any, or any actions already undertaken, for remediating the material weakness.

3.3 **Limitations on scope of design**

(1) Despite section 3.1, a non-venture issuer may limit its design of DC&P or ICFR to exclude controls, policies and procedures of

(a) subject to subsection (3), a proportionately consolidated entity or a variable interest entity in which the issuer has an interest; or

(b) subject to subsection (4), a business that the issuer acquired not more than 365 days before the end of the financial period to which the certificate relates.

(2) An issuer that limits its design of DC&P or ICFR under subsection (1) must disclose in its MD&A

(a) the limitation; and

(b) summary financial information about the proportionately consolidated entity, variable interest entity or business that the issuer acquired that has been proportionately consolidated or consolidated in the issuer's financial statements.

(3) An issuer must not limit its design of DC&P or ICFR under paragraph (1)(a) except where the certifying officers would not have a reasonable basis for making the representations in the annual or interim certificates because they do not have sufficient access to a proportionately consolidated entity or variable interest entity, as applicable, to design and evaluate controls, policies and procedures carried out by that entity.

(4) An issuer must not limit its design of DC&P or ICFR under paragraph (1)(b) except in the case of

(a) an annual certificate relating to the financial year in which the issuer acquired the business; and

(b) an interim certificate relating to the first, second or third interim period ending on or after the date the issuer acquired the business.

3.4 **Use of a control framework for the design of ICFR**

(1) A non-venture issuer must use a control framework to design the issuer's ICFR.

(2) If a venture issuer files a Form 52-109F1 or Form 52-109F2 for a financial period, the venture issuer must use a control framework to design the issuer's ICFR.

PART 4 – CERTIFICATION OF ANNUAL FILINGS

4.1 **Requirement to file**

(1) A reporting issuer must file a separate annual certificate in the wording prescribed by the required form

(a) for each individual who, at the time of filing the annual certificate, is a certifying officer; and

(b) signed by the certifying officer.

(2) A reporting issuer must file a certificate required under subsection (1) on the later of the dates on which it files the following:

(a) its AIF if it is required to file an AIF under NI 51-102; or

(b) its annual financial statements and annual MD&A.

(3) If a venture issuer voluntarily files an AIF for a financial year after it has filed its annual financial statements, annual MD&A and annual certificates for the financial year, the venture issuer must file on the same date that it files its AIF a separate annual certificate in the wording prescribed by the required form

(a) for each individual who, at the time of filing the annual certificate, is a certifying officer; and

(b) signed by the certifying officer.

(4) A reporting issuer must file a certificate required under subsection (1) or (3) separately from the documents to which the certificate relates.

4.2 **Required form of annual certificate**

(1) The required form of annual certificate under subsection 4.1(1) is

(a) Form 52-109F1, in the case of an issuer that is a non-venture issuer; and

(b) Form 52-109FV1, in the case of an issuer that is a venture issuer.

(2) Despite subsection (1)(b), a venture issuer may file Form 52-109F1 in the wording prescribed by that Form instead of Form 52-109FV1 for a financial year.

(3) The required form of annual certificate under subsection 4.1(3) is Form 52-109F1 – AIF.

4.3 **Alternative form of annual certificate for first financial period after initial public offering** – Despite subsection 4.2(1), an issuer may file an annual certificate in Form 52-109F1 – IPO/RTO for the first financial year that ends after the issuer becomes a reporting issuer if

(a) the issuer becomes a reporting issuer by filing a prospectus; and

(b) the first financial period that ends after the issuer becomes a reporting issuer is a financial year.

4.4 **Alternative form of annual certificate for first financial period after certain reverse takeovers** – Despite subsection 4.2(1), an issuer may file an annual certificate in Form 52-109F1 – IPO/RTO for the first financial year that ends after the completion of a reverse takeover if

(a) the issuer is the reverse takeover acquiree in the reverse takeover;

(b) the reverse takeover acquirer was not a reporting issuer immediately before the reverse takeover; and

(c) the first financial period that ends after the completion of the reverse takeover is a financial year.

4.5 **Alternative form of annual certificate for first financial period after becoming a non-venture issuer** – Despite subsection 4.2(1), an issuer may file an annual certificate in Form 52-109F1 – IPO/RTO for the first financial year that ends after the issuer becomes a non-venture issuer if the first financial period that ends after the issuer becomes a non-venture issuer is a financial year.

4.6 **Exception for new reporting issuers** – Despite section 4.1, a reporting issuer does not have to file an annual certificate relating to

(a) the annual financial statements required under section 4.7 of NI 51-102 for financial years that ended before the issuer became a reporting issuer; or

(b) the annual financial statements for a reverse takeover acquirer required under section 4.10 of NI 51-102 for financial years that ended before the completion of the reverse takeover.

PART 5 - CERTIFICATION OF INTERIM FILINGS

5.1 **Requirement to file**

(1) A reporting issuer must file a separate interim certificate in the wording prescribed by the required form

(a) for each individual who, at the time of filing the interim certificate, is a certifying officer; and

(b) signed by the certifying officer.

(2) A reporting issuer must file a certificate required under subsection (1) on the same date that the issuer files its interim filings.

(3) A reporting issuer must file a certificate required under subsection (1) separately from the documents to which the certificate relates.

5.2 **Required form of interim certificate**

(1) The required form of interim certificate under subsection 5.1(1) is

(a) Form 52-109F2, in the case of an issuer that is a non-venture issuer; and

(b) Form 52-109FV2, in the case of an issuer that is a venture issuer.

(2) Despite subsection (1)(b), a venture issuer may file Form 52-109F2 in the wording prescribed by that Form instead of Form 52-109FV2 for an interim period.

5.3 **Alternative form of interim certificate for first financial period after initial public offering** – Despite subsection 5.2(1), an issuer may file an interim certificate in Form 52-109F2 – IPO/RTO for the first interim period that ends after the issuer becomes a reporting issuer if

(a) the issuer becomes a reporting issuer by filing a prospectus; and

(b) the first financial period that ends after the issuer becomes a reporting issuer is an interim period.

5.4 **Alternative form of interim certificate for first financial period after certain reverse takeovers** – Despite subsection 5.2(1), an issuer may file an interim certificate in Form 52-109F2 – IPO/RTO for the first interim period that ends after the completion of a reverse takeover if

(a) the issuer is the reverse takeover acquiree in the reverse takeover;

(b) the reverse takeover acquirer was not a reporting issuer immediately before the reverse takeover; and

(c) the first financial period that ends after the completion of the reverse takeover is an interim period.

5.5 **Alternative form of interim certificate for first financial period after becoming a non-venture issuer** – Despite subsection 5.2(1), an issuer may file an interim certificate in Form 52-109F2 – IPO/RTO for the first interim period that ends after the issuer becomes a non-venture issuer if the first financial period that ends after the issuer becomes a non-venture issuer is an interim period.

5.6 **Exception for new reporting issuers** – Despite section 5.1, a reporting issuer does not have to file an interim certificate relating to

(a) the interim financial statements required under section 4.7 of NI 51-102 for interim periods that ended before the issuer became a reporting issuer; or

(b) the interim financial statements for a reverse takeover acquirer required under section 4.10 of NI 51-102 for interim periods that ended before the completion of the reverse takeover.

PART 6 – REFILED FINANCIAL STATEMENTS, MD&A OR AIF

6.1 **Refiled annual financial statements, annual MD&A or AIF** – If an issuer refiles its annual financial statements, annual MD&A or AIF for a financial year, it must file separate annual certificates for that financial year in Form 52-109F1R on the date that it refiles the annual financial statements, annual MD&A or AIF, as the case may be.

6.2 **Refiled interim financial statements or interim MD&A** – If an issuer refiles its interim financial statements or interim MD&A for an interim period, it must file separate interim certificates for that interim period in Form 52-109F2R on the date that it refiles the interim financial statements or interim MD&A, as the case may be.

PART 7 – GENERAL REQUIREMENTS FOR CERTIFICATES

7.1 **Dating of certificates** – A certifying officer must date a certificate filed under this Instrument the same date the certificate is filed.

7.2 **French or English**

(1) A certificate filed by an issuer under this Instrument must be in French or in English.

(2) In Québec, an issuer must comply with linguistic obligations and rights prescribed by Québec law.

PART 8 – EXEMPTIONS

8.1 **Exemption from annual requirements for issuers that comply with U.S. laws**

(1) Subject to subsection (2), Parts 2, 3, 4, 6 and 7 do not apply to an issuer for a financial year if

(a) the issuer is in compliance with the SOX 302 Rules and the issuer files signed certificates relating to its annual report under the 1934 Act separately, but concurrently, and as soon as practicable after they are filed with or furnished to the SEC; and

(b) the issuer is in compliance with the SOX 404 Rules, and the issuer files management's annual report on internal control over financial reporting and the attestation report on management's assessment of internal control over financial reporting included in the issuer's annual report under the 1934 Act for the financial year, if applicable, as soon as practicable after they are filed with or furnished to the SEC.

(2) Despite subsection (1), Parts 2, 3, 4, 6 and 7 apply to an issuer for a financial year if the issuer's annual financial statements, annual MD&A or AIF, that together comprise the issuer's annual filings, differ from the annual financial statements, annual MD&A or AIF filed with or furnished to the SEC, or included as exhibits to other documents filed with or furnished to the SEC, and certified in compliance with the SOX 302 Rules.

8.2 **Exemption from interim requirements for issuers that comply with U.S. laws**

(1) Subject to subsection (3), Parts 2, 3, 5, 6 and 7 do not apply to an issuer for an interim period if the issuer is in compliance with the SOX 302 Rules and the issuer files signed certificates relating to its quarterly report under the 1934 Act for the quarter separately, but concurrently, and as soon as practicable after they are filed with or furnished to the SEC.

(2) Subject to subsection (3), Parts 2, 3, 5, 6 and 7 do not apply to an issuer for an interim period if

(a) the issuer files with or furnishes to the SEC a report on Form 6-K containing the issuer's quarterly financial statements and MD&A;

(b) the Form 6-K is accompanied by signed certificates that are filed with or furnished to the SEC in the same form required by the SOX 302 Rules; and

(c) the issuer files signed certificates relating to the quarterly report filed or furnished under cover of the Form 6-K as soon as practicable after they are filed with or furnished to the SEC.

(3) Despite subsections (1) and (2), Parts 2, 3, 5, 6 and 7 apply to an issuer for an interim period if the issuer's interim financial statements or interim MD&A, that together comprise the issuer's interim filings, differ from the interim financial statements or interim MD&A filed with or furnished to the SEC, or included as exhibits to other documents filed with or furnished to the SEC, and certified in compliance with the SOX 302 Rules.

8.3 **Exemption for certain foreign issuers** – This Instrument does not apply to an issuer if it qualifies under, and is in compliance with, sections 5.4 and 5.5 of National Instrument 71-102 *Continuous Disclosure and Other Exemptions Relating to Foreign Issuers*.

8.4 **Exemption for certain exchangeable security issuers** – This Instrument does not apply to an issuer if it qualifies under, and is in compliance with, subsection 13.3(2) of NI 51-102.

8.5 **Exemption for certain credit support issuers** – This Instrument does not apply to an issuer if it qualifies under, and is in compliance with, subsection 13.4(2) of NI 51-102.

8.6 **General exemption**

(1) The regulator or securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario only the regulator may grant such an exemption.

(3) Except in Ontario, an exemption referred to in subsection (1) is granted under the statute referred to in Appendix B of National Instrument 14-101 *Definitions* opposite the name of the local jurisdiction.

PART 9 – EFFECTIVE DATE AND REPEAL

9.1 **Effective date** – This Instrument comes into force on December 15, 2008.

9.2 **Repeal** – Multilateral Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, which came into force on

(a) March 30, 2004, in all jurisdictions other than British Columbia, New Brunswick and Québec,

(b) June 30, 2005, in Québec,

(c) July 28, 2005, in New Brunswick, and

(d) September 19, 2005 in British Columbia,

is repealed.

FORM 52-109F1
CERTIFICATION OF ANNUAL FILINGS
FULL CERTIFICATE

I, ***<identify (i) the certifying officer, (ii) his or her position at the issuer, (iii) the name of the issuer and (iv) if the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate>***, certify the following:

1. ***Review:*** I have reviewed the AIF, if any, annual financial statements and annual MD&A, including, for greater certainty, all documents and information that are incorporated by reference in the AIF (together, the "annual filings") of ***<identify issuer>*** (the "issuer") for the financial year ended ***<state the relevant date>***.

2. ***No misrepresentations:*** Based on my knowledge, having exercised reasonable diligence, the annual filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, for the period covered by the annual filings.

3. ***Fair presentation:*** Based on my knowledge, having exercised reasonable diligence, the annual financial statements together with the other financial information included in the annual filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date of and for the periods presented in the annual filings.

4. ***Responsibility:*** The issuer's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (DC&P) and internal control over financial reporting (ICFR), as those terms are defined in National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, for the issuer.

5. ***Design:*** Subject to the limitations, if any, described in paragraphs 5.2 and 5.3, the issuer's other certifying officer(s) and I have, as at the financial year end

   (a) designed DC&P, or caused it to be designed under our supervision, to provide reasonable assurance that

      (i) material information relating to the issuer is made known to us by others, particularly during the period in which the annual filings are being prepared; and

      (ii) information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted by it under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation; and

   (b) designed ICFR, or caused it to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP.

5.1 ***Control framework:*** The control framework the issuer's other certifying officer(s) and I used to design the issuer's ICFR is ***<insert the name of the control framework used>*** .

<insert paragraph 5.2 or 5.3 if applicable. If paragraph 5.2 or 5.3 is not applicable, insert "5.2 N/A" or "5.3 N/A" as applicable. For paragraph 5.3, include (a)(i), (a)(ii) or (a)(iii) as applicable, and subparagraph (b).>

5.2 ***ICFR – material weakness relating to design:*** The issuer has disclosed in its annual MD&A for each material weakness relating to design existing at the financial year end

   (a) a description of the material weakness;

   (b) the impact of the material weakness on the issuer's financial reporting and its ICFR; and

   (c) the issuer's current plans, if any, or any actions already undertaken, for remediating the material weakness.

5.3 ***Limitation on scope of design:*** The issuer has disclosed in its annual MD&A

   (a) the fact that the issuer's other certifying officer(s) and I have limited the scope of our design of DC&P and ICFR to exclude controls, policies and procedures of

      (i) a proportionately consolidated entity in which the issuer has an interest;

(ii) a variable interest entity in which the issuer has an interest; or

(iii) a business that the issuer acquired not more than 365 days before the issuer's financial year end; and

(b) summary financial information about the proportionately consolidated entity, variable interest entity or business that the issuer acquired that has been proportionately consolidated or consolidated in the issuer's financial statements.

<insert subparagraph 6(b)(ii) if applicable. If subparagraph 6(b)(ii) is not applicable, insert "(ii) N/A".>

6. ***Evaluation:*** The issuer's other certifying officer(s) and I have

(a) evaluated, or caused to be evaluated under our supervision, the effectiveness of the issuer's DC&P at the financial year end and the issuer has disclosed in its annual MD&A our conclusions about the effectiveness of DC&P at the financial year end based on that evaluation; and

(b) evaluated, or caused to be evaluated under our supervision, the effectiveness of the issuer's ICFR at the financial year end and the issuer has disclosed in its annual MD&A

(i) our conclusions about the effectiveness of ICFR at the financial year end based on that evaluation; and

(ii) for each material weakness relating to operation existing at the financial year end

(A) a description of the material weakness;

(B) the impact of the material weakness on the issuer's financial reporting and its ICFR; and

(C) the issuer's current plans, if any, or any actions already undertaken, for remediating the material weakness.

7. ***Reporting changes in ICFR:*** The issuer has disclosed in its annual MD&A any change in the issuer's ICFR that occurred during the period beginning on ***<insert the date immediately following the end of the period in respect of which the issuer made its most recent interim or annual filing, as applicable>*** and ended on ***<insert the last day of the financial year>*** that has materially affected, or is reasonably likely to materially affect, the issuer's ICFR.

8. ***Reporting to the issuer's auditors and board of directors or audit committee:*** The issuer's other certifying officer(s) and I have disclosed, based on our most recent evaluation of ICFR, to the issuer's auditors, and the board of directors or the audit committee of the board of directors any fraud that involves management or other employees who have a significant role in the issuer's ICFR.

Date: ***<insert date of filing>***

_____
[Signature]
[Title]

<If the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate.>

FORM 52-109FV1
CERTIFICATION OF ANNUAL FILINGS
VENTURE ISSUER BASIC CERTIFICATE

I, ***<identify (i) the certifying officer, (ii) his or her position at the issuer, (iii) the name of the issuer and (iv) if the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate>***, certify the following:

1. ***Review:*** I have reviewed the AIF, if any, annual financial statements and annual MD&A, including, for greater certainty, all documents and information that are incorporated by reference in the AIF (together, the "annual filings") of ***<identify issuer>*** (the "issuer") for the financial year ended ***<state the relevant date>***.

2. ***No misrepresentations:*** Based on my knowledge, having exercised reasonable diligence, the annual filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, for the period covered by the annual filings.

3. ***Fair presentation:*** Based on my knowledge, having exercised reasonable diligence, the annual financial statements together with the other financial information included in the annual filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date of and for the periods presented in the annual filings.

Date: ***<insert date of filing>***

_____
[Signature]
[Title]

<If the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate.>

NOTE TO READER

In contrast to the certificate required for non-venture issuers under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (NI 52-109), this Venture Issuer Basic Certificate does not include representations relating to the establishment and maintenance of disclosure controls and procedures (DC&P) and internal control over financial reporting (ICFR), as defined in NI 52-109. In particular, the certifying officers filing this certificate are not making any representations relating to the establishment and maintenance of

i) controls and other procedures designed to provide reasonable assurance that information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation; and

ii) a process to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP.

The issuer's certifying officers are responsible for ensuring that processes are in place to provide them with sufficient knowledge to support the representations they are making in this certificate. Investors should be aware that inherent limitations on the ability of certifying officers of a venture issuer to design and implement on a cost effective basis DC&P and ICFR as defined in NI 52-109 may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation.

FORM 52-109F1 – IPO/RTO
CERTIFICATION OF ANNUAL FILINGS FOLLOWING
AN INITIAL PUBLIC OFFERING, REVERSE TAKEOVER OR
BECOMING A NON-VENTURE ISSUER

I, ***<identify (i) the certifying officer, (ii) his or her position at the issuer, (iii) the name of the issuer and (iv) if the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate>***, certify the following:

1. ***Review:*** I have reviewed the AIF, if any, annual financial statements and annual MD&A, including, for greater certainty, all documents and information that are incorporated by reference in the AIF (together, the "annual filings") of ***<identify issuer>*** (the "issuer") for the financial year ended ***<state the relevant date>***.

2. ***No misrepresentations:*** Based on my knowledge, having exercised reasonable diligence, the annual filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, for the period covered by the annual filings.

3. ***Fair presentation:*** Based on my knowledge, having exercised reasonable diligence, the annual financial statements together with the other financial information included in the annual filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date of and for the periods presented in the annual filings.

Date: ***<insert date of filing>***

_____
[Signature]
[Title]

<If the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate.>

NOTE TO READER

In contrast to the usual certificate required for non-venture issuers under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (NI 52-109), namely, Form 52-109F1, this Form 52-109F1 – IPO/RTO does not include representations relating to the establishment and maintenance of disclosure controls and procedures (DC&P) and internal control over financial reporting (ICFR), as defined in NI 52-109. In particular, the certifying officers filing this certificate are not making any representations relating to the establishment and maintenance of

i) controls and other procedures designed to provide reasonable assurance that information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation; and

ii) a process to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP.

The issuer's certifying officers are responsible for ensuring that processes are in place to provide them with sufficient knowledge to support the representations they are making in this certificate.

Investors should be aware that inherent limitations on the ability of certifying officers of an issuer to design and implement on a cost effective basis DC&P and ICFR as defined in NI 52-109 in the first financial period following

- completion of the issuer's initial public offering in the circumstances described in s. 4.3 of NI 52-109;
- completion of a reverse takeover in the circumstances described in s. 4.4 of NI 52-109; or
- the issuer becoming a non-venture issuer in the circumstances described in s. 4.5 of NI 52-109;

may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation.

FORM 52-109F1R
CERTIFICATION OF REFILED ANNUAL FILINGS

This certificate is being filed on the same date that ***<identify the issuer>*** (the "issuer") has refiled ***<identify the filing(s) that have been refiled>***.

I, ***<identify (i) the certifying officer, (ii) his or her position at the issuer, (iii) the name of the issuer and (iv) if the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate>***, certify the following:

1. ***Review:*** I have reviewed the AIF, if any, annual financial statements and annual MD&A, including, for greater certainty, all documents and information that are incorporated by reference in the AIF (together, the "annual filings") of the issuer for the financial year ended ***<state the relevant date>***.

<Insert all paragraphs included in the annual certificates originally filed with the annual filings, other than paragraph 1. If the originally filed annual certificates were in Form 52-109FV1 or Form 52-109F1 – IPO/RTO, include the "note to reader" contained in Form 52-109FV1 or Form 52-109F1 – IPO/RTO, as the case may be, in this certificate.>

Date: ***<insert date of filing>***

_____
[Signature]
[Title]

<If the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate.>

FORM 52-109F1 – AIF
CERTIFICATION OF ANNUAL FILINGS
IN CONNECTION WITH VOLUNTARILY FILED AIF

This certificate is being filed on the same date that ***<identify the issuer>*** (the "issuer") has voluntarily filed an AIF.

I, ***<identify (i) the certifying officer, (ii) his or her position at the issuer, (iii) the name of the issuer and (iv) if the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate>***, certify the following:

1. ***Review:*** I have reviewed the AIF, annual financial statements and annual MD&A, including for greater certainty all documents and information that are incorporated by reference in the AIF (together, the "annual filings") of the issuer for the financial year ended ***<state the relevant date>***.

<Insert all paragraphs included in the annual certificates originally filed with the annual filings, other than paragraph 1. If the originally filed annual certificates were in Form 52-109FV1 or Form 52-109F1 – IPO/RTO, include the "note to reader" contained in Form 52-109FV1 or Form 52-109F1 – IPO/RTO, as the case may be, in this certificate.>

Date: ***<insert date of filing>***

_____
[Signature]
[Title]

<If the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate.>

FORM 52-109F2
CERTIFICATION OF INTERIM FILINGS
FULL CERTIFICATE

I, ***<identify (i) the certifying officer, (ii) his or her position at the issuer, (iii) the name of the issuer and (iv) if the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate>***, certify the following:

1. ***Review:*** I have reviewed the interim financial statements and interim MD&A (together, the "interim filings") of ***<identify the issuer>*** (the "issuer") for the interim period ended ***<state the relevant date>***.

2. ***No misrepresentations:*** Based on my knowledge, having exercised reasonable diligence, the interim filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the interim filings.

3. ***Fair presentation:*** Based on my knowledge, having exercised reasonable diligence, the interim financial statements together with the other financial information included in the interim filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date of and for the periods presented in the interim filings.

4. ***Responsibility:*** The issuer's other certifying officer(s) and I are responsible for establishing and maintaining disclosure controls and procedures (DC&P) and internal control over financial reporting (ICFR), as those terms are defined in National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings*, for the issuer.

5. ***Design:*** Subject to the limitations, if any, described in paragraphs 5.2 and 5.3, the issuer's other certifying officer(s) and I have, as at the end of the period covered by the interim filings

   (a) designed DC&P, or caused it to be designed under our supervision, to provide reasonable assurance that

      (i) material information relating to the issuer is made known to us by others, particularly during the period in which the interim filings are being prepared; and

      (ii) information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted by it under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation; and

   (b) designed ICFR, or caused it to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP.

5.1 ***Control framework:*** The control framework the issuer's other certifying officer(s) and I used to design the issuer's ICFR is ***<insert the name of the control framework used>***.

<insert paragraph 5.2 or 5.3 if applicable. If paragraph 5.2 or 5.3 is not applicable, insert "5.2 N/A" or "5.3 N/A" as applicable. For paragraph 5.3, include (a)(i), (a)(ii) or (a)(iii) as applicable, and subparagraph (b).>

5.2 ***ICFR – material weakness relating to design:*** The issuer has disclosed in its interim MD&A for each material weakness relating to design existing at the end of the interim period

   (a) a description of the material weakness;

   (b) the impact of the material weakness on the issuer's financial reporting and its ICFR; and

   (c) the issuer's current plans, if any, or any actions already undertaken, for remediating the material weakness.

5.3 ***Limitation on scope of design:*** The issuer has disclosed in its interim MD&A

   (a) the fact that the issuer's other certifying officer(s) and I have limited the scope of our design of DC&P and ICFR to exclude controls, policies and procedures of

      (i) a proportionately consolidated entity in which the issuer has an interest;

(ii) a variable interest entity in which the issuer has an interest; or

(iii) a business that the issuer acquired not more than 365 days before the last day of the period covered by the interim filings; and

(b) summary financial information about the proportionately consolidated entity, variable interest entity or business that the issuer acquired that has been proportionately consolidated or consolidated in the issuer's financial statements.

6. ***Reporting changes in ICFR:*** The issuer has disclosed in its interim MD&A any change in the issuer's ICFR that occurred during the period beginning on ***<insert the date immediately following the end of the period in respect of which the issuer made its most recent interim or annual filing, as applicable >*** and ended on ***<insert the last day of the period covered by the interim filings >*** that has materially affected, or is reasonably likely to materially affect, the issuer's ICFR.

Date: ***<insert date of filing>***

_____
[Signature]
[Title]

<If the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate.>

FORM 52-109FV2
CERTIFICATION OF INTERIM FILINGS
VENTURE ISSUER BASIC CERTIFICATE

I, ***<identify (i) the certifying officer, (ii) his or her position at the issuer, (iii) the name of the issuer and (iv) if the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate>***, certify the following:

1. ***Review:*** I have reviewed the interim financial statements and interim MD&A (together, the "interim filings") of ***<identify the issuer>*** (the "issuer") for the interim period ended ***<state the relevant date>***.

2. ***No misrepresentations:*** Based on my knowledge, having exercised reasonable diligence, the interim filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the interim filings.

3. ***Fair presentation:*** Based on my knowledge, having exercised reasonable diligence, the interim financial statements together with the other financial information included in the interim filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date of and for the periods presented in the interim filings.

Date: ***<insert date of filing>***

_____
[Signature]
[Title]

<If the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate.>

NOTE TO READER

In contrast to the certificate required for non-venture issuers under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (NI 52-109), this Venture Issuer Basic Certificate does not include representations relating to the establishment and maintenance of disclosure controls and procedures (DC&P) and internal control over financial reporting (ICFR), as defined in NI 52-109. In particular, the certifying officers filing this certificate are not making any representations relating to the establishment and maintenance of

i) controls and other procedures designed to provide reasonable assurance that information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation; and

ii) a process to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP.

The issuer's certifying officers are responsible for ensuring that processes are in place to provide them with sufficient knowledge to support the representations they are making in this certificate. Investors should be aware that inherent limitations on the ability of certifying officers of a venture issuer to design and implement on a cost effective basis DC&P and ICFR as defined in NI 52-109 may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation.

FORM 52-109F2 – IPO/RTO
CERTIFICATION OF INTERIM FILINGS FOLLOWING
AN INITIAL PUBLIC OFFERING, REVERSE TAKEOVER OR
BECOMING A NON-VENTURE ISSUER

I, ***<identify (i) the certifying officer, (ii) his or her position at the issuer, (iii) the name of the issuer and (iv) if the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate>***, certify the following:

1. ***Review:*** I have reviewed the interim financial statements and interim MD&A (together, the "interim filings") of ***<identify the issuer>*** (the "issuer") for the interim period ended ***<state the relevant date>***.

2. ***No misrepresentations:*** Based on my knowledge, having exercised reasonable diligence, the interim filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the interim filings.

3. ***Fair presentation:*** Based on my knowledge, having exercised reasonable diligence, the interim financial statements together with the other financial information included in the interim filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date of and for the periods presented in the interim filings.

Date: ***<insert date of filing>***

_____

[Signature]
[Title]

<If the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate.>

NOTE TO READER

In contrast to the usual certificate required for non-venture issuers under National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (NI 52-109), namely, Form 52-109F2, this Form 52-109F2 – IPO/RTO does not include representations relating to the establishment and maintenance of disclosure controls and procedures (DC&P) and internal control over financial reporting (ICFR), as defined in NI 52-109. In particular, the certifying officers filing this certificate are not making any representations relating to the establishment and maintenance of

i) controls and other procedures designed to provide reasonable assurance that information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation; and

ii) a process to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP.

The issuer's certifying officers are responsible for ensuring that processes are in place to provide them with sufficient knowledge to support the representations they are making in this certificate.

Investors should be aware that inherent limitations on the ability of certifying officers of an issuer to design and implement on a cost effective basis DC&P and ICFR as defined in NI 52-109 in the first financial period following

- completion of the issuer's initial public offering in the circumstances described in s. 5.3 of NI 52-109;
- completion of a reverse takeover in the circumstances described in s. 5.4 of NI 52-109; or
- the issuer becoming a non-venture issuer in the circumstances described in s. 5.5 of NI 52-109;

may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation.

FORM 52-109F2R
CERTIFICATION OF REFILED INTERIM FILINGS

This certificate is being filed on the same date that ***<identify the issuer>*** (the "issuer") has refiled ***<identify the filing(s) that have been refiled>***.

I, ***<identify (i) the certifying officer, (ii) his or her position at the issuer, (iii) the name of the issuer and (iv) if the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate>***, certify the following:

1. ***Review:*** I have reviewed the interim financial statements and interim MD&A (together, the "interim filings") of the issuer for the interim period ended ***<state the relevant date>***.

<Insert all paragraphs included in the interim certificates originally filed with the interim filings, other than paragraph 1. If the originally filed interim certificates were in Form 52-109FV2 or Form 52-109F2 – IPO/RTO, include the "note to reader" contained in Form 52-109FV2 or Form 52-109F2 – IPO/RTO, as the case may be, in this certificate .>

Date: ***<insert date of filing>***

_____
[Signature]
[Title]

<If the certifying officer's title is not "chief executive officer" or "chief financial officer", indicate in which of these capacities the certifying officer is providing the certificate.>

5.1.2 Amendment Instrument for Form 51-102F1 Management's Discussion & Analysis of NI 51-102 Continuous Disclosure Obligations

AMENDMENT INSTRUMENT FOR
FORM 51-102F1 *MANAGEMENT'S DISCUSSION & ANALYSIS* OF
NATIONAL INSTRUMENT 51-102 *CONTINUOUS DISCLOSURE OBLIGATIONS*

1. This Instrument amends Form 51-102F1 Management's Discussion & Analysis.

2. Item 1.15 is amended by striking out the following instruction:

"*INSTRUCTION*

Your company may also be required to provide additional disclosure in its MD&A as set out in Form 52-109F1 Certification of Annual Filings *and Form 52-109F2* Certification of Interim Filings."

3. Item 1.15 is amended by adding the following paragraph after paragraph 1.15(b):

"(c) Your MD&A must include the MD&A disclosure required by National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* and, as applicable, Form 52-109F1 *Certification of Annual Filings – Full Certificate*, Form 52-109F1R *Certification of Refiled Annual Filings*, or Form 52-109F1 *AIF Certification of Annual Filings in Connection with Voluntarily Filed AIF*."

4. Item 2 is amended by adding the following section after section 2.2:

"*2.3 – Other Interim MD&A Requirements*

Your interim MD&A must include the interim MD&A disclosure required by National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* and, as applicable, Form 52-109F2 *Certification of Interim Filings – Full Certificate* or Form 52-109F2R *Certification of Refiled Interim Filings*."

5. This amendment comes into force on December 15, 2008.

5.1.3 Companion Policy 52-109CP to NI 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings

COMPANION POLICY 52-109CP TO NATIONAL INSTRUMENT 52-109
CERTIFICATION OF DISCLOSURE IN ISSUERS' ANNUAL AND INTERIM FILINGS

TABLE OF CONTENTS

PART 1 – GENERAL

1.1 **Introduction and purpose** – National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (the Instrument) sets out disclosure and filing requirements for all reporting issuers, other than investment funds. The objective of these requirements is to improve the quality, reliability and transparency of annual filings, interim filings and other materials that issuers file or submit under securities legislation.

This Companion Policy (the Policy) describes how the provincial and territorial securities regulatory authorities intend to interpret and apply the provisions of the Instrument.

1.2 **Application to non-corporate entities** – The Instrument applies to both corporate and non-corporate entities. Where the Instrument or the Policy refers to a particular corporate characteristic, such as the audit committee of the board of directors, the reference should be read to also include any equivalent characteristic of a non-corporate entity.

1.3 **Application to venture issuers** – Venture issuers should note that the guidance provided in Parts 5 through 14 of this Policy is intended for issuers filing Form 52-109F1 and Form 52-109F2. Under Parts 4 and 5 of the Instrument venture issuers are not required, but may elect, to use those Forms.

1.4 **Definitions** – For the purposes of the Policy, "DC&P" means disclosure controls and procedures (as defined in the Instrument) and "ICFR" means internal control over financial reporting (as defined in the Instrument).

PART 2 – FORM OF CERTIFICATES

2.1 **Prescribed wording** – Parts 4 and 5 of the Instrument require the annual and interim certificates to be filed in the exact wording prescribed by the required form (including the form number and form title) without any amendment. Failure to do so will be a breach of the Instrument.

PART 3 – CERTIFYING OFFICERS

3.1 **One individual acting as chief executive officer and chief financial officer** – If only one individual is serving as the chief executive officer and chief financial officer of an issuer, or is performing functions similar to those performed by such officers, that individual may either:

(a) provide two certificates (one in the capacity of the chief executive officer and the other in the capacity of the chief financial officer); or

(b) provide one certificate in the capacity of both the chief executive officer and chief financial officer and file this certificate twice, once in the filing category for certificates of chief executive officers and once in the filing category for certificates of chief financial officers.

3.2 **Individuals performing the functions of a chief executive officer or chief financial officer**

(1) ***No chief executive officer or chief financial officer*** – If an issuer does not have a chief executive officer or chief financial officer, each individual who performs functions similar to those performed by a chief executive officer or chief financial officer must certify the annual filings and interim filings. If an issuer does not have a chief executive officer or chief financial officer, in order to comply with the Instrument the issuer will need to identify at least one individual who performs functions similar to those performed by a chief executive officer or chief financial officer, as applicable.

(2) ***Management resides at underlying business entity level or external management company*** – In the case of a reporting issuer where executive management resides at the underlying business entity level or in an external management company such as for an income trust (as described in National Policy 41-201 *Income Trusts and Other Indirect Offerings*), the chief executive officer and chief financial officer of the underlying business entity or the external management company should generally be identified as individuals performing functions for the reporting issuer similar to a chief executive officer and chief financial officer.

(3) ***Limited partnership*** – In the case of a limited partnership reporting issuer with no chief executive officer and chief financial officer, the chief executive officer and chief financial officer of its general partner should generally be identified as individuals performing functions for the limited partnership reporting issuer similar to a chief executive officer and chief financial officer.

3.3 **"New" certifying officers** – An individual who is the chief executive officer or chief financial officer at the time that an issuer files annual and interim certificates is the individual who must sign a certificate.

Certain forms included in the Instrument require each certifying officer to certify that he or she has designed, or caused to be designed under his or her supervision, the issuer's DC&P and ICFR. If an issuer's DC&P and ICFR have been designed prior to a certifying officer assuming office, the certifying officer would:

(a) review the design of the existing DC&P and ICFR after assuming office; and

(b) design any modifications to the existing DC&P and ICFR determined to be necessary following his or her review,

prior to certifying the design of the issuer's DC&P and ICFR.

PART 4 – FAIR PRESENTATION, FINANCIAL CONDITION AND RELIABILITY OF FINANCIAL REPORTING

4.1 **Fair presentation of financial condition, results of operations and cash flows**

(1) ***Fair presentation not limited to issuer's GAAP*** – The forms included in the Instrument require each certifying officer to certify that an issuer's financial statements (including prior period comparative financial information) and other financial information included in the annual or interim filings *fairly present* in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date and for the periods presented.

This certification is not qualified by the phrase "in accordance with generally accepted accounting principles" which is typically included in audit reports accompanying annual financial statements. The forms specifically exclude this qualification to prevent certifying officers from relying entirely on compliance with the issuer's GAAP in this representation, particularly as the issuer's GAAP financial statements might not fully reflect the financial condition of the issuer. Certification is intended to provide assurance that the financial information disclosed in the annual filings or interim filings, viewed in its entirety, provides a materially accurate and complete picture that may be broader than financial reporting under the issuer's GAAP. As a result, certifying officers cannot limit the fair presentation representation by referring to the issuer's GAAP.

Although the concept of fair presentation as used in the annual and interim certificates is not limited to compliance with the issuer's GAAP, this does not permit an issuer to depart from the issuer's GAAP in preparing its financial statements. If a certifying officer believes that the issuer's financial statements do not fairly present the issuer's financial condition, the certifying officer should ensure that the issuer's MD&A includes any necessary additional disclosure.

(2) ***Quantitative and qualitative factors*** – The concept of fair presentation encompasses a number of quantitative and qualitative factors, including:

(a) selection of appropriate accounting policies;

(b) proper application of appropriate accounting policies;

(c) disclosure of financial information that is informative and reasonably reflects the underlying transactions; and

(d) additional disclosure necessary to provide investors with a materially accurate and complete picture of financial condition, results of operations and cash flows.

4.2 **Financial condition** – The Instrument does not formally define financial condition. However, the term "financial condition" in the annual certificates and interim certificates reflects the overall financial health of the issuer and includes the issuer's financial position (as shown on the balance sheet) and other factors that may affect the issuer's liquidity, capital resources and solvency.

4.3 **Reliability of financial reporting** – The definition of ICFR refers to the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP. In order to have reliable financial reporting and financial statements to be prepared in accordance with the issuer's GAAP, the amounts and disclosures in the financial statements must not contain any material misstatement.

PART 5 – CONTROL FRAMEWORKS FOR ICFR

5.1 **Requirement to use a control framework** – Section 3.4 of the Instrument requires an issuer to use a control framework in order to design the issuer's ICFR. The framework used should be a suitable control framework that is established by a body or group that has followed due-process procedures, including the broad distribution of the framework for public comment.

Examples of suitable frameworks that an issuer could use to design ICFR are:

(a) the *Risk Management and Governance: Guidance on Control* (COCO Framework), formerly known as Guidance of the Criteria of Control Board, published by The Canadian Institute of Chartered Accountants;

(b) the *Internal Control – Integrated Framework* (COSO Framework) published by The Committee of Sponsoring Organizations of the Treadway Commission (COSO); and

(c) the *Guidance on Internal Control* (Turnbull Guidance) published by The Institute of Chartered Accountants in England and Wales.

A smaller issuer can also refer to *Internal Control over Financial Reporting – Guidance for Smaller Public Companies* published by COSO, which provides guidance to smaller public companies on the implementation of the COSO Framework.

In addition, *IT Control Objectives for Sarbanes-Oxley* published by the IT Governance Institute, might provide useful guidance for the design and evaluation of information technology controls that form part of an issuer's ICFR.

5.2 **Scope of control frameworks** – The control frameworks referred to in section 5.1 include in their definition of "internal control" three general categories: effectiveness and efficiency of operations, reliability of financial reporting and compliance with applicable laws and regulations. ICFR is a subset of internal controls relating to financial reporting. ICFR does not encompass the elements of these control frameworks that relate to effectiveness and efficiency of an issuer's operations or an issuer's compliance with applicable laws and regulations, except for compliance with the applicable laws and regulations directly related to the preparation of financial statements.

PART 6 – DESIGN OF DC&P AND ICFR

6.1 **General** – Most sections in this Part apply to the design of both DC&P (DC&P design) and ICFR (ICFR design); however, some sections provide specific guidance relating to DC&P design or ICFR design. The term "design" in this context generally includes both developing and implementing the controls, policies and procedures that comprise DC&P and ICFR. This Policy often refers to such controls, policies and procedures as the "components" of DC&P and ICFR.

A control, policy or procedure is implemented when it has been placed in operation. An evaluation of effectiveness does not need to be performed to assess whether the control, policy or procedure is operating as intended in order for it to be placed in operation.

6.2 **Overlap between DC&P and ICFR** – There is a substantial overlap between the definitions of DC&P and ICFR. However, some elements of DC&P are not subsumed within the definition of ICFR and some elements of ICFR are not subsumed within the definition of DC&P. For example, an issuer's DC&P should include those elements of ICFR that provide reasonable assurance that transactions are recorded as necessary to permit the preparation of financial statements in accordance with the issuer's GAAP. However, the issuer's DC&P might not include certain elements of ICFR, such as those pertaining to the safeguarding of assets.

6.3 **Reasonable assurance** – The definition of DC&P includes reference to reasonable assurance that information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted by it under securities legislation is recorded, processed, summarized and reported within the time periods specified in securities legislation. The definition of ICFR includes the phrase "reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP". In this Part the term "reasonable assurance" refers to one or both of the above uses of this term.

Reasonable assurance is a high level of assurance, but does not represent absolute assurance. DC&P and ICFR cannot provide absolute assurance due to their inherent limitations. Each involves diligence and compliance and is subject to lapses in judgment and breakdowns resulting from human error. As a result of these limitations, DC&P and ICFR cannot prevent or detect all errors or intentional misstatements resulting from fraudulent activities.

The terms "reasonable", "reasonably" and "reasonableness" in the context of the Instrument do not imply a single conclusion or methodology, but encompass a range of potential conduct, conclusions or methodologies upon which certifying officers may base their decisions.

6.4 **Judgment** – The Instrument does not prescribe specific components of DC&P or ICFR or their degree of complexity. Certifying officers should design the components and complexity of DC&P and ICFR using their judgment, acting

reasonably, giving consideration to various factors particular to an issuer, including its size, nature of business and complexity of operations.

6.5 **Delegation permitted in certain cases** – Section 3.1 of the Instrument requires a non-venture issuer to establish and maintain DC&P and ICFR. Employees or third parties, supervised by the certifying officers, may conduct the design of the issuer's DC&P and ICFR. Such employees should individually and collectively have the necessary knowledge, skills, information and authority to design the DC&P and ICFR for which they have been assigned responsibilities. Nevertheless, certifying officers of the issuer must retain overall responsibility for the design and resulting MD&A disclosure concerning the issuer's DC&P and ICFR.

6.6 **Risk considerations for designing DC&P and ICFR**

(1) ***Approaches to consider for design*** – The Instrument does not prescribe the approach certifying officers should use to design the issuer's DC&P or ICFR. However, we believe that a top-down, risk-based approach is an efficient and cost-effective approach that certifying officers should consider. This approach allows certifying officers to avoid unnecessary time and effort designing components of DC&P and ICFR that are not required to obtain reasonable assurance. Alternatively, certifying officers might use some other approach to design, depending on the issuer's size, nature of business and complexity of operations.

(2) ***Top-down, risk-based approach*** – Under a top-down, risk-based approach to designing DC&P and ICFR certifying officers first identify and assess risks faced by the issuer in order to determine the scope and necessary complexity of the issuer's DC&P or ICFR. A top-down, risk-based approach helps certifying officers to focus their resources on the areas of greatest risk and avoid expending unnecessary resources on areas with little or no risk.

Under a top-down, risk-based approach, certifying officers initially consider risks without considering any existing controls of the issuer. Using this approach to design DC&P, the certifying officers identify the risks that could, individually or in combination with others, reasonably result in a material misstatement in its annual filings, interim filings or other reports filed or submitted by it under securities legislation. Using this approach to design ICFR, the certifying officers identify those risks that could, individually or in combination with others, reasonably result in a material misstatement of the financial statements (financial reporting risks). A material misstatement includes misstatements due to error, fraud or omission in disclosure.

Identifying risks involves considering the size and nature of the issuer's business and the structure and complexity of business operations. If an issuer has multiple locations or business units, certifying officers initially identify the risks that could reasonably result in a material misstatement and then consider the significance of these risks at individual locations or business units. If the officers identify a risk that could reasonably result in a material misstatement, but the risk is either adequately addressed by controls, policies or procedures that operate centrally or is not present at an individual location or business unit, then certifying officers do not need to focus their resources at that location or business unit to address the risk.

For the design of DC&P, the certifying officers assess risks for various types and methods of disclosure. For the design of ICFR, identifying risks involves identifying significant accounts and disclosures and their relevant assertions. After identifying risks that could reasonably result in a material misstatement, the certifying officers then ensure that the DC&P and ICFR designs include controls, policies and procedures to address each of the identified risks.

(3) ***Fraud risk*** – When identifying risks, certifying officers should explicitly consider the vulnerability of the entity to fraudulent activity (e.g., fraudulent financial reporting and misappropriation of assets). Certifying officers should consider how incentives (e.g., compensation programs) and pressures (e.g., meeting analysts' expectations) might affect risks, and what areas of the business provide opportunity for an individual to commit fraud. For the purposes of this Instrument, fraud would generally include an intentional act by one or more individuals among management, other employees, those charged with governance or third parties, involving the use of deception to obtain an unjust or illegal advantage. Although fraud is a broad legal concept, for the purposes of this Instrument, the certifying officers should be concerned with fraud that could cause a material misstatement in the issuer's annual filings, interim filings or other reports filed or submitted under securities legislation.

(4) ***Designing controls, policies and procedures*** – If the certifying officers choose to use a top-down, risk-based approach, they design specific controls, policies and procedures that, in combination with an issuer's control environment, appropriately address the risks discussed in subsections (2) and (3).

If certifying officers choose to use an approach other than a top-down, risk-based approach, they should still consider whether the combination of the components of DC&P and ICFR that they have designed are a sufficient basis for the representations about reasonable assurance required in paragraph 5 of the certificates.

6.7 **Control environment**

(1) ***Importance of control environment*** – An issuer's control environment is the foundation upon which all other components of DC&P and ICFR are based and influences the tone of an organization. An effective control environment contributes to the reliability of all other controls, processes and procedures by creating an atmosphere where errors or fraud are either less likely to occur, or if they occur, more likely to be detected. An effective control environment also supports the flow of information within the issuer, thus promoting compliance with an issuer's disclosure policies.

An effective control environment alone will not provide reasonable assurance that any of the risks identified will be addressed and managed. An ineffective control environment, however, can undermine an issuer's controls, policies and procedures designed to address specific risks.

(2) ***Elements of a control environment*** – A key element of an issuer's control environment is the attitude towards controls demonstrated by the board of directors, audit committee and senior management through their direction and actions in the organization. An appropriate tone at the top can help to develop a culture of integrity and accountability at all levels of an organization which support other components of DC&P and ICFR. The tone at the top should be reinforced on an ongoing basis by those accountable for the organization's DC&P and ICFR.

In addition to an appropriate tone at the top, certifying officers should consider the following elements of an issuer's control environment:

(a) *organizational structure of the issuer* – a structure which relies on established and documented lines of authority and responsibility may be appropriate for some issuers, whereas a structure which allows employees to communicate informally with each other at all levels may be more appropriate for some issuers;

(b) *management's philosophy and operating style* – a philosophy and style that emphasises managing risks with appropriate diligence and demonstrates receptiveness to negative as well as positive information will foster a stronger control environment;

(c) *integrity, ethics, and competence of personnel* – controls, policies and procedures are more likely to be effective if they are carried out by ethical, competent and adequately supervised employees;

(d) *external influences that affect the issuer's operations and risk management practices* – these could include global business practices, regulatory supervision, insurance coverage and legislative requirements; and

(e) *human resources policies and procedures* – an issuer's hiring, training, supervision, compensation, termination and evaluation practices can affect the quality of the issuer's workforce and its employees' attitudes towards controls.

(3) ***Sources of information about the control environment*** – The following documentation might provide useful information about an issuer's control environment:

(a) written codes of conduct or ethics policies;

(b) procedure manuals, operating instructions, job descriptions and training materials;

(c) evidence that employees have confirmed their knowledge and understanding of items (a) and (b);

(d) organizational charts that identify approval structures and the flow of information; and

(e) written correspondence provided by an issuer's external auditor regarding the issuer's control environment.

6.8 **Controls, policies and procedures to include in DC&P design** – In order for DC&P to provide reasonable assurance that information required by securities legislation to be disclosed by an issuer is recorded, processed, summarized and reported within the required time periods, DC&P should generally include the following components:

(a) written communication to an issuer's employees and directors of the issuer's disclosure obligations, including the purpose of disclosure and DC&P and deadlines for specific filings and other disclosure;

(b) assignment of roles, responsibilities and authorizations relating to disclosure;

(c) guidance on how authorized individuals should assess and document the materiality of information or events for disclosure purposes; and

(d) a policy on how the issuer will receive, document, evaluate and respond to complaints or concerns received from internal or external sources regarding financial reporting or other disclosure issues.

An issuer might choose to include these components in a document called a disclosure policy. Part 6 of National Policy 51-201 *Disclosure Standards* encourages issuers to establish a written disclosure policy and discusses in more detail some of these components. For issuers that are subject to National Instrument 52-110 *Audit Committees* (NI 52-110), compliance with the instrument will also form part of the issuer's DC&P design.

6.9 **Controls, policies and procedures to include in ICFR design** – In order for ICFR to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP, ICFR should generally include the following components:

(a) controls for initiating, authorizing, recording and processing transactions relating to significant accounts and disclosures;

(b) controls for initiating, authorizing, recording and processing non-routine transactions and journal entries, including those requiring judgments and estimates;

(c) procedures for selecting and applying appropriate accounting policies that are in accordance with the issuer's GAAP;

(d) controls to prevent and detect fraud;

(e) controls on which other controls are dependent, such as information technology general controls; and

(f) controls over the period-end financial reporting process, including controls over entering transaction totals in the general ledger, controls over initiating, authorizing, recording and processing journal entries in the general ledger and controls over recording recurring and non-recurring adjustments to the financial statements (e.g., consolidating adjustments and reclassifications).

6.10 **Identifying significant accounts and disclosures and their relevant assertions**

(1) ***Significant accounts and disclosures and their relevant assertions*** – As described in subsection 6.6(2) of the Policy, a top-down, risk-based approach to designing ICFR involves identifying significant accounts and disclosures and the relevant assertions that affect each significant account and disclosure. This method assists certifying officers in identifying the risks that could reasonably result in a material misstatement in the issuer's financial statements and not all possible risks the issuer faces.

(2) ***Identifying significant accounts and disclosures*** – A significant account could be an individual line item on the issuer's financial statements, or part of a line item. For example, an issuer might present "net sales" on the income statement, which represents a combination of "gross sales" and "sales returns", but might identify "gross sales" as a significant account. By identifying part of a line item as a significant account, certifying officers might be able to focus on balances that are subject to specific risks that can be separately identified.

A significant disclosure relating to the design of ICFR could be any form of disclosure included in the issuer's financial statements, or notes to the financial statements, that is presented in accordance with the issuer's GAAP. The identification of significant disclosures for the design of ICFR does not extend to the preparation of the issuer's MD&A or other similar financial information presented in a continuous disclosure filing other than financial statements.

(3) ***Considerations for identifying significant accounts and disclosures*** – A minimum threshold expressed as a percentage or a dollar amount could provide a reasonable starting point for evaluating the significance of an account or disclosure. However, certifying officers should use their judgment, taking into account qualitative factors, to assess accounts or disclosures for significance above or below that threshold. The following factors will be relevant when determining whether an account or disclosure is significant:

(a) the size, nature and composition of the account or disclosure;

(b) the risk of overstatement or understatement of the account or disclosure;

(c) the susceptibility to misstatement due to errors or fraud;

(d) the volume of activity, complexity and homogeneity of the individual transactions processed through the account or reflected in the disclosure;

(e) the accounting and reporting complexities associated with the account or disclosure;

(f) the likelihood (or possibility) of significant contingent liabilities in the account or disclosure;

(g) the existence of related party transactions; and

(h) the impact of the account on existing debt covenants.

(4) ***Assertions*** – Using a top-down, risk-based approach, the certifying officers identify those assertions for each significant account and disclosure that presents a risk that could reasonably result in a material misstatement in that significant account or disclosure. For each significant account and disclosure the following assertions could be relevant:

(a) *existence or occurrence* – whether assets or liabilities exist and whether transactions and events that have been recorded have occurred and pertain to the issuer;

(b) *completeness* – whether all assets, liabilities and transactions that should have been recorded have been recorded;

(c) *valuation or allocation* – whether assets, liabilities, equity, revenues and expenses have been included in the financial statements at appropriate amounts and any resulting valuation or allocation adjustments are appropriately recorded;

(d) *rights and obligations* – whether assets are legally owned by the issuer and liabilities are the obligations of the issuer; and

(e) *presentation and disclosure* – whether particular components of the financial statements are appropriately presented and described and disclosures are clearly expressed.

The certifying officers might consider assertions that differ from those listed above if the certifying officers determine that they have identified the pertinent risks in each significant account and disclosure that could reasonably result in a material misstatement.

(5) ***Identifying relevant assertions for each significant account and disclosure*** – To identify relevant assertions for each significant account and disclosure, the certifying officers determine the source of potential misstatements for each significant account or disclosure. When determining whether a particular assertion is relevant, the certifying officers would consider the nature of the assertion, the volume of transactions or data related to the assertion and the complexity of the underlying systems supporting the assertion. If an assertion does not present a risk that could reasonably result in a material misstatement in a significant account, it is likely not a relevant assertion.

For example, valuation might not be relevant to the cash account unless currency translation is involved; however, existence and completeness are always relevant. Similarly, valuation might not be relevant to the gross amount of the accounts receivable balance, but is relevant to the related allowance accounts.

(6) ***Identifying controls, policies and procedures for relevant assertions*** – Using a top-down, risk-based approach, the certifying officers design components of ICFR to address each relevant assertion. The certifying officers do not need to design all possible components of ICFR to address each relevant assertion, but should identify and design an appropriate combination of controls, policies and procedures to address all relevant assertions.

The certifying officers would consider the efficiency of evaluating an issuer's ICFR design when designing an appropriate combination of ICFR components. If more than one potential control, policy or procedure could address a relevant assertion, certifying officers could select the control, policy or procedure that would be easiest to evaluate (e.g., automated control vs. manual control). Similarly, if a control, policy or procedure can be designed to address more than one relevant assertion, then certifying officers could choose it rather than a control, policy or procedure that addresses only one relevant assertion. For example, the certifying officers would consider whether any entity-wide controls exist that adequately address more than one relevant assertion or improve the efficiency of evaluating operating effectiveness because such entity-wide controls negate the need to design and evaluate other components of ICFR at multiple locations or business units.

When designing a combination of controls, policies and procedures, the certifying officers should also consider how the components in subsection 6.7(2) of the Policy interact with each other. For example, the certifying officers should consider how information technology general controls interact with controls, policies and procedures over initiating, authorizing, recording, processing and reporting transactions.

6.11 **ICFR design challenges** – Key features of ICFR and related design challenges are described below.

(a) *Segregation of duties* – The term "segregation of duties" refers to one or more employees or procedures acting as a check and balance on the activities of another so that no one individual has control over all steps of processing a transaction or other activity. Assigning different people responsibility for authorizing transactions, recording transactions, reconciling information and maintaining custody of assets reduces the opportunity for any one employee to conceal errors or perpetrate fraud in the normal course of his or her duties. Segregating duties also increases the chance of discovering inadvertent errors early. If an issuer has few employees, a single employee may be authorized to initiate, approve and effect payment for transactions and it might be difficult to re-assign responsibilities to segregate those duties appropriately.

(b) *Board expertise* – An effective board objectively reviews management's judgments and is actively engaged in shaping and monitoring the issuer's control environment. An issuer might find it challenging to attract directors with the appropriate financial reporting expertise, objectivity, time, ability and experience.

(c) *Controls over management override* – An issuer might be dominated by a founder or other strong leader who exercises a great deal of discretion and provides personal direction to other employees. Although this type of individual can help an issuer meet its growth and other objectives, such concentration of knowledge and authority could allow the individual an opportunity to override established policies or procedures or otherwise reduce the likelihood of an effective control environment.

(d) *Qualified personnel* – Sufficient accounting and financial reporting expertise is necessary to ensure reliable financial reporting and the preparation of financial statements in accordance with the issuer's GAAP. Some issuers might be unable to obtain qualified accounting personnel or outsourced expert advice on a cost-effective basis. Even if an issuer obtains outsourced expert advice, the issuer might not have the internal expertise to understand or assess the quality of the outsourced advice. If an issuer consults on technically complex accounting matters, this consultation alone is not indicative of a deficiency relating to the design of ICFR.

An issuer's external auditor might perform certain services (e.g., income tax, valuation or internal audit services), where permitted by auditor independence rules, that provide skills which would otherwise be addressed by hiring qualified personnel or outsourcing expert advice from a party other than the external auditor. This type of arrangement should not be considered to be a component of the issuer's ICFR design.

If an issuer identifies one or more of these ICFR design challenges, additional involvement by the issuer's audit committee or board of directors could be a suitable compensating control or alternatively could mitigate risks that exist as a result of being unable to remediate a material weakness relating to the design challenge. The control framework the certifying officers use to design ICFR could include further information on these design challenges. See section 9.1 of the Policy for a discussion of compensating controls versus mitigating procedures.

6.12 **Corporate governance for internal controls** – The board of directors of an issuer is encouraged to consider adopting a written mandate to explicitly acknowledge responsibility for the stewardship of the issuer, including responsibility for internal control and management information systems.

6.13 **Maintaining design** – Following their initial development and implementation of DC&P and ICFR, and prior to certifying design each quarter, certifying officers should consider:

(a) whether the issuer faces any new risks and whether each design continues to provide a sufficient basis for the representations about reasonable assurance required in paragraph 5 of the certificates;

(b) the scope and quality of ongoing monitoring of DC&P and ICFR, including the extent, nature and frequency of reporting the results from the ongoing monitoring of DC&P and ICFR to the appropriate levels of management;

(c) the work of the issuer's internal audit function;

(d) communication, if any, with the issuer's external auditors; and

(e) the incidence of weaknesses in DC&P or material weaknesses in ICFR that have been identified at any time during the financial year.

6.14 **Efficiency and effectiveness** – In addition to the considerations set out in this Part that will assist certifying officers in appropriately designing DC&P and ICFR, other steps that certifying officers could take to enhance the efficiency and effectiveness of the designs are:

(a) embedding DC&P and ICFR in the issuer's business processes;

(b) implementing consistent policies and procedures and issuer-wide programs at all locations and business units;

(c) including processes to ensure that DC&P and ICFR are modified to adapt to any changes in business environment; and

(d) including procedures for reporting immediately to the appropriate levels of management any identified issues with DC&P and ICFR together with details of any action being undertaken or proposed to be undertaken to address such issues.

6.15 **Documenting design**

(1) ***Extent and form of documentation for design*** – The certifying officers should generally maintain documentary evidence sufficient to provide reasonable support for their certification of design of DC&P and ICFR. The extent of documentation supporting the certifying officers' design of DC&P and ICFR for each interim and annual certificate will vary depending on the certifying officers' assessment of risk, as discussed in section 6.6 of the Policy, as well as the size and complexity of the issuer's DC&P and ICFR. The documentation might take many forms (e.g., paper documents, electronic, or other media) and could be presented in a number of different ways (e.g., policy manuals, process models, flowcharts, job descriptions, documents, internal memoranda, forms, etc). Certifying officers should use their judgment, acting reasonably, to determine the extent and form of documentation.

(2) ***Documentation of the control environment*** - To provide reasonable support for the certifying officers' design of DC&P and ICFR, the certifying officers should generally document the key elements of an issuer's control environment, including those described in subsection 6.7(2) of the Policy.

(3) ***Documentation for design of DC&P*** – To provide reasonable support for the certifying officers' design of DC&P, the certifying officers should generally document:

(a) the processes and procedures that ensure information is brought to the attention of management, including the certifying officers, in a timely manner to enable them to determine if disclosure is required; and

(b) the items listed in section 6.8 of the Policy.

(4) ***Documentation for design of ICFR*** – To provide reasonable support for the certifying officers' design of ICFR, the certifying officers should generally document:

(a) the issuer's ongoing risk-assessment process and those risks which need to be addressed in order to conclude that the certifying officers have designed ICFR;

(b) how significant transactions, and significant classes of transactions, are initiated, authorized, recorded and processed;

(c) the flow of transactions to identify when and how material misstatements or omissions could occur due to error or fraud;

(d) a description of the controls over relevant assertions related to all significant accounts and disclosures in the financial statements;

(e) a description of the controls designed to prevent or detect fraud, including who performs the controls and, if applicable, how duties are segregated;

(f) a description of the controls over period-end financial reporting processes;

(g) a description of the controls over safeguarding of assets; and

(h) the certifying officers' conclusions on whether a material weakness relating to the design of ICFR exists at the end of the period.

PART 7 – EVALUATING OPERATING EFFECTIVENESS OF DC&P AND ICFR

7.1 **General** – Most sections in this Part apply to both an evaluation of the operating effectiveness of DC&P (DC&P evaluation) and an evaluation of the operating effectiveness of ICFR (ICFR evaluation); however, some sections apply specifically to an ICFR evaluation.

7.2 **Scope of evaluation of operating effectiveness** – The purpose of the DC&P and ICFR evaluations is to determine whether the issuer's DC&P and ICFR designs are operating as intended. To support a conclusion that DC&P or ICFR is effective, certifying officers should obtain sufficient appropriate evidence at the date of their assessment that the components of DC&P and ICFR that they designed, or caused to be designed, are operating as intended. Regardless of the approach the certifying officers use to design DC&P or ICFR, they could use a top-down, risk-based approach to evaluate DC&P or ICFR in order to limit the evaluation to those controls and procedures that are necessary to address the risks that might reasonably result in a material misstatement.

Form 52-109F1 requires disclosure of each material weakness relating to the operation of the issuer's ICFR. Therefore, the scope of the ICFR evaluation must be sufficient to identify any such material weaknesses.

7.3 **Judgment** – The Instrument does not prescribe how the certifying officers should conduct their DC&P and ICFR evaluations. Certifying officers should exercise their judgment, acting reasonably, and should apply their knowledge and experience in determining the nature and extent of the evaluation.

7.4 **Knowledge and supervision** – Form 52-109F1 requires the certifying officers to certify that they have evaluated, or supervised the evaluation of, the issuer's DC&P and ICFR. Employees or third parties, supervised by the certifying officers, may conduct the evaluation of the issuer's DC&P and ICFR. Such employees should individually and collectively have the necessary knowledge, skills, information and authority to evaluate the DC&P and ICFR for which they have been assigned responsibilities. Nevertheless, certifying officers must retain overall responsibility for the evaluation and resulting MD&A disclosure concerning the issuer's DC&P and ICFR.

Certifying officers should ensure that the evaluation is performed with the appropriate level of objectivity. Generally, the individuals who evaluate the operating effectiveness of specific controls or procedures should not be the same individuals who perform the specific controls or procedures. See section 7.10 of the Policy for guidance on self-assessments.

7.5 **Use of external auditor or other third party** – The certifying officers might decide to use a third party to assist with their DC&P or ICFR evaluations. In these circumstances, the certifying officers should assure themselves that the individuals performing the agreed-upon evaluation procedures have the appropriate knowledge and ability to complete the procedures. The certifying officers should be actively involved in determining the procedures to be performed, the findings to be communicated and the manner of communication.

If an issuer chooses to engage its external auditor to assist the certifying officers in the DC&P and ICFR evaluations, the certifying officers should determine the procedures to be performed, the findings to be communicated and the manner of communication. The certifying officers should not rely on ICFR-related procedures performed and findings reported by the issuer's external auditor solely as part of the financial statement audit. However, if the external auditor is separately engaged to perform specified ICFR-related procedures, the certifying officers might use the results of those procedures as part of their evaluation even if the auditor uses those results as part of the financial statement audit.

If the issuer refers, in a continuous disclosure document, to an audit report relating to the issuer's ICFR, prepared by its external auditor, then it would be appropriate for the issuer to file a copy of the internal control audit report with its financial statements.

7.6 **Evaluation tools** – Certifying officers can use a variety of tools to perform their DC&P and ICFR evaluations. These tools include:

(a) certifying officers' daily interaction with the control systems;

(b) walkthroughs;

(c) interviews of individuals who are involved with the relevant controls;

(d) observation of procedures and processes, including adherence to corporate policies;

(e) reperformance; and

(f) review of documentation that provides evidence that controls, policies or procedures have been performed.

Certifying officers should use a combination of tools for the DC&P and ICFR evaluations. Although inquiry and observation alone might provide an adequate basis for an evaluation of an individual control with a lower risk, they will not provide an adequate basis for the evaluation as a whole.

The nature, timing and extent of evaluation procedures necessary for certifying officers to obtain reasonable support for the effective operation of a component of DC&P or ICFR depends on the level of risk the component of DC&P or ICFR is designed to address. The level of risk for a component of DC&P or ICFR could change each year to reflect management's experience with a control's operation during the year and in prior evaluations.

7.7 **Certifying officers' daily interaction** – The certifying officers' daily interaction with their control systems provides them with opportunities to evaluate the operating effectiveness of the issuer's DC&P and ICFR during a financial year. This daily interaction could provide an adequate basis for the certifying officers' evaluation of DC&P or ICFR if the operation of controls, policies and procedures is centralized and involves a limited number of personnel. Reasonable support of such daily interaction would include memoranda, e-mails and instructions or directions from the certifying officers to other employees.

7.8 **Walkthroughs** – A walkthrough is a process of tracing a transaction from origination, through the issuer's information systems, to the issuer's financial reports. A walkthrough can assist certifying officers to confirm that:

(a) they understand the components of ICFR, including those components relating to the prevention or detection of fraud;

(b) they understand how transactions are processed;

(c) they have identified all points in the process at which misstatements related to each relevant financial statement assertion could occur; and

(d) the components of ICFR have been implemented.

7.9 **Reperformance**

(1) ***General*** – Reperformance is the independent execution of certain components of the issuer's DC&P or ICFR that were performed previously. Reperformance could include inspecting records whether internal (e.g., a purchase order prepared by the issuer's purchasing department) or external (e.g., a sales invoice prepared by a vendor), in paper form, electronic form or other media. The reliability of records varies depending on their nature, source and the effectiveness of controls over their production. An example of reperformance is inspecting whether the quantity and price information in a sales invoice agree with the quantity and price information in a purchase order, and confirming that an employee previously performed this procedure.

(2) ***Extent of reperformance*** – The extent of reperformance of a component of DC&P or ICFR is a matter of judgment for the certifying officers, acting reasonably. Components that are performed more frequently (e.g., controls for recording sales transactions) will generally require more testing than components that are performed less frequently (e.g., controls for monthly bank reconciliations). Components that are manually operated will likely require more rigorous testing than automated controls. Certifying officers could determine that they do not have to test every individual step comprising a control in order to conclude that the overall control is operating effectively.

(3) ***Reperformance for each evaluation*** – Certifying officers might find it appropriate to adjust the nature, extent and timing of reperformance for each evaluation. For example, in "year 1", certifying officers might test information technology controls extensively, while in "year 2", they could focus on monitoring controls that identify changes made to the information technology controls. Certifying officers should consider the specific risks the controls address when making these types of adjustments. It might also be appropriate to test controls at different interim periods, increase or reduce the number and types of tests performed or change the combination of procedures used in order to introduce unpredictability into the testing and respond to changes in circumstances.

7.10 **Self-assessments** – A self-assessment is a walk-through or reperformance of a control, or another procedure to analyze the operation of controls, performed by an individual who might or might not be involved in operating the control. A self-assessment could be done by personnel who operate the control or members of management who are not responsible for operating the control. The evidence of operating effectiveness from self-assessment activities depends on the personnel involved and how the activities are conducted.

A self-assessment performed by personnel who operate the control would normally be supplemented with direct testing by individuals who are independent from the operation of the control being tested and who have an equal or higher level of authority. In these situations, direct testing of controls would be needed to corroborate evidence from the self-assessment since the self-assessment alone would not have a reasonable level of objectivity.

In some situations a certifying officer might perform a self-assessment and the certifying officer is involved in operating the control. Even if no other members of management independent from the operation of the control with equal or higher level of authority can perform direct testing, the certifying officer's self-assessment alone would normally provide sufficient evidence since the certifying officer signs the annual certificate. In situations where there are two certifying officers and one is performing a self-assessment, it would be appropriate for the other certifying officer to perform direct testing of the control.

7.11 **Timing of evaluation** – Form 52-109F1 requires certifying officers to certify that they have evaluated the effectiveness of the issuer's DC&P and ICFR, as at the financial year end. Certifying officers might choose to schedule testing of some DC&P and ICFR components throughout the issuer's financial year. However, since the evaluation is at the financial year end, the certifying officers will have to perform sufficient procedures to evaluate the operation of the components at year end.

Since some year-end procedures occur subsequent to the year end (e.g., financial reporting close process), some testing of DC&P and ICFR components could also occur subsequent to year-end. The timing of evaluation activities will depend on the risk associated with the components being evaluated, the tools used to evaluate the components, and whether the components being evaluated are performed prior to, or subsequent to, year end.

7.12 **Extent of examination for each annual evaluation** – For each annual evaluation the certifying officers must evaluate those components of ICFR that, in combination, provide reasonable assurance regarding the reliability of financial reporting. For example, the certifying officers cannot decide to exclude components of ICFR for a particular process from the scope of their evaluation simply based on prior-year evaluation results. To have a reasonable basis for their assessment of the operating effectiveness of ICFR, the certifying officers must have sufficient evidence supporting operating effectiveness of all relevant components of ICFR as of the date of their assessment.

7.13 **Documenting evaluations**

(1) ***Extent of documentation for evaluation*** – The certifying officers should generally maintain documentary evidence sufficient to provide reasonable support for their certification of a DC&P and ICFR evaluation. The extent of documentation used to support the certifying officers' evaluations of DC&P and ICFR for each annual certificate will vary depending on the size and complexity of the issuer's DC&P and ICFR. The extent of documentation is a matter of judgment for the certifying officers, acting reasonably.

(2) ***Documentation for evaluations of DC&P and ICFR*** – To provide reasonable support for a DC&P or ICFR evaluation the certifying officers should generally document:

(a) a description of the process the certifying officers used to evaluate DC&P or ICFR;

(b) how the certifying officers determined the extent of testing of the components of DC&P or ICFR;

(c) a description of, and results from applying, the evaluation tools discussed in sections 7.6 and 7.7 of the Policy or other evaluation tools; and

(d) the certifying officers' conclusions about:

(i) the operating effectiveness of DC&P or ICFR, as applicable; and

(ii) whether a material weakness relating to the operation of ICFR existed as at the end of the period.

PART 8 – USE OF A SERVICE ORGANIZATION OR SPECIALIST FOR AN ISSUER'S ICFR

8.1 **Use of a service organization** – An issuer might outsource a significant process to a service organization. Examples include payroll, production accounting for oil and gas companies, or other bookkeeping services. Based on their assessment of risks as discussed in subsection 6.6(2) of the Policy, the certifying officers might identify the need for controls, policies and procedures relating to an outsourced process. In considering the design and evaluation of such controls, policies and procedures, the officers should consider whether:

(a) the service organization can provide a service auditor's report on the design and operation of controls placed in operation and tests of the operating effectiveness of controls at the service organization;

(b) the certifying officers have access to the controls in place at the service organization to evaluate the design and effectiveness of such controls; or

(c) the issuer has controls that might eliminate the need for the certifying officers to evaluate the design and effectiveness of the service organization's controls relating to the outsourced process.

8.2 **Service auditor's reporting on controls at a service organization** – If a service auditor's report on controls placed in operation and tests of the operating effectiveness of controls is available, the certifying officers should evaluate whether the report provides them sufficient evidence to assess the design and effectiveness of controls relating to the outsourced process. The following factors will be relevant in evaluating whether the report provides sufficient evidence:

(a) the time period covered by the tests of controls and its relation to the as-of date of the certifying officers' assessment of the issuer's ICFR;

(b) the scope of the examination and applications covered and the controls tested; and

(c) the results of the tests of controls and the service auditor's opinion on the operating effectiveness of controls.

8.3 **Elapsed time between date of a service auditor's report and date of certificate** – If a significant period of time has elapsed between the time period covered by the tests of controls in a service auditor's report and the date of the certifying officer's assessment of ICFR, the certifying officers should consider whether the service organization's controls have changed subsequent to the period covered by the service auditor's report. The service organization might communicate certain changes such as changes in its personnel or changes in reports or other data that it provides. Changes might also be indicated by errors identified in the service organization's processing. If the certifying officers identify changes in the service organization's controls, they should evaluate the effect of these changes and consider the need for additional procedures. These might include obtaining further information from the service organization, performing procedures at the service organization, or requesting that a service auditor perform specified procedures.

8.4 **Indicators of a material weakness relating to use of a service organization** – There could be circumstances in which a service auditor's report is not available, the certifying officers do not have access to controls in place at the service organization and the certifying officers have not identified any compensating controls performed by the issuer. In these circumstances the inability to assess the service organization's controls, policies and procedures might represent a material weakness since the certifying officers might not have sufficient evidence to conclude whether the components of the issuer's ICFR at the service organization have been designed or are operating as intended.

8.5 **Use of a specialist** – A specialist is a person or firm possessing expertise in specific subject matter. A reporting issuer might arrange for a specialist to provide certain specialized expertise such as actuarial services, taxation services or valuation services. Based on their assessment of risks as discussed in subsection 6.6(2) of the Policy, the certifying officers might identify the need for the services provided by a specialist. The certifying officers should ensure the issuer has controls, policies or procedures in place relating to the source data and the reasonableness of the assumptions used to support the specialist's findings. The certifying officers should also consider whether the specialist has the necessary competence, expertise and integrity.

PART 9 – MATERIAL WEAKNESS

9.1 **Identifying a deficiency in ICFR**

(1) ***Deficiency relating to the design of ICFR*** – A deficiency relating to the design of ICFR exists when:

(a) necessary components of ICFR are missing from the design;

(b) an existing component of ICFR is designed so that, even if the component operates as designed, the financial reporting risks would not be addressed; or

(c) a component of ICFR has not been implemented and, as a result, the financial reporting risks have not been addressed.

Subsection 6.6(2) of the Policy provides guidance on financial reporting risks.

(2) ***Deficiency relating to the operation of ICFR*** – A deficiency relating to the operation of ICFR exists when a properly designed component of ICFR does not operate as intended. For example, if an issuer's ICFR design requires two individuals to sign a cheque in order to authorize a cash disbursement and the certifying officers conclude that this process is not being followed consistently, the control may be designed properly but is deficient in its operation.

(3) ***Compensating controls versus mitigating procedures*** – If the certifying officers identify a component of ICFR that does not operate as intended they should consider whether there is a compensating control that addresses the financial reporting risks that the deficient ICFR component failed to address. If the certifying officers are unable to identify a compensating control, then the issuer would have a deficiency relating to the operation of ICFR.

In the process of determining whether there is a compensating control, the certifying officers might identify mitigating procedures which help to reduce the financial reporting risks that the deficient ICFR component failed to address, but do not meet the threshold of being a compensating control because:

(a) the procedures only partially address the financial reporting risks or

(b) the procedures are not designed by, or under the supervision of, the issuer's certifying officers, and thus may not represent an internal control.

In these circumstances, since the financial reporting risks are not addressed with an appropriate compensating control, the issuer would continue to have a deficiency relating to the operation of ICFR and would have to assess the significance of the deficiency. The issuer may have one or more mitigating procedures that reduce the financial reporting risks that the deficient ICFR component failed to address and may consider disclosure of those procedures, as discussed in section 9.7 of the Policy. In disclosing these mitigating procedures in its MD&A, an issuer should not imply that the procedures eliminate the existence of a material weakness.

9.2 **Assessing significance of deficiencies in ICFR** – If a deficiency or combination of deficiencies in the design or operation of one or more components of ICFR is identified, certifying officers should assess the significance of the deficiency, or combination of deficiencies, to determine whether a material weakness exists. Their assessment should generally include both qualitative and quantitative analyses.

Certifying officers evaluate the severity of a deficiency, or combination of deficiencies, by considering whether (a) there is a reasonable possibility that the issuer's ICFR will fail to prevent or detect a material misstatement of a financial statement amount or disclosure; and (b) the magnitude of the potential misstatement resulting from the deficiency or deficiencies. The severity of a deficiency in ICFR does not depend on whether a misstatement has actually occurred but rather on whether there is a reasonable possibility that the issuer's ICFR will fail to prevent or detect a material misstatement on a timely basis.

9.3 **Factors to consider when assessing significance of deficiencies in ICFR**

(1) **Reasonable possibility of misstatement** – Factors that affect whether there is a reasonable possibility that a deficiency, or combination of deficiencies would result in ICFR not preventing or detecting in a timely manner a misstatement of a financial statement amount or disclosure, include, but are not limited to:

(a) the nature of the financial statement accounts, disclosures and assertions involved (e.g., related-party transactions involve greater risk);

(b) the susceptibility of the related asset or liability to loss or fraud (e.g., greater susceptibility increases risk);

(c) the subjectivity, complexity, or extent of judgment required to determine the amount involved (e.g., greater subjectivity, complexity, or judgment increases risk);

(d) the interaction or relationship of the control with other controls, including whether they are interdependent or address the same financial reporting risks;

(e) the interaction of the deficiencies (e.g., when evaluating a combination of two or more deficiencies, whether the deficiencies could affect the same financial statement amounts or disclosures); and

(f) the possible future consequences of the deficiency.

(2) **Magnitude of misstatement** – Various factors affect the magnitude of a misstatement that might result from a deficiency or deficiencies in ICFR. These factors include, but are not limited, to the following:

(a) the financial statement amounts or total of transactions relating to the deficiency; and

(b) the volume of activity in the account balance or class of transactions relating to the deficiency that has occurred in the current period or that is expected in future periods.

9.4 **Indicators of a material weakness** – It is a matter for the certifying officers' judgment whether the following situations indicate that a deficiency in ICFR exists and, if so, whether it represents a material weakness:

(a) identification of fraud, whether or not material, on the part of the certifying officers or other senior management who play a significant role in the issuer's financial reporting process;

(b) restatement of previously issued financial statements to reflect the correction of a material misstatement;

(c) identification by the issuer or its external auditor of a material misstatement in the financial statements in the current period in circumstances that indicate that the misstatement would not have been detected by the issuer's ICFR; and

(d) ineffective oversight of the issuer's external financial reporting and ICFR by the issuer's audit committee.

9.5 **Conclusions on effectiveness if a material weakness exists** – If the certifying officers identify a material weakness relating to the design or operation of ICFR existing as at the period-end date, the certifying officers could not conclude that the issuer's ICFR is effective. Certifying officers may not qualify their assessment by stating that the issuer's ICFR is effective subject to certain qualifications or exceptions unless the qualification pertains to one of the permitted scope limitations available in section 3.3 of the Instrument. As required by paragraph 6 in Form 52-109F1, the certifying officers must ensure the issuer has disclosed in the annual MD&A the certifying officers' conclusions about the effectiveness of ICFR at the financial year end.

9.6 **Disclosure of a material weakness**

(1) ***Disclosure of a material weakness relating to the design of ICFR*** – If the certifying officers become aware of a material weakness relating to the design of ICFR that existed at the end of the annual or interim period, the issuer's annual or interim MD&A must describe each material weakness relating to design, the impact of each material weakness on the issuer's financial reporting and its ICFR, and the issuer's current plans, if any, or any actions already undertaken, for remediating each material weakness as required by paragraph 5.2 of Form 52-109F1 and Form 52-109F2.

(2) ***Disclosure of a material weakness relating to the operation of ICFR*** – If the certifying officers become aware of a material weakness relating to the operation of ICFR that existed at the financial year end, the issuer's annual MD&A must describe each material weakness relating to operation, the impact of each material weakness on the issuer's financial reporting and its ICFR, and the issuer's current plans, if any, or any actions already undertaken, for remediating each material weakness as required by subparagraphs 6(b)(ii)(A), (B) and (C) of Form 52-109F1.

If a material weakness relating to the operation of ICFR continues to exist, the certifying officers should consider whether the deficiency initially relating to the operation of ICFR has become a material weakness relating to the design of ICFR that must be disclosed in the interim, as well as the annual MD&A under paragraph 5.2 of Form 52-109F1 and Form 52-109F2.

(3) ***Description of a material weakness*** – Disclosure pertaining to an identified material weakness should provide investors with an accurate and complete picture of the material weakness, including its effect on the issuer's ICFR. Issuers should consider providing disclosure in the annual or interim MD&A that allows investors to understand the cause of the material weakness and assess the potential impact on, and importance to, the financial statements of the identified material weakness. The disclosure will be more useful to investors if it distinguishes between those material weaknesses that may have a pervasive impact on ICFR from those material weaknesses that do not.

9.7 **Disclosure of remediation plans and actions undertaken** – If an issuer commits to a remediation plan to correct a material weakness relating to the design or operation of ICFR prior to filing a certificate, the annual or interim MD&A would describe the issuer's current plans, or any actions already undertaken, for remediating each material weakness.

Once an issuer has completed its remediation it would disclose information about the resulting change in the issuer's ICFR in its next annual or interim MD&A as required by paragraph 7 of Form 52-109F1 or paragraph 6 of Form 52-109F2.

If an issuer is unable to, or chooses not to, remediate a material weakness, but identifies mitigating procedures that reduce the impact of the material weakness on the issuer's ICFR, then disclosure about these mitigating procedures could provide investors with an accurate and complete picture of the material weakness, including its effect on the issuer's ICFR. If an issuer does not plan to remediate the material weakness, regardless of whether there are mitigating procedures, the issuer would continue to have a material weakness that the issuer must disclose in the annual or interim MD&A.

PART 10 – WEAKNESS IN DC&P THAT IS SIGNIFICANT

10.1 **Conclusions on effectiveness of DC&P if a weakness exists that is significant** – If the certifying officers identify a weakness relating to the design or operation of DC&P that is significant existing as at the period-end date, the certifying officers could not conclude that the issuer's DC&P is effective. Certifying officers may not qualify their assessment by stating that the issuer's DC&P is effective subject to certain qualifications or exceptions unless the qualification pertains to one of the permitted scope limitations available in section 3.3 of the Instrument. A certifying officer could not conclude that the issuer's DC&P is effective if there is a deficiency, or combination of deficiencies, in DC&P such that there is a reasonable possibility that the issuer will not disclose material information required to be disclosed under securities legislation, within the time periods specified in securities legislation.

As required by paragraph 6(a) in Form 52-109F1, the certifying officers must ensure the issuer has disclosed in its annual MD&A the certifying officers' conclusions about the effectiveness of DC&P. The MD&A disclosure about the effectiveness of DC&P will be useful to investors if it discusses any identified weaknesses that are significant, whether the issuer has committed, or will commit, to a plan to remediate the identified weaknesses, and whether there are any mitigating procedures that reduce the risks that have not been addressed as a result of the identified weaknesses.

10.2 **Interim certification of DC&P design if a weakness exists that is significant** – If the certifying officers identify a weakness in the design of DC&P that is significant at the time of filing an interim certificate, to provide reasonable context for their certifications of the design of DC&P, it would be appropriate for the issuer to disclose in its interim MD&A the identified weakness and any other information necessary to provide an accurate and complete picture of the condition of the design of the issuer's DC&P.

10.3 **Certification of DC&P if a material weakness in ICFR exists** – As discussed in section 6.2 of the Policy, there is a substantial overlap between the definitions of DC&P and ICFR. If the certifying officers identify a material weakness in the issuer's ICFR, this will almost always represent a weakness that is significant in the issuer's DC&P.

PART 11 – REPORTING CHANGES IN ICFR

11.1 **Assessing the materiality of a change in ICFR** – Paragraph 7 of Form 52-109F1 and paragraph 6 of Form 52-109F2 require an issuer to disclose any change in the issuer's ICFR that has materially affected, or is reasonably likely to materially affect, the issuer's ICFR. A material change in ICFR might occur regardless of whether the change is being made to remediate a material weakness (e.g., a change from a manual payroll system to an automated payroll system). A change in an issuer's ICFR that was made to remediate a material weakness would generally be considered a material change in an issuer's ICFR.

PART 12 – ROLE OF BOARD OF DIRECTORS AND AUDIT COMMITTEE

12.1 **Board of directors** – Form 52-109F1 requires the certifying officers to represent that the issuer has disclosed in its annual MD&A certain information about the certifying officers' evaluation of the effectiveness of DC&P. Form 52-109F1 also requires the certifying officers to represent that the issuer has disclosed in its annual MD&A certain information about the certifying officers' evaluation of the effectiveness of ICFR. Under National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102), the board of directors must approve the issuer's annual MD&A, including the required disclosure concerning DC&P and ICFR, before it is filed. To provide reasonable support for the board of directors' approval of an issuer's MD&A disclosure concerning ICFR, including any material weaknesses, the board of directors should understand the basis upon which the certifying officers concluded that any particular deficiency or combination of deficiencies did or did not constitute a material weakness (see section 9.2 of the Policy).

12.2 **Audit committee** – NI 52-110 requires the audit committee to review an issuer's financial disclosure and to establish procedures for dealing with complaints and concerns about accounting or auditing matters. Issuers subject to NI 52-110 should consider its specific requirements in designing and evaluating their DC&P and ICFR.

12.3 **Reporting fraud** – Paragraph 8 of Form 52-109F1 requires certifying officers to disclose to the issuer's auditors, the board of directors or the audit committee of the board of directors any fraud that involves management or other employees who have a significant role in the issuer's ICFR. Subsection 6.6(3) of the Policy provides guidance on the term "fraud" for purposes of this Instrument.

Two types of intentional misstatements are (i) misstatements resulting from fraudulent financial reporting, which includes omissions of amounts or disclosures in financial statements to deceive financial statement users, and (ii) misstatements resulting from misappropriation of assets.

PART 13 – CERTAIN LONG TERM INVESTMENTS

13.1 **Underlying entities** – An issuer might have a variety of long term investments that affect how the certifying officers design and evaluate the effectiveness of the issuer's DC&P and ICFR. In particular, an issuer could have any of the following interests:

(a) an interest in an entity that is a subsidiary which is consolidated in the issuer's financial statements;

(b) an interest in an entity that is a variable interest entity (a VIE) which is consolidated in the issuer's financial statements;

(c) an interest in an entity that is proportionately consolidated in the issuer's financial statements;

(d) an interest in an entity that is accounted for using the equity method in the issuer's financial statements (an equity investment); or

(e) an interest in an entity that is accounted for using the cost method in the issuer's financial statements (a portfolio investment).

In this Part, the term entity is meant to capture a broad range of structures, including, but not limited to, corporations. The terms "consolidated", "subsidiary", "VIE", "proportionately consolidated", "equity method" and "cost method" have the meaning ascribed to such terms under the issuer's GAAP. In this Part, the term "underlying entity" refers to one of the entities referred to in items (a) through (e) above.

13.2 **Fair presentation** – As discussed in section 4.1 of the Policy, the concept of fair presentation is not limited to compliance with the issuer's GAAP. If the certifying officers believe that an issuer's financial statements do not fairly present its financial condition insofar as it relates to an underlying entity, the certifying officers should cause the issuer to provide additional disclosure in its MD&A.

13.3 **Design and evaluation of DC&P and ICFR**

(1) ***Access to underlying entity*** – The nature of an issuer's interest in an underlying entity will affect the certifying officer's ability to design and evaluate the effectiveness of the controls, policies and procedures carried out by the underlying entity.

Subsidiary – In the case of an issuer with an interest in a subsidiary, as the issuer controls the subsidiary, certifying officers will have sufficient access to the subsidiary to design and evaluate the effectiveness of the controls, policies and procedures carried out by the underlying entity.

Proportionately consolidated entity or VIE – In the case of an issuer with an interest in a proportionately consolidated entity or a VIE, certifying officers might not always have sufficient access to the underlying entity to design and evaluate the effectiveness of the controls, policies and procedures carried out by the underlying entity.

Whether the certifying officers have sufficient access to a proportionately consolidated entity or a VIE to design and evaluate the effectiveness of the controls, policies and procedures carried out by the underlying entity is a question of fact. The sufficiency of their access could depend on, among other things:

(a) the issuer's percentage ownership of the underlying entity;

(b) whether the other underlying entity owners are reporting issuers;

(c) the nature of the relationship between the issuer and the operator of the underlying entity if the issuer is not the operator;

(d) the terms of the agreement(s) governing the underlying entity; and

(e) the date of creation of the underlying entity.

Portfolio investment or equity investment – In the case of an issuer with a portfolio investment or an equity investment, certifying officers will generally not have sufficient access to the underlying entity to design and evaluate the effectiveness of the controls, policies and procedures carried out by the underlying entity.

(2) ***Access to an underlying entity in certain indirect offering structures*** – In the case of certain indirect offering structures, including certain income trust and limited partnership offering structures, the issuer could have:

(a) a significant equity interest in the underlying entity but not legally control the underlying entity, since legal control is retained by a third party (typically the party involved in establishing the indirect offering structure) or

(b) an equity interest in an underlying entity that represents a significant asset of the issuer and results in the issuer providing the issuer's equity holders with separate audited annual financial statements and interim financial statements prepared in accordance with the same GAAP as the issuer's financial statements.

In these cases, we generally expect the trust indenture, limited partnership agreement or other constating documents to include appropriate terms ensuring the certifying officers will have sufficient access to the underlying entity to design and evaluate the effectiveness of the controls, policies and procedures carried out by the underlying entity.

(3) ***Reasonable steps to design and evaluate*** – Certifying officers should take all reasonable steps to design and evaluate the effectiveness of the controls, policies and procedures carried out by the underlying entity that provide the certifying officers with a basis for the representations in the annual and interim certificates. However, it is left to the discretion of the certifying officers, acting reasonably, to determine what constitutes “reasonable steps”.

If the certifying officers have access to the underlying entity to design the controls, policies and procedures discussed in subsection (2) and they are not satisfied with those controls, policies and procedures, the certifying officers should consider whether there exists a material weakness or a weakness in DC&P that is significant.

(4) ***Disclosure of a scope limitation relating to a proportionately consolidated entity or VIE*** – A scope limitation exists if the certifying officers would not have a reasonable basis for making the representations in the annual or interim certificates because they do not have sufficient access to a proportionately consolidated entity or VIE, as applicable, to design and evaluate the controls, policies and procedures carried out by that underlying entity.

When determining whether a scope limitation exists, certifying officers must initially consider whether one, or a combination of more than one, proportionately consolidated entity or VIE includes risks that could reasonably result in a material misstatement in the issuer’s annual filings, interim filings or other reports. The certifying officers would consider such risks when the certifying officers first identify the risks faced by the issuer in order to determine the scope and necessary complexity of the issuer’s DC&P or ICFR, as discussed in subsection 6.6(2) of the Policy.

The certifying officers would disclose a scope limitation if one, or a combination of more than one, proportionately consolidated entity or VIE includes risks that could reasonably result in a material misstatement and the certifying officers do not have sufficient access to design and evaluate the controls, policies and procedures carried out by each underlying entity.

The certifying officers would not disclose a scope limitation if a proportionately consolidated entity or VIE, individually or in combination with another such entity, does not include risks that could reasonably result in a material misstatement.

The issuer must disclose in its MD&A a scope limitation and summary financial information about each underlying entity in accordance with section 3.3 of the Instrument. The summary financial information may be disclosed in aggregate or individually for each proportionately consolidated entity or VIE.

Meaningful summary financial information about an underlying entity, or combination of underlying entities, that is the subject of a scope limitation would include:

(a) sales or revenues;

(b) income or loss before discontinued operations and extraordinary items;

(c) net income or loss for the period; and

unless (i) the accounting principles used to prepare the financial statements of the underlying entity permit the preparation of its balance sheet without classifying assets and liabilities between current and non-current, and (ii) the MD&A includes alternative meaningful financial information about the underlying entity, or combination of underlying entities, which is more appropriate to the underlying entity’s industry,

(d) current assets;

(e) non-current assets;

(f) current liabilities; and

(g) non-current liabilities.

Meaningful disclosure about an underlying entity that is the subject of a scope limitation would also include any contingencies and commitments for the proportionately consolidated entity or VIE.

(5) ***Limited access to the underlying entity of a portfolio investment or equity investment*** – Although the certifying officers may not have sufficient access to design and evaluate controls, policies and procedures carried out by the underlying entity of a portfolio investment or equity investment, the issuer's DC&P and ICFR should address the issuer's controls over its disclosure of material information relating to:

(a) the carrying amount of the investment;

(b) any dividends the issuer receives from the investment;

(c) any required impairment charge related to the investment; and

(d) if applicable, the issuer's share of any income/loss from the equity investment.

(6) ***Reliance on financial information of underlying entity*** – In most cases, certifying officers will have to rely on the financial information reported by a proportionately consolidated entity, VIE or the underlying entity of an equity investment. In order to certify an issuer's annual or interim filings that include information regarding the issuer's investment in these underlying entities, the certifying officers should perform the following minimum procedures:

(a) ensure that the issuer receives the underlying entity's financial information on a timely basis;

(b) review the underlying entity's financial information to determine whether it has been prepared in accordance with the issuer's GAAP; and

(c) review the underlying entity's accounting policies and evaluate whether they conform to the issuer's accounting policies.

PART 14 – BUSINESS ACQUISITIONS

14.1 **Access to acquired business** – In many circumstances it is difficult for certifying officers to design or evaluate controls, policies and procedures carried out by an acquired business shortly after acquiring the business. In order to address these situations, paragraph 3.3(1)(c) of the Instrument permits an issuer to limit the scope of its design of DC&P and ICFR for a business that the issuer acquired not more than 365 days before the end of the financial period to which the certificate relates. Generally this will result in an issuer limiting the scope of its design for a business acquisition for three interim certificates and one annual certificate.

14.2 **Disclosure of scope limitation** – When determining whether a scope limitation exists, certifying officers must initially consider whether an acquired business includes risks that could reasonably result in a material misstatement in the issuer's annual filings, interim filings or other reports. The certifying officers would consider such risks when the certifying officers first identify the risks faced by the issuer in order to determine the scope and necessary complexity of the issuer's DC&P or ICFR, as discussed in subsection 6.6(2) of the Policy. If the certifying officers limit the scope of their design of DC&P and ICFR for a recent business acquisition, this scope limitation and summary financial information about the business must be disclosed in the issuer's MD&A in accordance with section 3.3 of the Instrument and paragraph 5.3 in Form 52-109F1, or 52-109F2 as applicable. Meaningful summary financial information about the acquired business would include:

(a) sales or revenues;

(b) income or loss before discontinued operations and extraordinary items;

(c) net income or loss for the period; and

unless (i) the accounting principles used to prepare the financial statements of the acquired business permit the preparation of its balance sheet without classifying assets and liabilities between current and non-current, and (ii) the MD&A includes alternative meaningful financial information about the acquired business which is more appropriate to the acquired business' industry,

(d) current assets;

(e) non-current assets;

(f) current liabilities; and

(g) non-current liabilities.

Meaningful disclosure about the acquired business would also include the issuer's share of any contingencies and commitments, which arise as a result of the acquisition. In the case of related businesses, as defined in NI 51-102, the issuer may present the summary financial information about the businesses on a combined basis.

PART 15 – VENTURE ISSUER BASIC CERTIFICATES

15.1 **Venture issuer basic certificates** – Many venture issuers have few employees and limited financial resources which make it difficult for them to address the challenges described in section 6.11 of the Policy. As a result, many venture issuers are unable to design DC&P and ICFR without (i) incurring significant additional costs, (ii) hiring additional employees, or (iii) restructuring the board of directors and audit committee. Since these inherent limitations exist for many venture issuers, the required forms of certificate for venture issuers are Forms 52-109FV1 and 52-109FV2. These forms do not include representations relating to the establishment and maintenance of DC&P and ICFR.

Although Forms 52-109FV1 and 52-109FV2 are the required forms for venture issuers, a venture issuer may elect to file Forms 52-109F1 or 52-109F2, which include representations regarding the establishment and maintenance of DC&P and ICFR.

Certifying officers of a non-venture issuer are not permitted to use Forms 52-109FV1 and 52-109FV2. Although a non-venture issuer may face similar challenges in designing its ICFR, such as those described in section 6.11 of the Policy, the issuer is still required to file Forms 52-109F1 and 52-109F2 and disclose in the MD&A a description of each material weakness existing at the end of the financial period.

15.2 **Note to reader included in venture issuer basic certificates** – Forms 52-109FV1 and 52-109FV2 include a note to reader that clarifies the responsibility of certifying officers and discloses that inherent limitations on the ability of certifying officers of a venture issuer to design and implement on a cost effective basis DC&P and ICFR may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation.

15.3 **Voluntary disclosure regarding DC&P and ICFR** – If a venture issuer files Form 52-109FV1 or 52-109FV2, it is not required to discuss in its annual or interim MD&A the design or operating effectiveness of DC&P or ICFR. If a venture issuer files Form 52-109FV1 or 52-109FV2 and chooses to discuss in its annual or interim MD&A or other regulatory filings the design or operation of one or more components of its DC&P or ICFR, it should also consider disclosing in the same document that:

(a) the venture issuer is not required to certify the design and evaluation of the issuer's DC&P and ICFR and has not completed such an evaluation; and

(b) inherent limitations on the ability of the certifying officers to design and implement on a cost effective basis DC&P and ICFR for the issuer may result in additional risks to the quality, reliability, transparency and timeliness of interim and annual filings and other reports provided under securities legislation.

A selective discussion in a venture issuer's MD&A about one or more components of a venture issuer's DC&P or ICFR without these accompanying statements will not provide transparent disclosure of the state of the venture issuer's DC&P or ICFR.

PART 16 – CERTIFICATION REQUIREMENTS FOR A NEW REPORTING ISSUER AND AN ISSUER THAT BECOMES A NON-VENTURE ISSUER

16.1 **Certification requirements after becoming a non-venture issuer** – Sections 4.5 and 5.5 of the Instrument permit an issuer that becomes a non-venture issuer to file Forms 52-109F1 – IPO/RTO and 52-109F2 – IPO/RTO for the first

certificate that the issuer is required to file under this Instrument, for a financial period that ends after the issuer becomes a non-venture issuer. If, subsequent to becoming a non-venture issuer, the issuer is required to file an annual or interim certificate for a period that ended while it was a venture issuer, the required form of certificate for that annual or interim filing is Form 52-109FV1 or 52-109FV2.

PART 17 – EXEMPTIONS

17.1 **Issuers that comply with U.S. laws** – Some Canadian issuers that comply with U.S. laws might choose to prepare two sets of financial statements and file financial statements in Canada with accounting principles that differ from those that are filed or furnished in the U.S. For example, an issuer may file U.S. GAAP financial statements in the U.S. and financial statements using another acceptable form of GAAP in Canada. In order to ensure that the financial statements filed in Canada are certified (under either the Instrument or SOX 302 Rules), those issuers will not have recourse to the exemptions in sections 8.1 and 8.2 of the Instrument.

PART 18 – LIABILITY FOR CERTIFICATES CONTAINING MISREPRESENTATIONS

18.1 **Liability for certificates containing misrepresentations** – A certifying officer providing a certificate containing a misrepresentation potentially could be subject to quasi-criminal, administrative or civil proceedings under securities law.

A certifying officer providing a certificate containing a misrepresentation could also potentially be subject to private actions for damages either at common law or, in Québec, under civil law, or under the statutory civil liability regimes in certain jurisdictions.

PART 19 – TRANSITION

19.1 **Representations regarding DC&P and ICFR following the transition periods** – If an issuer files an annual certificate in Form 52-109F1 or an interim certificate in Form 52-109F2 that includes representations regarding DC&P or ICFR, these representations would not extend to the prior period comparative information included in the annual filings or interim filings if:

(a) the prior period comparative information was previously the subject of certificates that did not include these representations; or

(b) no certificate was required for the prior period.

PART 20 – CERTIFICATION OF REVISED OR RESTATED ANNUAL OR INTERIM FILINGS

20.1 **Certification of revised or restated annual or interim filings** – If an issuer files a revised or restated continuous disclosure document that was originally certified as part of its annual or interim filings, the certifying officers would need to file Form 52-109F1R or Form 52-109F2R. These certificates would be dated the same date the certificate is filed and filed on the same date as the revised or restated continuous disclosure document.

20.2 **Disclosure considerations if an issuer revises or restates a continuous disclosure document** – If an issuer determines that it needs to revise or restate previously issued financial statements, the issuer should consider whether its original disclosures regarding the design or operating effectiveness of ICFR are still appropriate and should modify or supplement its original disclosure to include any other material information that is necessary for such disclosures not to be misleading in light of the revision or restatement.

Similarly, if an issuer determines that it needs to revise or restate a previously issued continuous disclosure document, the issuer should consider whether its original disclosures regarding the design or operating effectiveness of DC&P are still appropriate and should modify or supplement its original disclosure to include any other material information that is necessary for such disclosures not to be misleading in light of the revision or restatement.

5.1.4 Framework 81-406 Point of sale disclosure for mutual funds and segregated funds

Joint Forum of Financial Market Regulators
Forum conjoint des autorités de réglementation du marché financier

Framework 81-406

Point of sale disclosure for mutual funds and segregated funds

Prepared by:
Canadian Securities Administrators and Canadian Council of Insurance Regulators

October 24, 2008

Contents

The Joint Forum of Financial Market Regulators consists of representatives from the:

- Canadian Association of Pension Supervisory Authorities (CAPSA)
- Canadian Council of Insurance Regulators (CCIR) and
- Canadian Securities Administrators (CSA)

The goal of the Joint Forum is to continuously improve the financial services regulatory system through greater harmonization, simplification and co-ordination of regulatory activities.

Introduction

Our vision for the point of sale disclosure project is to provide investors with meaningful information about a mutual fund or segregated fund when they need it most—before they make their decision to invest.

On June 15, 2007, the Joint Forum of Financial Market Regulators (Joint Forum or we) released for public comment our Proposed Framework 81-406: *Point of sale disclosure for mutual funds and segregated funds* (proposed framework).

The proposed framework described the elements of our proposed point of sale disclosure regime, including a new fund summary document called "Fund Facts", delivery options, investor rights and the regulatory requirements for preparing, filing and delivering the document.

The comment period was 120 days and closed on October 15, 2007. The Joint Forum received comment letters from 85 stakeholders: 70 from industry, 11 from investors and investor advocates, and 4 from other interested parties.

We carefully reviewed and considered all the comments we received. In addition, we conducted a series of follow-up consultations with investors, representatives from the mutual fund and insurance industries, and service providers to better understand and clarify some of the issues raised in the comment letters. We thank everyone who submitted comment letters and participated in the consultations.

This paper describes the revised framework and the changes we made as a result of the comments we received. Like the proposed framework, our vision focuses on three key principles:

- providing investors with key information about a fund
- providing the information in a simple, accessible and comparable format
- providing the information before investors make their decision to buy

We want investors to have disclosure that can give them a basic and correct understanding of the potential benefits, risks and costs of investing in a fund and to be able to meaningfully compare one fund with another.

Both industry and investors expressed strong support for these principles in their comment letters. However, industry also expressed serious concerns about the potential costs and disruptions that could be caused by an unduly rigid application of the principles. In reviewing the comments and assessing whether a change to the proposed framework was warranted, we sought solutions that would achieve the principles without imposing undue costs. We also considered whether a proposed change would allow investors to link the information they receive about a fund to a particular purchase they are considering.

The Fund Facts document remains central to the framework. However, in response to comments, we have made revisions to it, particularly in the areas of costs and adviser compensation.

We have modified our approach to delivery, in response to comments that requiring the Fund Facts to be delivered before every purchase would impede the purchase process for both investors and their advisers. We believe that the revised approach still achieves our vision while better meeting the needs of investors and accommodating the various business models in the two industries.

We have revised some elements of the proposed cooling-off right in response to comments and as a result of the changes to the delivery requirement. In response to comments, we have also revised the framework to include less frequent updating and filing of the Fund Facts.

This framework reflects the shared vision of securities and insurance regulators for a more meaningful and effective disclosure regime. It does not outline specific requirements for the new regime. Rather it sets out concepts and principles agreed upon by members of the CSA and CCIR. The framework will form the basis for implementation.

The Joint Forum has turned the framework over to the CCIR and the CSA to begin the process for making the necessary changes to insurance guidelines and legislation (for segregated funds) and to securities rules and legislation (for mutual funds). Each organization will follow its usual procedures to seek input from, and work collaboratively with, all stakeholders to identify and resolve implementation issues and formulate the necessary changes. The Joint Forum will monitor their progress, particularly to ensure harmonization between the sectors.

Insurance and securities regulators are strongly committed to the key principles and will consider their applicability to other securities and insurance products.

This document reflects the ideas of the regulators that are members of the Joint Forum and its member associations. It does not necessarily represent the views of any government.

A snapshot of the framework

This is a summary of the key elements of the framework. You will find more detail about each element on the following pages.

- **Fund Facts.** The Fund Facts is the central document in the disclosure regime under the framework. It is in plain language, fits on both sides of one page and highlights key information that is important to investors, including performance, risk and cost. To promote comparability and simplicity, many aspects of the Fund Facts will be prescribed, such as the items, headings, their order and certain content. Other aspects, including the specific content under some items, will be left to fund managers and insurers to determine. Flexibility will be permitted to accommodate different kinds of funds.

- **Time of delivery.** Delivery of the Fund Facts under the framework depends on the type of purchase and who is initiating the transaction:

  - ***Initial purchase.*** An initial purchase is the purchase of, or switch into, a fund not currently held in the investor's account or under their insurance contract. Advisers will have to deliver the Fund Facts before or at the point of sale when recommending a fund other than a money market fund. For initial purchases of money market funds recommended by their adviser and for initial purchases of any fund initiated by the investor, investors will be able to choose to receive the Fund Facts with the trade confirmation, instead of before or at the point of sale. Investors who have an order execution-only account will receive the Fund Facts no later than with the trade confirmation for initial purchases of any fund since all trades in these accounts are investor-initiated.

  - ***Subsequent purchase.*** The Fund Facts will not have to be delivered for subsequent purchases of, or switches into, a fund currently held in the investor's account or under their insurance contract.

    Investors will also have the option to receive annually a Fund Facts for each fund in their account or under their insurance contract.

- **Methods of delivery.** Advisers will have a wide range of delivery options before or at the point of sale, including in person, by mail, by fax and electronically. Electronic delivery could include, for example, sending directly to the investor an e-mail with an electronic copy of, or link to, the Fund Facts, or directing the investor to the relevant Fund Facts on the fund manager's or insurer's website. Simply making the document available on the website or generally stating that it is available on the website without specifically directing the investor to the relevant Fund Facts will not satisfy the delivery requirement.

- **Cooling-off right.** Investors in mutual funds and segregated funds will be able to cancel a purchase within two business days after receiving the trade confirmation by notifying their dealer or insurer. The investor will get back the lesser of the amount they invested and the value of the fund on the day they exercised the cooling-off right, plus any fees or charges associated with the purchase. The cancellation of a purchase will be processed the same way as a redemption.

Background

The current disclosure regime

The current disclosure regime for mutual funds and segregated funds does not give investors meaningful information when they need it most—before they make their decision to buy a fund.

Many investors have trouble finding and understanding the information they need because it is buried in the simplified prospectus for mutual funds and in the information folder and insurance contract for segregated funds. These documents tend to be long and complex. Investors also find it difficult to compare information about different funds.

In addition, investors may not receive the documents before they make their purchase decision. Dealers must send the prospectus to mutual fund investors within two days after the purchase transaction. Segregated fund investors must receive the information folder at the point of sale, but may not receive the insurance contract until after the sale.

While these documents are intended to provide critical information to investors who are considering whether to buy a fund, research indicates that many investors do not use this information when making purchase decisions.

2003 consultation paper

In 2003, the Joint Forum published Consultation Paper 81-403: *Rethinking Point of Sale Disclosure for Segregated Funds and Mutual Funds*. In April 2004, the Joint Forum published its report on the consultation paper, which summarized the comments received and set out our responses to those comments. You can find these documents on the Joint Forum website at www.jointforum.ca.

2007 proposed framework

In 2007, the Joint Forum published its proposed framework, which included a new fund summary document called the Fund Facts, delivery methods, a new cooling-off right, and requirements for preparing and filing the document. You can find the framework paper and comment letters on the Joint Forum website at www.jointforum.ca.

Delivery

This section describes when and how investors will receive the Fund Facts under the framework. The revised framework responds directly to the comments we received and provides greater flexibility in accommodating investor needs and promoting market efficiency. It also builds on existing obligations for insurance and securities advisers to "know your client" and determine suitability.

General comments

The proposed framework required delivery of the Fund Facts before or at the point of sale for all initial and subsequent purchases. We received comments from both industry and investors that a "one-size-fits-all" approach may impede the timely execution of trades because it does not reflect the types of relationship advisers have with their clients or the various business models of dealers and insurers.

For example, some commenters suggested that the point of sale delivery requirement should not apply to "self-directed" investors because they do their own research and have made their purchase decision before contacting their adviser.

Many commenters were opposed to the requirement to deliver the Fund Facts before or at the point of sale for subsequent purchases because of the potential disruption to the purchase process.

We also received comments about possible delays when the investor wants to buy a fund immediately, for example, in a volatile market or during RRSP season.

Guiding principles

The Fund Facts should be delivered if an investor may not be in a position to make an informed decision about investing in a fund. A key element is the distinction between investors who rely on an adviser's recommendation and those who do their own research and simply want to execute a trade.

Advisers should deliver the Fund Facts at a time and in a way that allows an investor to easily link the information they receive about a fund to the purchase they are considering.

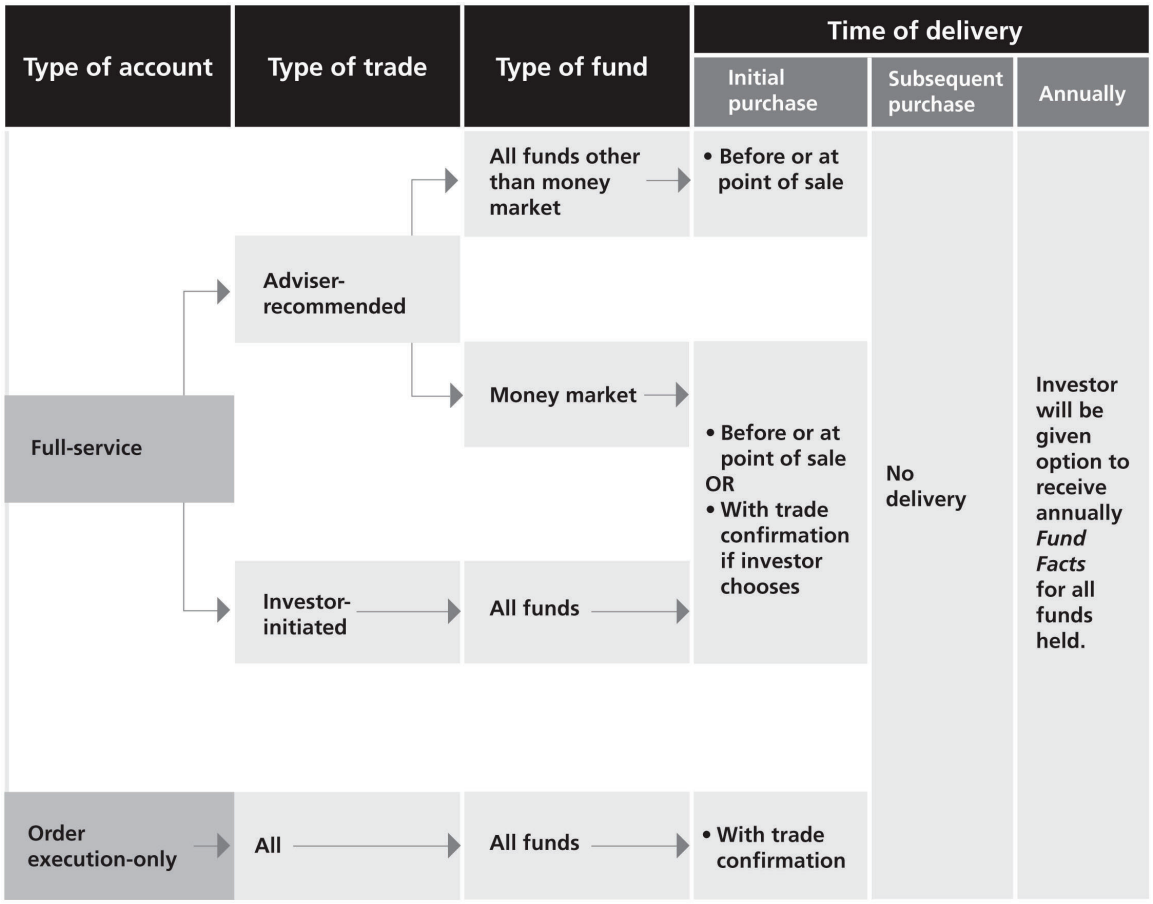
Our response

Under the framework, delivery of the Fund Facts before or at the point of sale is required for all initial purchases of mutual funds and segregated funds (except for money market funds) that are recommended by an adviser.

Investors who have a full-service account can choose to receive the Fund Facts with the trade confirmation (instead of before or at the point of sale) for initial purchases of money market funds recommended by an adviser and for initial purchases of any fund that are initiated by the investor. Investors who have an order execution-only account and do not receive advice or have their trades assessed for suitability, for example those who deal with a discount broker, will receive the Fund Facts no later than with the trade confirmation for initial purchases of any fund.

There is no delivery requirement for subsequent purchases of a fund that the investor already holds. However, fund managers and insurers will be required to make the Fund Facts continuously available to investors on their website and by request in print without charge.

The diagram below shows delivery under the framework:



Type of trade

The framework recognizes that investors will have differing needs in receiving fund disclosure. This largely depends on the nature of their relationship with their adviser, the type of account they have and the circumstances of the purchase.

For example, some investors usually rely on their adviser to recommend a fund while other investors may make investment decisions based on their own research and contact their adviser simply to execute the trade. Firms that provide advice currently have an obligation to ensure that the advisers who work for them assess the suitability of all purchases of a fund by a client, regardless of who initiates the transaction.

The same suitability obligation does not apply to order execution-only accounts, whether they are at a full-service firm or discount broker. For purchases through these accounts, investors have no expectation of receiving advice or having someone assess the suitability of a product. They rely on their own research when making investment decisions and initiate all their own trades. They do, however, expect timely execution of their trades.

Current requirements for recommended trades

The delivery requirement builds on existing rules and policies that apply to securities and insurance advisers. The concept of recommended trade is a key element of an adviser's obligation to determine suitability. To meet this obligation, the adviser must ensure that each recommendation made to a client is suitable based on the client's financial situation, investment knowledge, investment objectives and risk tolerance.

Time of delivery

Initial purchase

Under the framework, an initial purchase is the purchase of, or switch into, a fund not currently held in the investor's account or under their insurance contract.

Full-service accounts

If the adviser recommends the fund

Advisers whose clients have a full-service account will have to provide the Fund Facts before or at the point of sale for initial purchases of all funds except money market funds that they recommend to an investor. In this situation, the investor may have no other information about the fund and may not be in a position to make an informed decision without the Fund Facts. Advisers may fulfil this delivery obligation by electronic delivery, in person delivery or by fax.

Exception for money market funds

We acknowledge that there may be circumstances when an investor wants immediate trade execution even if they have little or no written disclosure about the fund.

We have therefore excluded money market funds from the point of sale delivery requirement because they are generally of low risk and are commonly used as a temporary parking spot for investors' money, particularly in RRSP season. In these circumstances, the adviser may go back to the client after the initial recommendation of a money market fund and resume the discussion of what fund or funds may be more suitable as a longer-term investment.

Under the framework, investors can choose to receive the Fund Facts for a money market fund before or at the point of sale, or with their trade confirmation.

If the investor initiates the purchase

We agree that investors who initiate the initial purchase of a fund through an adviser should be able to decide whether they want to receive the Fund Facts before or after the point of sale.

Accordingly, under the framework, investors who make an investment decision without their adviser's recommendation can choose to receive the Fund Facts before or at the point of sale, or with their trade confirmation. While the adviser is still required to determine whether the fund is suitable for the investor, we recognize that an investor who has done their own research should be able to request immediate execution.

Delivery with trade confirmation

As noted above, there are two situations under the framework when an investor can choose to receive the Fund Facts with the trade confirmation:

- when the adviser recommends the initial purchase of a money market fund
- when the investor initiates the initial purchase of any fund

In these situations, the adviser will have to bring the Fund Facts to the investor's attention and explain that the investor can choose to receive it before placing their order to buy or afterwards with the trade confirmation. Investors should understand that they are entitled to receive the Fund Facts before they buy a fund, but can choose to receive it afterwards.

Order execution-only accounts

Some commenters suggested that the point of sale disclosure regime should not apply to purchases made in order execution-only accounts, for example through discount brokers. However, even though investors with these types of accounts inform themselves on all trades and expect immediate execution, we think they should still receive disclosure about the fund, including their right to cancel their purchase, when they buy a fund for the first time.

Accordingly, firms offering order execution-only accounts will be required to send the Fund Facts no later than with the trade confirmation.

Subsequent purchase

Under the framework, a subsequent purchase is the purchase of more units or shares of, or a switch into, a fund currently held in the investor's account or under their insurance contract.

A few industry commenters suggested that investors may be frustrated if they had to wait to receive the Fund Facts for a fund they are already familiar with. Other industry and investor commenters suggested that investors would already have the Fund Facts from their initial purchase and that receiving it again would not be necessary, unless there was a material change to the fund. Some commenters noted that other sources of information about the fund are available to investors, such as the management report of fund performance.

Industry commenters highlighted a number of circumstances when the requirement to deliver the Fund Facts before or at the point of sale for subsequent purchases could disrupt the purchase process. These included the adviser not having the Fund Facts for a fund the investor wants to buy and the investor not having ready access to a fax machine or computer to receive the Fund Facts when the transaction is conducted by telephone.

We agree with these comments and have eliminated the requirement to deliver Fund Facts for subsequent purchases. We note that investors can request a Fund Facts at any time. Fund managers and insurers will be required to make the Fund Facts continuously available on their website and by request in print without charge.

Annual delivery

Many commenters suggested a number of alternatives to requiring delivery of the Fund Facts for all subsequent purchases:

- deliver the Fund Facts only if there has been a material change to it
- allow investors to waive receipt
- deliver the Fund Facts after the sale with the trade confirmation
- do not deliver the Fund Facts before or at the point of sale but send updated Fund Facts every six months or annually
- do not deliver the Fund Facts at all

We agree that some investors might find it useful to receive updated Fund Facts annually. Dealers and insurers will have to give investors the option to receive annually the Fund Facts for all of the funds they hold. This option is not a substitute for meeting the delivery requirement under the framework.

Alternative regime

A group of industry commenters suggested an alternative to the disclosure regime set out in our proposed framework. Under this alternative regime, when an investor first opens an account, they would receive the following information for all funds available in a family of mutual funds or under an insurance contract:

- fee and adviser compensation disclosure on a "fund family" basis
- fund specific-information along the lines of the information found on page 1 of the prototype Fund Facts published with the proposed framework

When an investor buys a particular fund, the firm would send the fund-specific information with the trade confirmation. The fund-specific information would also be available to investors on a central website.

Splitting up the key information about a fund could make it difficult for investors to be in a position to make an informed investment decision. Investors may have incomplete information because they have lost or forgotten what they received at account opening. In addition, information received at account opening may be outdated by the time the investor is making a decision to invest. Investors may also have difficulty linking information received at account opening to a particular purchase they are considering at a later date.

However, the framework does not restrict advisers from providing information in addition to the Fund Facts, including fund family fee and compensation disclosure, at account opening or at any other time.

Methods of delivery

Under the framework, advisers have a wide range of options for delivering the Fund Facts, including in person, by mail, by fax and electronically. The regime contemplated by the framework is intended to be flexible as long as the principles underlying it are followed.

Delivery could include, for example, sending an electronic copy of the document directly to the investor as an attachment or a link, or directing the investor to the relevant Fund Facts on the fund manager's or insurer's website. Simply making the document available on the website or generally stating that it is available on the website without specifically directing the investor to the relevant Fund Facts will not satisfy the delivery requirement.

Delivery could also include referring an investor to a particular Fund Facts previously delivered, as long as it is current and the investor can easily find and link the information to the particular purchase they are considering.

Oral delivery is not permitted under the framework. Although there was some support from industry to allow oral delivery and to allow delivery simply by making Fund Facts generally available on websites, investors did not want these options. We revisited these options and concluded that neither is consistent with our principles, particularly those of simplicity and accessibility.

Where the framework permits delivery after the purchase, dealers and insurers must deliver the Fund Facts no later than with the trade confirmation.

Delivery obligation

Where delivery of the Fund Facts is required before or at the point of sale, advisers will have two obligations:

- The adviser will have to deliver the Fund Facts to the investor.
- Once delivered, the adviser will have to bring the Fund Facts to the attention of the investor.

These obligations are designed to give investors an opportunity to review the information and ask questions before they make a purchase.

Changes to current delivery requirements

Mutual funds

The existing delivery requirements will be amended to allow dealers to meet their delivery obligation for the simplified prospectus by delivering only the Fund Facts. Dealers will have to deliver the simplified prospectus to investors only on request.

Segregated funds

Fund Facts will become part of the information folder. The current requirements for delivering the information folder will not change.

As described above, insurers will be required to deliver the Fund Facts for initial purchases of non-money market funds that take place after entering into the insurance contract.

Proving receipt of the Fund Facts

Mutual funds

Dealers will not be required to have investors acknowledge receipt of the Fund Facts. Dealers may impose their own requirements as part of their compliance policies and procedures for delivery obligations. Although dealers may choose to adopt a policy that includes written acknowledgement from investors confirming their receipt of Fund Facts, we do not expect that they will be required to do this.

Segregated funds

Insurers will have to include a signature line on the insurance contract application for the investor to acknowledge that they have received the Fund Facts for all segregated funds selected on the application, as required by law.

As part of their compliance policies and procedures, insurers may impose their own requirements to have investors acknowledge receipt of the Fund Facts for initial purchases made after investors have entered into the insurance contract.

Providing other materials at the point of sale

Like the proposed framework, the framework permits dealers and insurers to provide investors with permitted advertising or marketing material before or at the point of sale. If other materials are provided, the adviser will still have to bring the Fund Facts to the attention of the investor. The existing rules relating to advertising and marketing material will continue to apply.

Fund Facts

The Fund Facts is the central document in the point of sale disclosure system under the framework. It maintains the same overall approach and format as the document we described in the proposed framework. However, we have revised some content, particularly in the areas of costs and adviser compensation on page 2 of the document. This section describes the comments we received and the changes we made.

General comments

Most stakeholders expressed general support for clear, meaningful and simple disclosure in the Fund Facts. Comments were split between support for standardizing the content of Fund Facts and caution against being overly prescriptive. There was some support for a principles-based approach to the document.

There was some support for the proposal to require a separate Fund Facts for each series, class or guarantee option of a fund that has a separate management expense ratio (MER), if investors know about the other options and the series is indicated on the Fund Facts. Some commenters suggested also having a fund family document that outlines all of the series or classes available for a fund.

There was some industry opposition to a separate Fund Facts for each series because of the time and expense involved in preparing and filing multiple versions of the Fund Facts. They would prefer to have one Fund Facts that covered all series of a fund.

A few industry commenters suggested producing one Fund Facts for each fund but only including representative figures for performance and cost, rather than for each series. They suggested using the series with the highest MER or the most common series, or allowing the fund manager to choose the series.

Guiding principles

The Fund Facts should allow investors to easily compare funds, but it should also be flexible enough to accommodate different kinds of funds and to allow fund managers and insurers to describe their funds accurately. The Fund Facts should be short, generally no more than two pages.

Our response

While we received many helpful suggestions to add or change information in the Fund Facts, we considered all of them in view of our vision. In particular, when assessing whether a change was warranted, we considered whether it would add undue length or complexity to the document.

Many aspects of the Fund Facts will be prescribed, but flexibility will be permitted in certain areas to describe the fund's features, for example, the fund's investments and the types of investors the fund is suitable for.

One Fund Facts for each series or class is most consistent with our vision, would be less confusing for investors to read and understand, and would make it easier for investors to link the Fund Facts to a particular purchase.

For many funds, the series may affect not only MER and performance, but a number of other considerations as well. For example, the type of investor who can buy a fund can vary by series (institutional, retail), as can adviser compensation (fee, commission), sales charge options, product type (single fund, wrap program), minimum investment amounts, and tax and income requirements. These differences could affect a number of areas of the Fund Facts; namely, Quick Facts (MER, distributions), performance, suitability, sales charges and ongoing costs. It would be difficult to produce a Fund Facts for all series that is as short and easy to read as a Fund Facts for a single series.

Accordingly, one Fund Facts will have to be produced for each class or series of the fund. However, different guarantee options for a segregated fund may be combined on one Fund Facts.

Fund Facts content

The following is a summary of the changes we made to the Fund Facts. We have created revised versions of the Fund Facts prototypes—one for mutual funds and one for segregated funds. They are substantially similar, but take into account certain differences between the two investment products. You can find these prototypes in Appendix 1.

Page 1

We have added the series to the fund name to help investors distinguish between different series they may be considering. We have also added a note about other series that may be appropriate on page 2 under “How much does it cost?”.

Quick facts

Several industry commenters did not support breaking out the insurance cost in the MER section of Quick Facts because of the complexities involved for certain segregated funds. We agree with this comment. We have changed the segregated fund version of the Fund Facts to show only the total MER in the Quick Facts. We have also shortened the heading for the MER because MER is more fully explained in the new section on ongoing expenses on page 2.

A few commenters suggested adding the trading expense ratio (TER). We considered these comments, but for simplicity, we have kept the reference to the MER only.

We have also added the minimum initial and additional investments to Quick Facts. This was in response to comments that minimum investment amounts can vary by series.

What does the fund invest in?

A few industry commenters wanted to see investment objectives added to this section. We have not made this change because the investments section is intended to provide investors with a concise description of the fund’s investments. However, fund managers and insurers may refer to investment objectives in the suitability section.

Some commenters wanted clarification on the use of the pie chart. Fund managers and insurers will be able to choose up to two appropriate pie charts for each Fund Facts.

How has the fund performed?

A few commenters wanted to see benchmarks added to the performance information. We considered these comments, but based on our principle of simplicity, we have not included benchmarks.

Other commenters wanted clarification on the calculation for average returns. Insurance and securities regulators will provide further guidance to industry about how to calculate average returns as part of the implementation phase of this project.

A few commenters suggested adding a statement about the effects of tax on returns. We agree with this comment and have added a statement about tax to the performance section.

How risky is it?

Some commenters were opposed to using a scale to measure risk and suggested other approaches. We considered these approaches but we believe that a scale achieves comparability and consistency in a way that is easy for investors to understand. We have, however, revised the introductory statement to clarify how the scale is used.

There was some opposition to using the Investment Fund Institute of Canada (IFIC) risk classification for the risk scale because it was developed by industry. The framework contemplates use of the IFIC risk scale at least until an acceptable alternative is developed. Some regulators would prefer to include a generic requirement for a risk rating and indicate in guidance that the IFIC scale could be used to meet the requirement. Securities and insurance regulators will actively explore an alternative scale that is not developed by industry. If one becomes available, they will revisit whether to continue using the IFIC scale to measure risk.

Are there any guarantees?

We have made a minor wording change to the mutual fund version of the Fund Facts to take into account that some mutual funds offer guarantees.

Who is this fund for?

A few commenters suggested that suitability could vary, depending on how the fund fits into an investor's portfolio. Others wondered how they would link fund volatility to client suitability. The Fund Facts is intended to provide key information about a particular fund. An overall portfolio discussion is outside the scope of the document and is part of the adviser's role. Fund managers and insurers, however, will have flexibility in how they describe suitability.

A few commenters thought that the warning statement in the prototype was unduly negative. We note that this statement is not intended for all funds.

Page 2

Most of the comments on Fund Facts related to the cost and compensation information on page 2.

Several industry commenters noted that there are various forms of adviser compensation and that the firm sets the compensation structure for an adviser.

We agree with these comments and have revised the Fund Facts to show compensation paid only at the firm level. We have removed the adviser compensation section and changed references from "adviser" to "firm". This also addresses concerns that for order execution-only accounts, the investor does not have an adviser. Firm compensation is now included in relevant areas in the sales charge table and in a new section on ongoing fund expenses.

Sales charges

Several industry commenters noted that funds may offer other sales charge options that do not appear in the table, such as low load or no-load. They also noted that information on the deferred sales charge option was incomplete, for example, free switches and the 10 per cent free redemption feature were missing.

Investors wanted the Fund Facts to explain terms such as "initial sales charge" and "deferred sales charge". Two commenters noted that the tick boxes in the chart could cause an investor to confuse the Fund Facts with an application form.

We agree with these comments and have revised the sales charge table for clarity and to include more information about the sales charge options. We note that fund managers and insurers will have to disclose all sales charge options available for a series of a fund, including any not shown in the prototype.

Ongoing fund expenses (new section)

Some investors wanted more detail about the trailing commission. Some commenters wanted to see a clearer link between the MER and compensation costs. Others wanted us to clarify who pays what to whom and provide percentages.

In response to these comments, we created a new section on ongoing fund expenses. This section provides more detail on the MER and explains how trailing commissions work, including the percentages paid for each sales charge option.

Other fees (new section)

A few commenters noted that investors may be charged other fees, which should be disclosed in the Fund Facts. We agree that investors should be aware of any fees charged in connection with a purchase or sale of a fund, and have added a new section outlining some typical fees.

What if I change my mind?

We have revised the wording in this section to reflect the proposed changes to the cooling-off right.

For more information

Two commenters suggested adding a disclaimer that the Fund Facts contains key information about a fund but this information may not be complete. A few commenters suggested including other references in this section, such as the annual information form, management report of fund performance, financial statements and educational resources.

We considered these comments and have added a statement that the Fund Facts may not contain all the information an investor needs. For simplicity, we have left a single reference to the simplified prospectus or insurance contract.

Others noted that investors may not know what a simplified prospectus is. We agree and have revised the wording to give some context to this document.

Preparing the Fund Facts

The following is a summary of the requirements for preparing the Fund Facts. Insurance and securities regulators will provide further guidance in the implementation phase of this project.

Content

- Fund managers and insurers will have to produce one Fund Facts for each series or class of a fund.
- Insurers may combine all guarantee options for a series or class of a fund on one Fund Facts.
- The following will be prescribed:
  - the items and their order
  - the items on the first page
  - the items on the second page
  - section headings
  - certain language
- Flexibility will be permitted in certain areas to allow fund managers and insurers to describe their funds accurately. These include:
  - the description of the fund's investments
  - providing up to two pie charts for investment mix
  - the type of allocation used for pie charts
  - the description of suitability
  - the description of sales charges
  - the description of ongoing fund expenses, including trailing commission
  - the description of ongoing fees

Format

- The Fund Facts will be a maximum of two pages (both sides of one page), unless multiple sales charge options mean that the items on page 2 cannot reasonably fit on one page. In that case, the Fund Facts may go to a third page.
- Fund managers and insurers may produce the Fund Facts in landscape or portrait format.

Fonts

- There will be no minimum requirement for the font size, but the fonts will have to be easy to read and highly legible.

Colour

- Fund managers and insurers may produce the Fund Facts in colour or in black and white.

Reading level

- The Fund Facts will have to be written in plain language.
- The reading level of the Fund Facts will have to be less than grade 6.0 on the Flesch-Kincaid or equivalent scale.

Investor rights

This section describes the rights we are proposing for investors.

General comments

Commenters generally supported the two-day cooling-off right in the proposed framework. However, some suggested that it would be easier for investors and advisers to determine when the cooling-off right starts if it is based on when the investor receives the trade confirmation rather than on when the investor gives the adviser instructions to buy the fund.

A number of commenters expressed concern about the ongoing right for investors to cancel a mutual fund purchase if the Fund Facts is not delivered before or at the point of sale. They said this right creates significant compliance challenges for dealers to maintain records proving delivery if an investor claims non-delivery in the months or years following a transaction.

Guiding principles

Investors should have a reasonable opportunity to change their mind after buying a mutual fund or segregated fund. Investors should also have recourse if the Fund Facts contains incomplete or inaccurate information, or if they do not receive the Fund Facts as required under the framework.

Our response

Cooling-off right

It is important for both investors and advisers to understand what triggers the cooling-off right. We agree with the comments that it is more practical for investors and advisers to base the cooling-off right on when an investor receives the trade confirmation. Mutual fund investors in many provinces have a similar right today.

Under the framework, the cooling-off right applies to all purchases. For mutual funds, it will start when the investor receives, or is deemed to receive under the law, the trade confirmation. For segregated funds, it will start on the earlier of when the investor receives the trade confirmation and seven days after the trade confirmation is mailed.

Exercising the cooling-off right

For mutual funds, the investor will exercise the cooling-off right by notifying the dealer in writing. If the purchase was paid for in cash, the dealer will have to return the money to the investor. If the purchase was a switch from another fund, the dealer will have to instruct the fund manager to switch the investor back to their original investment.

If the fund manager has received payment from the dealer or fund units have been issued, the fund manager will have to return to the dealer the money it has received or the value of the units it has issued at the time the investor exercises the cooling-off right.

For segregated funds, the investor will exercise the cooling-off right with the insurer. In addition, investors will have a new cooling-off right that allows them to cancel their insurance contract within two days of entering into it.

Amount received on exercising cooling-off right

The investor will get back the lesser of:

- the amount of their original investment and
- the value of the fund on the day the investor exercise the cooling-off right

If the value of the fund goes down during the cooling-off period, the investor will get back less than the amount they invested.

The investor will get back any costs associated with the transaction, such as sales charges. The investor will not pay any redemption fees or short-term trading fees. The cancellation of a purchase will be processed the same way as a redemption.

Right for misrepresentation

Mutual funds

The Fund Facts will be incorporated by reference into the simplified prospectus. This means that the existing securities laws will apply and any misrepresentation in the Fund Facts will result in the investor having a statutory right to take action against the mutual fund for rescission or damages.

Segregated funds

The Fund Facts will be incorporated by reference into the insurance contract. This means that if there is a misrepresentation in the Fund Facts, the existing insurance laws and contract law will apply.

If the Fund Facts is not delivered

Mutual funds

A right of action for failure to deliver the simplified prospectus exists under securities law today. Under the framework, investors continue to have this right if the Fund Facts is not delivered when required.

As discussed earlier, the current prospectus delivery requirements will be amended to allow dealers to meet their obligations by delivering only the Fund Facts. The simplified prospectus will be available to investors on request. This “layered approach” will avoid undue burden on dealers and investors by limiting delivery of the prospectus to only those investors who want the additional information found in it.

Segregated funds

The existing insurance laws will apply. Where applicable, it will be an unfair or deceptive act or practice for insurers to fail to deliver the Fund Facts when they are required to do so. This means that although investors will not be able to cancel their purchase, they can complain to their provincial regulator who may take action against the insurer.

Filing requirements

This section describes the requirements for filing and updating the Fund Facts under the framework.

Mutual funds

Filing

The fund manager will have to file Fund Facts with securities regulators. The Fund Facts will have to be filed annually, together with the rest of the fund manager’s prospectus documents, for receipt by the regulators. Fund managers will continue to prepare and file the simplified prospectus, annual information form, financial statements and management reports of fund performance according to current practice.

We have eliminated the requirement to file the Fund Facts with the annual and interim continuous disclosure documents based on comments from industry that more than one mandatory filing per year would be onerous and costly.

If fund managers want to provide more current information to investors, however, they may update and file the Fund Facts more often, but no more frequently than quarterly, unless there is a material change.

The CSA will be reviewing the entire disclosure regime for mutual funds to determine whether it can be streamlined.

Material changes

Fund managers will have to update and file a new or revised Fund Facts if there is a material change to the information in the Fund Facts. These material changes will be treated the same way that any other material change to the prospectus is currently treated.

Certificate requirements

The certificate requirements for mutual fund prospectuses will be amended so that the certificates are forward looking. This is similar to the requirements for the short form prospectus offering system in National Instrument 44-102 *Shelf Distributions*.

The forward-looking certificates will apply to all updates of the Fund Facts. If a mutual fund files a prospectus amendment because of a material change to the simplified prospectus or to the Fund Facts, new certificates will be needed.

Regulatory review

Securities regulators will review the Fund Facts the same way they review other documents that are currently incorporated by reference into the simplified prospectus.

When the review has been completed, the regulator will issue a receipt for the prospectus. The mutual fund may not be sold until the regulator in each province where the fund will be offered has issued a receipt or where there is a deemed receipt under the passport system in provinces where this system is available.

Segregated funds

Filing

The insurer will have to file Fund Facts with insurance regulators in provinces where filing is required. The Fund Facts will have to be filed annually, together with the other documents that form part of the insurance contract, for receipt in provinces where receipting occurs.

We have eliminated the requirement to update and file the Fund Facts semi-annually in provinces where filing is required. Commenters said that more than one mandatory filing per year would be onerous and costly. Insurers may update and file the Fund Facts no more frequently than quarterly, unless there is a material change.

Material changes

Insurers will have to update and file a new or revised Fund Facts in provinces where filing is required if there is a material change to the information in the Fund Facts. If the material change requires an amendment to the insurance contract, the insurer will have to obtain a receipt for the amendment in provinces where receipting occurs before using the amended Fund Facts.

Regulatory review

The Fund Facts will form part of the information folder that insurance regulators will review according to their current practices.

When the review has been completed, the insurance regulator will issue a receipt in provinces where receipting occurs.

Regulators will review updates to the Fund Facts that result from material changes according to their current practices and will receipt them in provinces where receipting occurs.

Key Facts for segregated funds

The CCIR has separately developed an additional two-page prototype document called “Key Facts”. This document summarizes the key features of the insurance contract under which segregated funds are offered.

We received a number of comments on Key Facts. The CCIR will work with insurance industry stakeholders to develop changes to Key Facts that are consistent with our vision.

Next steps

The Joint Forum has turned the framework over to the CCIR and the CSA to begin the process for making the necessary changes to insurance guidelines and legislation (for segregated funds) and to securities rules and legislation (for mutual funds).

Each organization will follow its usual procedures to seek input from, and work collaboratively with, all stakeholders to identify and resolve implementation issues and formulate the necessary changes. The Joint Forum will monitor their progress, particularly to ensure harmonization between the sectors.

As part of the implementation process, we expect that there will be a transition period to allow industry sufficient time to produce and file Fund Facts. The transition period would also give industry sufficient time to develop procedures to meet their delivery obligations under the new regime.

For more information

If you have questions about the framework, please contact the Joint Forum Secretariat.

Neil Mohindra
Policy Manager
Joint Forum Secretariat
5160 Yonge St.
Box 85, 17th floor
North York, ON
M2N 6L9

Phone: 416-590-7031
Fax: 416-590-7070
E-mail: jointforum@fsco.gov.on.ca

Joint Forum Point of Sale Committee

Chair

Jim Hall
Superintendent of Insurance and Financial Institutions
Saskatchewan Financial Services Commission
Phone: 306-787-7881
E-mail: jhall@sfsc.gov.sk.ca

Members

Noreen Bent
Manager and Senior Legal Counsel
Legal Services, Corporate Finance
British Columbia Securities Commission
Phone: 604-899-6741
E-mail: nbent@bcsc.bc.ca

Christopher Birchall
Senior Securities Analyst, Corporate Finance
British Columbia Securities Commission
Phone: 604-899-6722
E-mail: cbirchall@bcsc.bc.ca

Peter Blandy
Manager of Compliance
Alberta Superintendent of Insurance and Financial Institutions
Phone: 780-415-8556
E-mail: peter.blandy@gov.ab.ca

Bob Bouchard
Director and Chief Administration Officer
Manitoba Securities Commission
Phone: 204-945-2555
E-mail: bob.bouchard@gov.mb.ca

Patricia Callon
Investment Funds Branch
Ontario Securities Commission
Phone: 416-593-3673
Email: pcallon@osc.gov.on.ca

Elliott Katz
Senior Policy Analyst, Licensing and Market Conduct Division
Financial Services Commission of Ontario
Phone: 416-590-7578
E-mail: ekatz@fsco.gov.on.ca

Scott Lamb
Legal Counsel
Financial Services Commission of Ontario
Phone: 416-590-7024
E-mail: slamb@fsco.gov.on.ca

Fernand Lavigne
Financial Analyst
Autorité des marchés financiers
Phone: 514-395-0558, ext. 4818
E-mail: fernand.lavigne@lautorite.qc.ca

Pierre Martin
Senior Legal Counsel
Service des affaires juridiques
Autorité des marchés financiers
Phone: 514-395-0337, ext. 2545
E-mail: pierre.martin@lautorite.qc.ca

Stephen Paglia
Legal Counsel
Ontario Securities Commission
Phone: 416-593-2393
E-mail: spaglia@osc.gov.on.ca

Carol Shevlin
Policy Manager
CCIR Secretariat
Canadian Council of Insurance Regulators
Phone: 416-226-7893
E-mail: cshevlin@fsco.gov.on.ca

Susan Silma
Director, Compliance and Registrant Regulation
Ontario Securities Commission
Phone: 416-593-2302
E-mail: ssilma@osc.gov.on.ca

Grant Swanson
Executive Director, Licensing and Market Conduct Division
Financial Services Commission of Ontario
Phone: 416-590-7120
E-mail: gswanson@fsco.gov.on.ca

Susan Swayze
Senior Plain Language Editor
Ontario Securities Commission
Phone: 416-593-2338
E-mail: sswayze@osc.gov.on.ca

Joint Forum Point of Sale Steering Committee

Chair

David Wild
Chair
Saskatchewan Financial Services Commission and Superintendent of Pensions
Phone: 306-787-9006
E-mail: dwild@sfsc.gov.sk.ca

Members

Bob Christie
Chief Executive Officer and Superintendent
Financial Services Commission of Ontario
Phone: 416-590-7000
E-mail: bchristi@fsco.gov.on.ca

C. Michael Grist
Deputy Superintendent of Insurance
Financial Institutions Commission of British Columbia
Phone: 604-953-5370
E-mail: c.michael.grist@ficombc.ca

Doug Hyndman
Chair
British Columbia Securities Commission
Phone: 604-899-6555
E-mail: dhyndman@bcsc.bc.ca

Lawrence Ritchie
Vice-Chair
Ontario Securities Commission
Phone: 416-593-8241
E-mail: lritchie@osc.gov.on.ca

Jean St-Gelais
President and Chief Executive Officer
Autorité des marchés financiers
Phone: 418-525-7251
E-mail: jean.st-gelais@lautorite.qc.ca

APPENDIX 1
REVISED FUND FACTS FOR
MUTUAL FUNDS AND SEGREGATED FUNDS

XYZ Mutual Funds

FUND FACTS

XYZ Canadian Equity Fund – Series A
September 30, 2008

Quick facts

Date fund created:	January 1, 1996	**Portfolio manager:**	Capital Asset Management Ltd.
Total value on September 30, 2008:	$1 billion	**Distributions:**	Annually, on December 15
Management expense ratio (MER):	2.25%	**Minimum investment:**	$500 initial, $50 additional

What does the fund invest in?

The fund invests in Canadian companies. They can be of any size and from any industry. The charts below give you a snapshot of the fund's investments on September 30, 2008. The fund's investments will change.

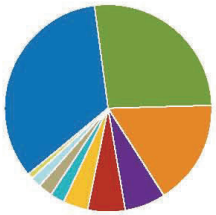
Top 10 investments (September 30, 2008)

1. Royal Bank of Canada
2. Encana Corp.
3. Petro-Canada
4. Alcan Inc.
5. Canadian National Railway Company
6. Goldcorp Inc.
7. Extendicare Inc.
8. Husky Energy
9. Open Text
10. Thomson Corp.

Total investments	**126**

The top 10 investments make up 32% of the fund.

Investment mix (September 30, 2008)



Industry	
Financial services	34.0%
Energy	26.6%
Industrial goods	16.5%
Business services	6.4%
Telecommunication	5.9%
Hardware	3.7%
Healthcare services	2.3%
Consumer services	2.1%
Media	1.9%
Consumer goods	0.6%

How has the fund performed?

This section tells you how the fund has performed over the past 10 years. Returns are after the MER has been deducted. These expenses reduce the returns you get on your investment.

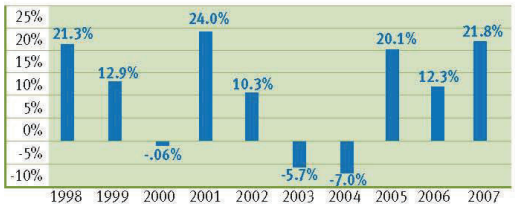
It's important to note that this doesn't tell you how the fund will perform in the future. Also, your actual return will depend on your personal tax situation.

Average return

A person who invested $1,000 in the fund 10 years ago now has $2,705. This works out to an average of 10.5% a year.

Year-by-year returns

This chart shows how the fund has performed in each of the past 10 years. There were three years when people who owned this fund lost some of the money they had at the start of the year.



How risky is it?

When you invest in a fund, the value of your investment can go down as well as up. XYZ Mutual Funds has rated this fund's risk as moderate.

Very low	Low	Low to moderate	**Moderate**	Moderate to high	High

Are there any guarantees?

Like most mutual funds, this fund doesn't have any guarantees. You may not get back the amount of money you invest.

Who is this fund for?

Investors who:

- are looking for a long-term investment
- want to invest in a broad range of Canadian companies
- can handle the ups and downs of the stock market.

! Don't buy this fund if you need a steady source of income from your investment.

XYZ Mutual Funds

XYZ Canadian Equity Fund – Series A

How much does it cost?

The following tables show the fees and expenses you could pay to buy, own and sell Series A units of the fund. The fees and expenses are different for each series. Ask about other series that may be suitable for you.

1. Sales charges

You have to choose a sales charge option when you buy the fund. Ask about the pros and cons of each option.

Sales charge option	What you pay	How it works
Initial sales charge	Up to 4% of the amount you buy	• You and your adviser decide on the rate. • The initial sales charge is deducted from the amount you buy. It goes to your investment firm as a commission.
Deferred sales charge	**If you sell within:** 1 year of buying 6.0% 2 years of buying 5.0% 3 years of buying 4.0% 4 years of buying 3.0% 5 years of buying 2.0% 6 years of buying 1.0% After 6 years nothing	• The deferred sales charge is a set rate. It is deducted from the amount you sell. • When you buy the fund, XYZ Mutual Funds pays your investment firm a commission of 4.9%. Any deferred sales charge you pay goes to XYZ Mutual Funds. • You can sell up to 10% of your units each year without paying a deferred sales charge. • You can switch to Series A units of other XYZ Mutual Funds at any time without paying a deferred sales charge. The deferred sales charge schedule will be based on the date you bought the first fund.

2. Ongoing fund expenses

You don't pay these expenses directly. They affect you because they reduce the return you get on your investment.

	Annual rate (as a % of the fund's value)
Management fee The fund pays a management fee to XYZ Mutual Funds.	2.00%
Operating expenses These are the day-to-day costs of running the fund.	0.25%
Management expense ratio (MER) This is the total of the management fee and operating expenses.	**2.25%**

Trailing commission

XYZ Mutual Funds pays your investment firm a trailing commission for as long as you own the fund. It is for the services and advice your investment firm provides to you. Investment firms may pay part of the trailing commission to their advisers.

The trailing commission is paid out of the management fee. The rate depends on the sales charge option you choose:

- **Initial sales charge** – up to 1.0% of the value of your investment each year
- **Deferred sales charge** – up to 0.50% of the value of your investment each year

3. Other fees

You may have to pay other fees when you sell or transfer units of the fund.

Fee	What you pay
Short-term trading fee	1% of the value of units you sell or transfer within 90 days of buying them. This fee goes to the fund.
Switch fee	Your investment firm may charge you up to 2% of the value of units you transfer to another XYZ Mutual Fund.
Change fee	Your investment firm may charge you up to 2% of the value of units you transfer to another series of the fund.

What if I change my mind?

- You can cancel your investment up to two days after you receive the trade confirmation.
- You have to tell your investment firm in writing that you want to cancel.
- You'll get back the amount you invested, or less if the value of the fund has gone down.
- If you paid cash, you'll get cash back. If you switched from another fund, you'll be switched back to that fund.
- You'll also get back any sales charges and fees you paid.

For more information

This summary may not contain all the information you need. You can ask for a copy of the fund's simplified prospectus, which has more detailed information.

XYZ Mutual Funds
123 Asset Allocation St.
Toronto, ON M1A 2B3

Phone: (416) 555-5555
Toll-free: 1-800-555-5556
Email: investing@xyzfunds.com
www.xyzfunds.com

GIANT FINANCIAL

FUND FACTS

Choice® Insurance Contract
XYZ Canadian Equity Fund
September 30, 2008

Quick facts

Date fund created:	January 1, 1996	**Portfolio manager:**	Capital Asset Management Ltd.
Total value on September 30, 2008:	$1 billion	**Distributions:**	Annually, on December 15
Management expense ratio (MER):	2.85% to 3.45%, depending on the guarantee option you choose	**Minimum investment:**	$500 initial, $50 additional

What does the fund invest in?

The fund invests in Canadian companies. They can be of any size and from any industry. The charts below give you a snapshot of the fund's investments on September 30, 2008. The fund's investments will change.

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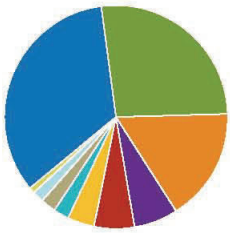


Industry	
Financial services	34.0%
Energy	26.6%
Industrial goods	16.5%
Business services	6.4%
Telecommunication	5.9%
Hardware	3.7%
Healthcare services	2.3%
Consumer services	2.1%
Media	1.9%
Consumer goods	0.6%

How has the fund performed?

This section tells you how the fund has performed over the past 10 years for an investor who chose the basic guarantee. Returns are after the MER has been deducted. These expenses reduce the returns you get on your investment.

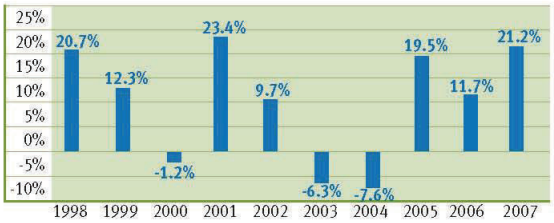
It's important to note that this doesn't tell you how the fund will perform in the future. Also, your actual return will depend on the guarantee option you choose and on your personal tax situation.

Average return

A person who invested $1,000 in the fund and chose the basic guarantee 10 years ago now has $2,539. This works out to an average of 9.8% a year.

Year-by-year returns

This chart shows how the fund has performed in each of the past 10 years for an investor who chose the basic guarantee. There were three years when people who owned this fund lost some of the money they had at the start of the year.



How risky is it?

When you invest in a fund, the value of your investment can go down as well as up. Giant Financial has rated this fund's risk as moderate.

Very low	Low	Low to moderate	**Moderate**	Moderate to high	High

Are there any guarantees?

This fund is offered under an insurance contract. It comes with guarantees that protect your investment if the markets go down. The MER includes the insurance cost for the guarantee. For details, see page 2 of this document or the insurance contract.

Who is this fund for?

Investors who:

- are looking for a long-term investment
- want to invest in a broad range of Canadian companies
- can handle the ups and downs of the stock market.

! Don't buy this fund if you need a steady source of income from your investment.

GIANT FINANCIAL

Choice® Insurance Contract
XYZ Canadian Equity Fund

How much does it cost?

The following tables show the fees and expenses you could pay to buy, own and sell units of the fund. The ongoing fees and expenses are different for each guarantee option.

1. Sales charges

You have to choose a sales charge option when you buy the fund. Ask about the pros and cons of each option.

Sales charge option	What you pay	How it works
Initial sales charge	Up to 4% of the amount you buy	• You and your adviser decide on the rate. • The initial sales charge is deducted from the amount you buy. It goes to your investment firm as a commission.
Deferred sales charge	**If you sell within:** 1 year of buying 6.0% 2 years of buying 5.0% 3 years of buying 4.0% 4 years of buying 3.0% 5 years of buying 2.0% 6 years of buying 1.0% After 6 years nothing	• The deferred sales charge is a set rate. It is deducted from the amount you sell. • When you buy the fund, Giant Financial pays your investment firm a commission of 4.9%. Any deferred sales charge you pay goes to Giant Financial. • You can sell up to 10% of your units each year without paying a deferred sales charge. • You can switch to units of other funds under the insurance contract at any time without paying a deferred sales charge as long as you do not change your guarantee option. The deferred sales charge schedule will be based on the date you bought the first fund.

2. Ongoing fund expenses

The management expense ratio (MER) includes the management fee and operating expenses of the fund, and the insurance cost for the guarantee. You don't pay these expenses directly. They affect you because they reduce the return you get on your investment. For details about how the guarantees work, see your insurance contract.

Guarantee option	MER (annual rate as a % of the fund's value)
Basic (75/75)	2.85%
Combined (75/100)	3.10%
Full (100/100)	3.45%

Trailing commission

Giant Financial pays your investment firm a trailing commission for as long as you own the fund. It is for the services and advice your investment firm provides to you. Investment firms may pay part of the trailing commission to their advisers.

The trailing commission is paid out of the management fee. The rate depends on the sales charge option you choose:

- **Initial sales charge** – up to 1.0% of the value of your investment each year
- **Deferred sales charge** – up to 0.50% of the value of your investment each year

3. Other fees

You may have to pay other fees when you sell or transfer units of the fund.

Fee	What you pay
Short-term trading fee	1% of the value of units you sell or transfer within 90 days of buying them. This fee goes to the fund.
Switch fee	Giant Financial may charge you up to 2% of the value of units you transfer to another fund under the insurance contract.
Change fee	Giant Financial may charge you up to 2% of the value of units you transfer to another guarantee option of the fund.

What if I change my mind?

- You can cancel your investment up to two days after you receive the trade confirmation.
- You have to tell your investment firm in writing that you want to cancel.
- You'll get back the amount you invested, or less if the value of the fund has gone down.
- If you paid cash, you'll get cash back. If you switched from another fund, you'll be switched back to that fund.
- You'll also get back any sales charges and fees you paid.

For more information

This summary may not contain all the information you need. You can ask for a copy of the insurance contract, which has more detailed information.

Giant Financial
10010-101 St. NW
Edmonton, AB T5J 3G8

Phone: (780) 555-1212
Toll-free: 1-800-555-5556
Email: investing@giantfin.com
www.giantfin.com

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Chapter 7

Insider Reporting

This chapter is available in the print version of the OSC Bulletin, as well as as in Carswell's internet service SecuritiesScource (see www.carswell.com).

This chapter contains a weekly summary of insider transactions of Ontario reporting issuers in the System for Electronic Disclosure by Insiders (SEDI). The weekly summary contains insider transactions reported during the seven days ending Sunday at 11:59 pm.

To obtain Insider Reporting information, please visit the SEDI website (www.sedi.ca).

Chapter 8

Notice of Exempt Financings

REPORTS OF TRADES SUBMITTED ON FORMS 45-106F1 AND 45-501F1

Transaction Date	No of Purchasers	Issuer/Security	Total Purchase Price ($)	No of Securities Distributed
10/10/2008	56	20/20 Diversified Income Trust - Units	1,079,024.25	1,107.00
10/02/2008 to 10/06/2008	9	473 Albert Street Office Limited Partnership - Limited Partnership Units	860,000.00	860,000.00
10/08/2008	1	Acero-Martin Exploration Inc. - Common Shares	28,407.06	473,451.00
10/08/2008	8	Acero-Martin Exploration Inc. - Units	193,002.00	3,216,700.00
10/10/2008	5	AMADOR GOLD CORP. - Common Shares	1,200,000.00	10,000,000.00
09/30/2008	9	Arctic Star Diamond Corp. - Flow-Through Units	1,340,000.00	16,750,000.00
09/28/2008	36	Ascendancy #2 Limited Partnership - Units	3,035,000.00	3,035.00
10/01/2008	1	Atlanta Gold Inc. - Common Shares	25,000.00	41,806.00
09/26/2008	1	A&Q Alternative Solution Index (CAD) Certificates Maturing 30 June 2015 - Units	149,156.80	160.00
10/03/2008	5	BCGold Corp. - Flow-Through Shares	1,135,000.00	5,675,000.00
10/03/2008	2	BCGold Corp. - Non Flow-Through Shares	330,000.00	1,650,000.00
08/26/2008	5	BlackBerry Partners Fund Carry L.P. - Units	10,001.00	100,000.00
10/01/2008	1	Brevan Howard Fund, Ltd. - Debt	20,687,550.00	123,884.96
09/30/2008	2	Broadway Credit Card Trust - Notes	568,182,000.00	3.00
10/02/2008 to 10/08/2008	19	Canada Zinc Metals Corp. - Common Shares	7,077,400.20	7,863,778.00
10/03/2008	1	CardioComm Solutions Inc. - Common Shares	75,000.00	714,285.00
10/09/2008	17	CareVest Blended Mortgage Investment Corporation - Preferred Shares	508,825.00	508,825.00
10/09/2008	15	CareVest First Mortgage Investment Corporation - Preferred Shares	793,810.00	793,810.00
10/01/2008	6	CEO Capital LP No. 1 - Limited Partnership Units	500,000.00	500.00
10/01/2008	11	Cogeco Cable Inc. - Notes	256,601,000.00	3.00
09/29/2008	2	Darnley Bay Resources Limited - Common Shares	150,000.00	600,000.00
10/03/2008	1	Eagleridge Minerals Ltd. - Common Shares	200,000.00	1,333,333.00
09/12/2008 to 09/18/2008	1	ECOM Financial Corp. - Common Shares	300,000.00	1,200,000.00
10/01/2008	1	Eton Park Overseas Fund Ltd. - Common Shares	20,722,650.00	19,500.00
09/30/2008	1	Falcon Oil & Gas Ltd. - Special Warrants	20,799,999.00	NA

Transaction Date	No of Purchasers	Issuer/Security	Total Purchase Price ($)	No of Securities Distributed
10/02/2008	8	FCI Energy Opportunities (Cdn) L.P. - Limited Partnership Units	3,050,000.00	3,050.00
10/03/2008	2	First Leaside Elite Limited Partnership - Limited Partnership Interest	200,000.00	183,908.00
10/03/2008	1	First Leaside Fund - Trust Units	2,901.45	2,668.00
10/06/2008	1	First Leaside Investors Limited Partnership - Limited Partnership Interest	25,000.00	25,000.00
10/03/2008	1	First Leaside Visions I Limited Partnership - Limited Partnership Interest	100,000.00	100,000.00
10/07/2008	1	First Leaside Wealth Management Inc. - Preferred Shares	50,000.00	50,000.00
09/03/2008	2	Foran Mining Corporation - Units	32,000.00	400,000.00
10/01/2008	2	Fort Tryon Equities Fund, Ltd. - Common Shares	13,897,790.00	2,800.00
09/30/2008	361	FT Capital Investment Fund - Units	5,961,000.00	11,922.00
09/22/2008 to 09/26/2008	32	General Motors Acceptance Corporation of Canada, Limited - Notes	11,835,118.24	11,835,118.24
09/29/2008 to 10/03/2008	11	General Motors Acceptance Corporation of Canada, Limited - Notes	3,998,390.28	3,998,390.28
10/03/2008	4	Geodex Minerals Ltd. - Flow-Through Shares	541,500.00	1,805,000.00
10/01/2008	2	Grosvenor Global Long/Short Equity Master Fund, Ltd. - Common Shares	13,897,790.00	13,100.00
10/01/2008	1	Harris Associates Global Large Cap L.P. - Limited Partnership Interest	40,269,641.56	40,269,641.00
09/29/2008 to 10/06/2008	24	IGW Real Estate Investment Trust - Trust Units	899,299.87	815,244.00
09/24/2008	58	Kimber Resources Inc. - Units	5,000,000.00	4,000,000.00
09/30/2008	8	KingSett Canadian Real Estate Income Fund LP - Units	5,700,000.00	5,700.00
09/30/2008	1	Kingwest Avenue Portfolio - Units	120,000.00	46,214.28
10/08/2008	1	KWG Resources Inc. - Common Shares	100,000.00	2,000,000.00
01/08/2008	1	Lounor Exploration Inc. - Common Shares	108,000.00	600,000.00
10/06/2008	47	L.O.M. Medical International Inc. - Common Shares	3,508,395.00	1,169,465.00
09/02/2008	3	MCAN Performance Strategies - Limited Partnership Units	1,891,111.50	14,802.76
09/23/2008	1	Microbix Biosystems Inc. - Debentures	2,500,000.00	2,500,000.00
10/03/2008	3	Nakina Systems Inc. - Preferred Shares	2,168,341.19	12,938,677.00
09/24/2008 to 10/01/2008	38	Neo Exploration Inc. - Common Shares	3,680,050.40	1,692,143.00
10/03/2008	39	New Global Ventures International Ltd. - Units	2,875,031.23	7,157,765.00
10/09/2008	1	New Solutions Financial (II) Corporation - Debentures	248,000.00	2.00

Transaction Date	No of Purchasers	Issuer/Security	Total Purchase Price ($)	No of Securities Distributed
10/01/2008 to 10/09/2008	3	Newport Canadian Equity Fund - Units	65,000.00	542.81
09/23/2008 to 09/30/2008	9	Newport Fixed Income Fund - Units	115,200.00	1,140.57
10/01/2008 to 10/09/2008	3	Newport Fixed Income Fund - Units	90,000.00	894.17
10/01/2008	1	Newport Global Equity Fund - Units	25,000.00	379.65
09/30/2008	25	Newport Strategic Yield Fund - Units	1,059,286.40	94,936.00
09/23/2008 to 09/30/2008	4	Newport Yield Fund - Units	44,000.00	383.14
10/01/2008 to 10/09/2008	7	Newport Yield Fund - Units	231,000.00	2,097.96
10/08/2008	13	Northquest Ltd. - Common Shares	260,000.00	2,600,000.00
10/01/2007 to 09/30/2008	1	Northwest Quadrant Balanced Growth Portfolio - Common Shares	4,823,554.82	522,780.84
10/06/2008	30	OccuLogix, Inc. - Common Shares	2,396,167.10	188,401,588.00
06/17/2008	4	OGX Petroleo e Gas Participacoes S.A. - Common Shares	243,964,209.84	341,200.00
10/03/2008	21	Oilsands Quest Inc. - Common Shares	22,079,973.31	6,008,156.00
10/03/2008	77	Oilsands Quest Inc. - Common Shares	17,640,000.00	4,800,000.00
09/30/2008	4	Osisko Mining Corporation - Common Shares	12,250,245.00	2,916,725.00
09/24/2008	1	Otter Tail Corporation - Common Shares	310,530.00	5,175,000.00
10/03/2008	12	Platinex Inc. - Common Share Purchase Warrant	525,000.00	6,183,333.00
03/15/2007 to 09/29/2008	159	Platinum Lands Registered Capital Corp. - Bonds	3,862,100.00	38,621.00
07/28/2008	7	Quorum Oil and Gas Technology Fund Limited - Common Shares	436,127.55	1,864,406.00
09/30/2008 to 10/02/2008	1	R3, Ltd. - Common Shares	240,446,250.00	225,000.00
10/02/2008	1	Radiant Energy Corporation - Common Shares	439,078.44	3,658,987.00
10/01/2008	1	Ranchlands I Limited Partnership - Loans	25,000.00	25,000.00
08/25/2008	3	River Run Springs Corporation - Units	443,000.00	443.00
10/07/2008	18	Rocher Deboule Minerals Corp. - Units	650,500.00	3,255,000.00
09/01/2008	76	Seven Generations Energy Ltd. - Common Shares	185,817,525.00	37,163,505.00
09/19/2008	12	Sextant Strategic Opportunities Hedge Fund LP - Units	2,041,113.23	31,315.00
09/29/2008	5	Shear Wind Inc. - Units	1,662,500.00	3,537,234.00
10/01/2008	131	Shelter Bay Energy Inc. - Common Shares	299,999,999.50	200,000,000.00
09/30/2008	9	Skybridge Development Corp. - Flow-Through Shares	437,500.00	1,250,000.00
09/30/2008	16	Skybridge Development Corp. - Units	750,000.00	2,500,000.00

Transaction Date	No of Purchasers	Issuer/Security	Total Purchase Price ($)	No of Securities Distributed
10/01/2008	4	Stacey Muirhead Limited Partnership - Limited Partnership Units	250,432.00	7,473.16
10/01/2008	2	Stacey Muirhead RSP Fund - Trust Units	22,143.00	2,206.89
09/28/2008 to 09/30/2008	29	Terrapark IV, L.P. - Limited Partnership Interest	20,191,930.00	23,501,449.00
09/29/2008	31	The Goldman Sachs Group Inc. - Common Shares	66,645,257.10	519,294.00
09/24/2008	2	Tri Origin Exploration Ltd. - Flow-Through Shares	1,050,000.00	3,000,000.00
09/29/2008 to 09/30/2008	1	UBS AG - Certificate	14,632,164.74	41,700.00
10/07/2008	1	Union Pacific Corporation - Notes	11,100,000.00	10,000,000.00
10/03/2008	1	Unison Capital Partners III (A) L.P. - Limited Partnership Interest	20,440,000.00	2,000,000,000.00
10/03/2008	11	Verb Exchange Inc. - Units	1,500,000.00	15,000,000.00
09/30/2008	11	Viva Source Corp. - Special Warrants	147,000.00	245,000.00
09/24/2008	1	Voice Enabling Systems Technology Inc. - Common Share Purchase Warrant	30,000.00	50,000.00
10/02/2008	16	Walton AZ Sawtooth Investment Corporation - Common Shares	234,350.00	23,435.00
10/02/2008	67	Walton TX South Grayson Investment Corporation - Common Shares	1,115,390.00	111,539.00
10/06/2008 to 10/07/2008	14	WindRiver Power Corporation - Common Shares	1,384,680.00	728,912.00
10/06/2008 to 10/07/2008	4	WindRiver Power Corporation - Flow-Through Shares	328,365.20	183,947.00

Chapter 11

IPOs, New Issues and Secondary Financings

Issuer Name:
BFI Canada Ltd.
Principal Regulator - Ontario
Type and Date:
Preliminary Short Form Base Shelf Prospectus dated October 17, 2008
NP 11-202 Receipt dated October 20, 2008
Offering Price and Description:
US $500,000,000
Common Shares
Debt Securities
Warrants
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1331926

Issuer Name:
Chalk Media Corp.
Principal Regulator - British Columbia
Type and Date:
Preliminary Short Form Prospectus dated October 17, 2008
NP 11-202 Receipt dated October 17, 2008
Offering Price and Description:
$ 3,000,000.00 - Minimum * Common Shares $5,000,000 - Maximum * Common Shares Price: $* per Offered Share
Underwriter(s) or Distributor(s):
Blackmont Capital Inc.
Promoter(s):
-
Project #1331850

Issuer Name:
Encell Energy Storage Corporation
Principal Regulator - Ontario
Type and Date:
Preliminary CPC Prospectus dated October 16, 2008
NP 11-202 Receipt dated October 17, 2008
Offering Price and Description:
$1,000,000.00 - Minimum 2,500,000 Common Shares; $1,800,000.00 - Maximum 4,500,000 Common Shares
Price: $0.40 per Common Share
Underwriter(s) or Distributor(s):
Research Capital Corporation
Promoter(s):
-
Project #1331527

Issuer Name:
Front Street Canadian Equity Fund
Front Street Diversified Income Fund
Front Street Money Market Fund
Front Street Resource Fund
Front Street Small Cap Fund
Front Street Special Opportunities Canadian Fund
Principal Regulator - Ontario
Type and Date:
Preliminary Simplified Prospectuses dated October 16, 2008
NP 11-202 Receipt dated October 17, 2008
Offering Price and Description:
Series A, B and F Shares
Underwriter(s) or Distributor(s):
-
Promoter(s):
Front Street Mutual Funds Limited
Front Street Capital 2004
Project #1331641

Issuer Name:
INTERCABLE ICH INC.
Principal Regulator - Quebec
Type and Date:
Preliminary Short Form Prospectus dated October 15, 2008
NP 11-202 Receipt dated October 17, 2008
Offering Price and Description:
$ * - Price: * Units
Underwriter(s) or Distributor(s):
Jones Gable & Company Limited
Promoter(s):
-
Project #1331520

Issuer Name:
Mackenzie Ivy American Class
Mackenzie Sentinel U.S. Short-Term Yield Class
Principal Regulator - Ontario
Type and Date:
Preliminary Simplified Prospectuses dated October 14, 2008
NP 11-202 Receipt dated October 16, 2008
Offering Price and Description:
Series A, F, I and O Securities
Underwriter(s) or Distributor(s):
-
Quadrus Investment Services Ltd.
Promoter(s):
Mackenzie Financial Corporation
Project #1331186

Issuer Name:
Marquis Enhanced Canadian Equity Pool
Marquis Global Equity Pool
Marquis Multipartners Equity Portfolio
Marquis Multipartners Growth Portfolio
(Series T Units)
Radiant All Equity Portfolio
Radiant Growth Portfolio
(Serios O and T Units)
Principal Regulator - Ontario
Type and Date:
Preliminary Simplified Prospectuses dated October 15, 2008
NP 11-202 Receipt dated October 16, 2008
Offering Price and Description:
Series O and T Units
Underwriter(s) or Distributor(s):
Goodman & Company, Investment Counsel Ltd.
Promoter(s):
Goodman & Company, Investment Counsel Ltd.
Project #1331332

Issuer Name:
O'Leary Global Infrastructure Fund
Principal Regulator - Quebec
Type and Date:
Amended and Restated Preliminary Prospectus dated October 21, 2008
NP 11-202 Receipt dated October 21, 2008
Offering Price and Description:
$ * - * Units Price: $12.00 per Class A Combined Unit
Underwriter(s) or Distributor(s):
CIBC World Markets Inc.
RBC Dominion Securities Inc.
BMO Nesbitt Burns Inc.
Scotia Capital Inc.
Blackmont Capital Inc.
Wellington West Capital Inc.
Dundee Securities Corporation
HSBC Securities (Canada) Inc.
Raymond James Ltd.
Richardson Partners Financial Limited
Promoter(s):
GENCAP Funds LP
Project #1318927

Issuer Name:
Pathway Multi Series Fund Inc. - Flex Dividend and Income Growth Series Fund
Principal Regulator - Ontario
Type and Date:
Preliminary Simplified Prospectus dated October 20, 2008
NP 11-202 Receipt dated October 21, 2008
Offering Price and Description:
A/Regular Series, Low Load/DSC Series, F Series, I Series
Underwriter(s) or Distributor(s):
-
Promoter(s):
Mineralfields Fund Management Inc.
Project #1332335

Issuer Name:
Cymbria Corporation
Principal Regulator - Ontario
Type and Date:
Final Prospectus dated October 20, 2008
NP 11-202 Receipt dated October 20, 2008
Offering Price and Description:
Maximum $675,000,000.00 - 67,500,000 Class A Shares
Price: $10.00 per Share Minimum Purchase: 100 Shares
Underwriter(s) or Distributor(s):
BMO Nesbitt Burns Inc.
CIBC World Markets Inc.
RBC Dominion Securities Inc.
Scotia Capital Inc.
TD Securities Inc.
National Bank Financial Inc.
Dundee Securities Corporation
Blackmont Capital Inc.
Canaccord Capital Corporation
HSBC Securities (Canada) Inc.
Industrial Alliance Securities Inc.
Raymond James Ltd
Richardson Partners Financial Limited
Desjardins Securities Inc.
GMP Securities L.P.
M Partners Inc.
Manulife Securities Incorporated
Wellington West Capital Markets Inc.
Promoter(s):
Edgepoint Investment Group Inc.
Project #1318993

Issuer Name:
Greengreen Capital Corp.
Principal Regulator - Ontario
Type and Date:
Final Prospectus dated October 14, 2008
NP 11-202 Receipt dated October 16, 2008
Offering Price and Description:
$225,000.00 - 1,500,000 COMMON SHARES ($0.15 per Common Share)
Underwriter(s) or Distributor(s):
Haywood Securities Inc.
Promoter(s):
Mark Greenspan
Project #1284777

Issuer Name:
MEGA Brands Inc.
Principal Regulator - Quebec
Type and Date:
Final Short Form Base Shelf Prospectus dated October 17, 2008
NP 11-202 Receipt dated October 17, 2008
Offering Price and Description:
20,064,000 Common Shares
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1328980

Issuer Name:
New Generation Biotech (Equity) Fund Inc.
Type and Date:
Amendment #1 dated September 26, 2008 to the Prospectus dated December 20, 2007
Receipted on October 15, 2008
Offering Price and Description:
Class A Shares
Underwriter(s) or Distributor(s):
-
Promoter(s):
CFPA Sponsor Inc.
Project #1185396

Issuer Name:
Pathway Quebec Mining 2008-II Flow-Through Limited Partnership
Principal Regulator - Ontario
Type and Date:
Final Prospectus dated October 14, 2008
NP 11-202 Receipt dated October 16, 2008
Offering Price and Description:
Maximum Offering: $10,000,000.00 (1,000,000 Units);
Minimum Offering: $2,500,000.00 (250,000 Units)
Price per unit: $10 Minimum Subscription: 250 Units
Underwriter(s) or Distributor(s):
Wellington West Capital Inc.
HSBC Securities (Canada) Inc.
Desjardins Securities Inc.
Canaccord Capital Corporation
Laurentian Bank Securities Inc.
Industrial Alliance Securities Inc.
Dundee Securities Corporation
Promoter(s):
Pathway Quebec Mining 2008-II Inc.
Project #1321917

Issuer Name:
RBC Private U.S. Large Cap Equity Pool
(formerly, RBC Private U.S. Diversified Equity Pool)
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectus dated October 20, 2008
NP 11-202 Receipt dated October 21, 2008
Offering Price and Description:
Mutual fund trust units at net asset value
Underwriter(s) or Distributor(s):
RBC Asset Management Inc.
Promoter(s):
RBC Asset Management Inc.
Project #1324530

Issuer Name:
Regal Resources Inc.
Principal Regulator - British Columbia
Type and Date:
Final Prospectus dated October 14, 2008
Mutual Reliance Review System Receipt dated October 17, 2008
Offering Price and Description:
MINIMUM OF $300,000.00 (1,500,000 UNITS) AND MAXIMUM OF $400,000.00 (2,000,000 UNITS)
PRICE: $0.20 PER UNIT
Underwriter(s) or Distributor(s):
Union Securities Ltd.
Promoter(s):
Harvey D. Dick
Project #1202895

Issuer Name:
WARNIC 1 ENTERPRISES LTD.
Principal Regulator - British Columbia
Type and Date:
Final CPC Prospectus dated October 14, 2008
NP 11-202 Receipt dated October 16, 2008
Offering Price and Description:
Maximum of 12,333,333 Common Shares ($1,850,000.00); Minimum of 6,666,666 Common Shares ($1,000,000.00) at $0.15 per Common Share
Underwriter(s) or Distributor(s):
Wolverton Securities Ltd.
Promoter(s):
John F. Dunlop
Project #1293466

Issuer Name:
Front Street Real Estate 2008 Limited Partnership
Principal Jurisdiction - Ontario
Type and Date:
Amended and Restated Preliminary Prospectus dated June 26, 2008
Closed on October 20, 2008
Offering Price and Description:
$75,000,000.00 - (Maximum offering - 7,500,000 Units); (Minimum Offering * Units); Price - $10.00 per Class B Unit and $10.00 per Class F Unit Minimum Purchase $5,000 (500 Class B Units or 500 Class F Units)
Underwriter(s) or Distributor(s):
CIBC World Markets Inc.
RBC Dominion Securities Inc.
BMO Nesbitt Burns Inc.
National Bank Financial Inc.
TD Securities Inc.
Richardson Partners Financial Limited
Canaccord Capital Corporation
Dundee Securities Corporation
HSBC Securities (Canada) Inc.
Raymond James Ltd.
Wellington West Capital Inc.
Blackmont Capital Inc.
Tuscarora Capital Inc.
Desjardins Securities Inc.
Promoter(s):
FS GP V Corp.
Front Street Investment Management Inc.
Project #1219513

Chapter 12

Registrations

12.1.1 Registrants

Type	Company	Category of Registration	Effective Date
Name Change	From: Lehman Brothers Canada Inc. To: Barclays Capital Canada Inc.	Investment Dealer	October 01, 2008
New Registration	Delano Capital Corp.	Limited Market Dealer	October 16, 2008
New Registration	Henderson Global Investors Equity Planning Inc.	Limited Market Dealer	October 20, 2008
New Registration	Teachers Personal Investors Services, Inc.	International Dealer	October 21, 2008
Change in Category	Independent Equity Research Corp	From: Securities Adviser To: Limited Market Dealer Securities Adviser	October 21, 2008
Change of Category	Baring International Investment Limited	From: International Adviser (Investment Counsel & Portfolio Manager) & International Dealer To: Non-Canadian Adviser (Investment Counsel & Portfolio Manager) & Limited Market Dealer (Non-resident)	October 21, 2008

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Chapter 13

SRO Notices and Disciplinary Proceedings

13.1.1 IIROC Rules Notice – Notice of Approval - UMIR – Provisions Respecting Short Sales and Failed Trades

October 15, 2008 No. 08-0143

IIROC RULES NOTICE

NOTICE OF APPROVAL - UMIR

PROVISIONS RESPECTING SHORT SALES AND FAILED TRADES

PROVISIONS RESPECTING SHORT SALES AND FAILED TRADES

Summary

Securities regulators in Canada and abroad have recently taken regulatory action to protect investors and market integrity in light of the current and unprecedented market turmoil. To address concerns of investors and marketplace participants, the Investment Industry Regulatory Organization of Canada ("IIROC") has responded by increasing its regular monitoring of trading on equity marketplaces in Canada, including heightened surveillance of all short selling activity and rates of trade failure.

IIROC has received approval to put in place various provisions which will provide IIROC with additional tools to address potential abusive short selling and failed trade activity. These provisions had previously been published for public comment in September of 2007.[1] A proposal to remove all price restrictions at which a short sale may be made has been deferred at this time because of the current market conditions and the fact that the regulatory framework governing short selling is under active review in the United States and other foreign jurisdictions. IIROC will continue to monitor developments in the Canadian market and new initiatives taken by foreign regulators with respect to short sales and failed trades and determine what additional actions should be taken.

In particular, the Board of Directors of IIROC approved for publication a request for comments on a proposal to preclude additional short sales by a person who has executed a failed trade unless arrangements have been made for the borrowing of the securities necessary to settle any resulting trade prior to the entry of the order ("Pre-Borrow Requirement"). This proposal is similar to the "hard T+3 close-out requirement" recently introduced in the United States.[2] IIROC expects to publish the Rules Notice dealing with this proposal in the next few weeks. Persons will be given a 60-day period from the date the Rules Notice is published to comment on the proposal.

Notice of Approval

This Rules Notice provides notice of the approval by the applicable securities regulatory authorities (the "Recognizing Regulators"), effective October 14, 2008, of amendments to the Universal Market Integrity Rules ("UMIR") respecting various aspects of short sales and failed trades (the "Amendments"). In particular, the Amendments:

- require that notice be provided to a Market Regulator if, after the execution of a trade, the trade is varied (with respect to price, volume or settlement date) or cancelled;
- provide that the Market Regulator may designate particular securities or class of securities as being ineligible for short selling;
- provide a definition of a "failed trade" and require that a report of a "failed trade" be made to a Market Regulator if the reason for the failure is not resolved within ten trading days following the original settlement date of the trade; and
- clarify certain requirements that must be met for a seller to be considered the owner of securities at the time of a sale.

[1] Market Integrity Notice 2007-017 – Request for Comments – Provisions Respecting Short Sales and Failed Trades (September 7, 2007).

[2] Securities and Exchange Commission, Release No. 34-58572 (September 17, 2008) dealing with Rule 240T under Regulation SHO.

Certain of the Amendments, while approved by the applicable securities regulatory authorities, will become effective on a future date. See "Implementation Plan" on pages 17 and 18.

The Amendments have been revised from the proposals contained in Market Integrity Notice 2007-017 – *Request for Comments – Provisions Respecting Short Sales and Failed Trades* (September 7, 2007) (the "Short Sale and Failed Trade Proposal"). ***The provisions in the Short Sale and Failed Trade Proposal to:***

- ***repeal the restrictions on the price at which a short sale may be made; and***
- ***eliminate the requirement to file "Short Position Reports"***

have been deferred at this time and are not part of the Amendments.

Background to the Amendments

Statistical Study of Failed Trades on Canadian Marketplaces

The Amendments build on a study of failed trades undertaken by Market Regulation Services Inc. ("RS") in 2006 (the "RS Failed Trade Study").[3] The RS Failed Trade Study found that:

- failed trades accounted for 0.27% of the total number of trades executed;
- the more "junior" the marketplace in terms of the type of security traded, the higher the incidence of failed trades;[4]
- special settlement trades experienced a significantly higher rate of failure (6.15% of trades compared to 0.26% for regular settlement trades);
- the predominant cause of failed trades was administrative delay or error[5], which accounted for almost 51% of fails;
- less than 6% of fails resulting from the sale of a security involved short sales;
- fails involving short sales accounted for only 0.07% of total short sales;
- "buy-ins" were executed in only 4% of failed trades; and
- the average "failed" trade was settled 4.2 days after the "expected settlement date" with fully 96% of failed trades settled within 10 days after the "expected" settlement date.

The RS Failed Trade Study was conducted in early August of 2006 and, during that time, approximately 24% of sales made by dealers participating in the study were short sales. However, the RS Failed Trade Study found that only 6% of fails resulting from the sale of a security involved a short sale. This finding is at odds with the presumption underpinning the "fails list" provisions in the United States which further restricts short sales when a security passes the threshold on "fails" and is added to the fails list. Based on the results of the RS Failed Trade Study, the Amendments will require a Participant to file a report with IIROC if the failed trade is not resolved within 10 days following the settlement date, and that a further report be submitted once the problem has been rectified. In this way, the specific trades which are problematic will be brought to the attention of the regulator for further review and action if appropriate. IIROC expects that one outcome of this aspect of the Amendments will be enhancements in the policies and procedures of Participants to minimize the number of trades that will be subject to these reporting requirements (the by-product of which would be a reduction in the average number of days that a failed trade remains "outstanding").

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3 For a more detailed discussion of the RS Failed Trade Study and its results, see Market Policy Notice 2007-003 – General – Results of the Statistical Study of Failed Trades on Canadian Marketplaces (April 13, 2007).

4 Rates of trade failure for Study Participants ranged from 0.22% of total trades by Study Participants on the TSX (a total of 838 fails out of 379,211 trades), to 0.90% of trades on TSXV (resulting from 239 fails out of 26,509 trades) and 2.22% of trades on CNQ (resulting from 1 failed trade out of the 45 trades executed on CNQ by Study Participants during the Study Period). The rate of trade failure on CNQ is comparable to the 2.21% rate reported by the SEC Office of Economic Analysis for US Exchange and OTC Bulletin Board securities based on data for May of 2006.

5 Administrative delays/errors generally include: inadvertent delays related to obtaining physical certificates for securities, custodian lacking instructions and discrepancies related to security price/amount.

Recent Trends in Trading Activity, Short Selling and Failed Trades

Concurrent with the issuance of the Rules Notice requesting comments on the Pre-Borrow Requirement, IIROC will be issuing an Administrative Notice setting out the results of a statistical report on trends on Canadian marketplaces in the period May 1, 2007 to September 30, 2008 (the "Study Period") with respect to overall trading activity, short selling and failed trades.
Based on the information derived during the Study Period:

Trading Activity

- the number of trades in securities listed on the Toronto Stock Exchange ("TSX") has been increasing throughout the Study Period across all marketplaces trading those securities with the increase concentrated in trading of:
    - securities inter-listed between the TSX and an exchange in the United States ("inter-listed securities"), and
    - Exchange-traded Funds ("ETFs");
- while the number of trades in securities listed on the TSX Venture Exchange ("TSXV") or Canadian Trading and Quotation System Inc. ("CNQ") has varied significantly throughout the Study Period, the overall trend appears to be a reduction in the total number of trades per trading day;
- in periods of increased "market stress":
    - trading activity as measured by number of trades, value traded and volume traded exceeds the average for the Study Period,
    - there is generally a lower than average level of short selling activity on the TSXV and CNQ,
    - there is a higher number of trades per alert generated on the TSX, and
    - the average number of statistical alerts generated per trading day decreases in relation to increases in the level of trading;
- over the Study Period, the average volume of a trade:
    - in an inter-listed security generally declined on the TSX,
    - on a new marketplace increased from levels at the time of launch,
    - in securities listed on TSXV and CNQ increased slightly;

Short Sales

- the more "senior" the security the higher the proportion of short sales;
- short sales tend to have a lower volume but higher value than sales from a "long position" (indicating a concentration of short sale activity in more senior and liquid securities on each of the marketplaces);
- short selling activity accounts for a disproportionate level of the trading activity on 3 of the 4 "new" marketplaces (possibly indicating a concentration of arbitrage and algorithmic trading);
- less than two-thirds of the short sales that qualify as "short exempt" are in fact marked in this manner (though the proportion of short sales that are marked as "exempt" has been increasing since the grant of the exemption from price restrictions in July of 2007);
- there has been an increase in the proportion of short sales involving inter-listed securities since the grant of the exemption from price restrictions in July of 2007;
- other than the increase in short sales of inter-listed securities, there has been no significant change over the Study Period in the pattern of short selling in comparison with the trading of securities generally;

Failed Trades

- over the Study Period:
  - the number of failed trades as a percentage of the overall number of trades has generally been declining,
  - on average, 4.95% of failed trades are closed out through the execution of a "buy-in" on a marketplace, and
  - the accumulated value of failed trades as a percentage of the value of trades has generally been declining; and
- "market stress" does not appear to have an impact on the rate or value of trade failures.

This report compares the recent Canadian experience with short sales and failed trades with the situation in the United States. In particular, the analysis undertaken by IIROC does not support the need in Canada for a number of the actions recently taken by the Securities and Exchange Commission ("SEC") in the United States, including proposed amendments to Regulation SHO.

It is the intention of IIROC to update the results of the statistical report on a periodic basis. The update will be provided to the Recognizing Regulators and will be made publicly available through the issuance of an IIROC Notice.

Deferral of Aspects of the Short Sale and Failed Trade Proposal

Deferral of Proposal to Repeal of Price Restrictions on All Short Sales

Under the Short Sale and Failed Trade Proposal, one of the proposals was the repeal of all restrictions on the price at which a short sale may be made. This aspect of the Short Sale and Failed Trade Proposal would parallel action taken by the SEC in 2007 to repeal price restrictions on short sales in the United States.[6]

However, in light of recent actions taken by the SEC on a temporary basis to restrict or prohibit short sales on securities of financial issuers or issuers generally and given the concern expressed in the media that the repeal of price restrictions on short sales in the United States may have contributed to the volatility experienced in US markets, IIROC determined to defer at this time consideration of the repeal of price restrictions. Any proposal to consider the ratification or withdrawal of that portion of the Short Sale and Failed Trade Proposal dealing with the repeal of the price restrictions on short sales would be made if:

- the SEC indicates that it intends to propose the reintroduction of price restrictions or other similar restrictions or prohibitions on short sales in the United States;
- statistical data becomes available on the impact of the repeal of price restrictions on inter-listed securities that became effective in July of 2007; or
- the launch of a marketplace or a facility of a marketplace that does not system-enforce the price restrictions or the listing exchange ceases to be the "principal" market would introduce problems for Participants and Access Persons to comply with the existing UMIR provisions.

Deferral of Proposal to Repeal the Requirement for Short Position Reports

IIROC has decided to defer further consideration of that aspect of the Short Sale and Failed Trade Proposal that would have repealed the requirement for Participants and Access Persons to prepare and file a short position report on a semi-monthly basis. To replace the aggregation of the information in the short position reports filed by Participants and Access Persons into the Consolidated Short Position Report ("CSPR"), IIROC envisaged the dissemination by third parties of periodic summary reports of short sales effected on marketplaces in particular securities. IIROC will pursue the introduction of the trade summaries on the most cost effective and efficient basis (after consultation with the applicable securities regulatory authorities and marketplaces). At this time, IIROC believes that the options for the preparation of a consolidated summary report would be by:

[6] On June 13, 2007, the SEC approved amendments to remove the price restrictions on short sales as set out in Rule 10a-1 as well as any short sale price test of any self-regulatory organization. In addition, the amendments prohibit any self-regulatory organization from having a price test. These amendments were effective July 3, 2007 with a compliance date indicated of July 6, 2007.

- marketplaces acting co-operatively (in a manner similar to the preparation of the CSPR today);
- IIROC using the regulatory feed provided for trades on all regulated marketplaces; or
- the information processor, if one is approved for all regulated marketplaces.

IIROC would propose to pursue the repeal of Rule 10.10 only once IIROC is satisfied that adequate information on short sales executed on a marketplace has become generally available and there has been a period of at least six months to a year following the introduction of the summary reports on short sales executed on marketplaces during which both the summaries and the CSPR would be available. The availability of both types of reports will allow the current users of the CSPR an opportunity to evaluate the information provided by trading summaries and would provide IIROC an opportunity to track the relationship between information provided in the CSPR with the marketplace trading summaries.

Exemption from Price Restrictions on Short Sales for Inter-listed Securities

In light of the decision of the SEC to remove price restrictions on short sales, IIROC granted, effective July 6, 2007, an exemption from the price restrictions on a short sale under Rule 3.1 of UMIR in respect of securities which are inter-listed on an exchange in the United States (the "Inter-listed Exemption).[7] Under the Inter-listed Exemption, if a security is listed on an Exchange and is also listed on an exchange in the United States, a short sale of the security may be entered on any marketplace using the "short exempt" marker. Securities which trade on an ECN in the United States but are not otherwise listed on an exchange in the United States do not qualify for the exemption. With the decision to defer final consideration of that aspect of the Short Sale and Failed Trade Proposal dealing with the repeal of price restrictions on short sales of all securities, the Inter-listed Exemption will continue in force until the approval by the Recognizing Regulators or the withdrawal by IIROC from consideration of this aspect of the Short Sale and Failed Trade Proposal.

Other Monitoring Initiatives

To assist in the monitoring of short sales, IIROC will introduce additional alerts to its trade monitoring systems that will detect changes in the historic pattern of short selling for a particular security. To ensure an accurate audit trail, IIROC has introduced effective August 1, 2008 new automated procedures for correcting order markers including "bundled" orders which contain sales from both a long and a short position which have been marked as "short" or "short exempt". Historically, "bundled" orders were to have been entered on a market with the most restrictive of the order markers applicable to any order in the bundle. (Reference should be made to IIROC Notice 08-0033 – Rules Notice – Guidance Note – *New Procedures for Order Marker Corrections* and IIROC Notice 08-0050 – Rules Notice – Guidance Note – *User Guide for the Regulatory Marker Correction Form*.)

Impact Study

With the approval of the Amendments, IIROC will undertake an empirical study ("Impact Study") of:

- the impact of the Amendments;
- the effects of granting the Inter-listed Exemption; and
- the possible effects of a full repeal of all price restrictions on short sales.

It is the intention of IIROC to engage third party consultants to undertake the Impact Study. The construction and methodology of the Impact Study will be based on the recommendations of the consultants. The results of the Impact Study will be published by IIROC through the issuance of one or more IIROC Notices and the public will be provided with an opportunity to comment on the results of the Impact Study.

IIROC anticipates that the Impact Study would:

- analyze trading and settlement activity of listed securities (including both liquid and illiquid securities listed on TSX, TSXV and CNQ);
- cover a period of at least one year prior to and one year following the approval date of the Amendments; and
- be based on five or more categories of listed securities being:

[7] For a more detailed description of the exemption, reference should be made to Market Integrity Notice 2007-014 - *Guidance – Exemption of Certain Inter-listed Securities from Price Restrictions on Short Sales* (July 6, 2007).

- securities inter-listed with an exchange in the United States,
- securities which qualify as "highly-liquid", and
- at least three tiers of "illiquid" securities determined by relative liquidity.

The Impact Study will attempt to determine whether the Amendments or the Inter-listed Exemption had an effect on:

- volume of short selling;
- rates of trade failure;
- the relationship, or the lack thereof, between levels of short selling and trade failure;
- the ability to detect manipulative or deceptive trading in circumstances when abusive short selling has occurred;
- price volatility and the operation of the price discovery mechanism; and
- levels of displayed liquidity.

The Impact Study will also attempt to determine whether there was any difference in the effects based on the presence of "market stress" for the particular security or securities generally. In this context, "stress" would be measured by unusual volumes or price movement.

While the "Pilot Project" undertaken in the United States on behalf of the SEC in connection with the removal of price restrictions on short sales had found no evidence that the results of the Pilot Project would not be applicable to smaller or less liquid securities, the Impact Study would attempt to confirm whether this finding was applicable in the Canadian context. If the Impact Study found that the effect of the approved amendments varied significantly due to the liquidity of the issuers or if the Impact Study found deterioration in the rate of trade settlement, IIROC would then consider whether other additional amendments should be made to UMIR to incorporate comparable provisions from Regulation SHO (such as locate requirements, fail lists and close-out requirements.) IIROC may also consider whether price restrictions on short sales should be re-introduced for certain types of illiquid securities.

In the view of IIROC, there is no one measure from the Impact Study that would be determinative on the question of whether price restrictions should be reinstated with respect to the securities subject to the Inter-listed Exemption or repealed with respect to securities currently subject to price restrictions on a short sale. Rather, reinstatement should be considered if one or more of the following trends emerged (either generally or in connection with trading of a particular marketplace or type of security):

- an increase in the proportion of "failed trade reports" in relation to overall trading activity combined with an increase in the proportion of "short sale" transactions covered by the "failed trade reports";
- a significant increase in the failure rates of trade on regular settlement date (for which no explanation other than short sale failure is readily apparent);
- an increasing number of securities being designated as a "Short Sale Ineligible Security";
- a disproportionate increase in the number of trading alerts generated by IIROC's monitoring systems involving short sales; and
- a disproportionate increase in the number of cases subject to review or investigation by IIROC involving short sales.

The Impact Study will also provide an opportunity to track the relationship between information provided from the CSPR with that provided in the periodic trading summaries of short selling activity on marketplaces. If the Impact Study concludes that the trading summaries are an appropriate replacement for the CSPR, IIROC would pursue an amendment to UMIR through the publication of a Rules Notice requesting comment on the repeal of Rule 10.10. (See "Deferral of the Proposal to Repeal the Requirement for Short Position Reports" on page 6.)

Staff of IIROC considered a proposal for a "pilot project" (which would have provided an exemption from the price restrictions on a short sale for a range of securities including both highly-liquid and "illiquid" securities prior to repealing the price restrictions for all securities) as an alternative to the Impact Study. The TSXV currently does not support the "short exempt" marker. While the TSXV has indicated an intention to introduce the "short exempt" marker, the TSXV has not publicly announced a timetable for its

introduction. The introduction of a pilot project would either have to be delayed until the TSXV had implemented the "short exempt" marker or would have necessitated significant programming changes by TSXV and possibly Participants accessing that marketplace in order to enable the price restrictions to be suspended for a subset of TSXV securities. As such, in the opinion of IIROC staff, a pilot project could not be implemented in a cost efficient and timely manner (as compared to the repeal of price restrictions on short sales of all securities accompanied by an impact study).

CSA/SRO Working Group on Short Selling and Failed Trade Issues

IIROC staff are participating (and prior to June 1, 2008 staff of both RS and the Investment Dealers Association of Canada ("IDA") participated) in an informal working group comprised of staff from the Canadian Securities Administrators ("CSA"), Canadian Depository for Securities Limited ("CDS"), Toronto Stock Exchange and the Bourse de Montréal (the "Working Group") that has been examining various issues related to failed trades and short sales, including the role that short sales play in the occurrence of failed trades. The Working Group is monitoring developments in the US, including proposals by the SEC to amend Regulation SHO.

The Working Group will be provided with the periodic updates published by IIROC to the *Recent Trends in Trading Activity, Short Selling and Failed Trades.* The Working Group will also be provided with any interim analysis prepared as part of the Impact Study. If settlement rates deteriorate after the implementation of the Amendments, either generally or for specific classes of securities, then IIROC would support additional initiatives by the marketplaces, CDS, CSA or the Member Regulation Policy Department of IIROC. Similarly, if significant "problems" emerged during this period with respect to the execution or settlement of short sales, IIROC and the other members of the Working Group would be in a position to consider appropriate additional regulatory responses.

Summary of the Amendments

The following is a summary of the principal components of the Amendments:

Additional Restrictions on Short Sales

Definition of "Short Sale Ineligible Security"

The Amendments allow the Market Regulator to designate a particular security or a class of securities as being ineligible to be sold "short". The purpose of this provision is to provide additional flexibility to the Market Regulator to respond to developments in trading of a particular security or class of securities if rates of failed trades become, in the opinion of the Market Regulator, excessive.[8] The Amendments also provide an exemption to permit a short sale of a "Short Sale Ineligible Security" if the sale is undertaken in furtherance of Market Maker Obligations or by a derivatives market maker.

The criteria which IIROC would use in pursuing a designation of a security have been specifically set out in Part 4 of Policy 1.1. If, based on reports of failed trades submitted to IIROC in accordance with the requirements of Rule 7.10 or other sources of information, IIROC became aware of systemic failures to settle trades in a particular security or class of securities that were related to short selling activity, the Amendments would permit IIROC to designate the particular security or class of securities as being ineligible for a short sale in the interest of a fair and orderly market. Since the RS Failed Trade Study indicated that short selling was not the primary reason for the existence of failed trades, IIROC is of the view that a statistical threshold would not by itself be appropriate and IIROC must determine that short selling is exacerbating the situation before determining to seek to designate the security as being ineligible for further short selling. IIROC is of the view that there are greater risks to market integrity if a series of dealers experience prolonged trade failures for relatively minor number of shares of security that is illiquid than from the failure of a single block trade (due possibly to administrative problems or delays at a custodian) in a highly-liquid security.

In the view of IIROC, the need to make a designation will be a relatively rare occurrence. Since the introduction of UMIR, there has been no instance when either RS or IIROC would have sought approval for such a designation. However, IIROC acknowledges that the repeal of price restrictions on short sales will likely result in increased volatility for less liquid securities. In addition, IIROC acknowledges that junior issuers are concerned with the possibility of "bear raids". IIROC is of the view that the activity which is part of a "bear raid" will be detected in accordance with existing monitoring standards employed by IIROC

[8] At the time of the drafting of UMIR, CDNX had Rule C.2.12 which provided: "The Exchange may, whenever it shall determine that market conditions so warrant, prescribe a prohibition on short selling". A comparable provision was not incorporated into UMIR on the grounds that the general provisions curtailing abusive short selling made the provision unnecessary.

and that such activity may be contrary to existing prohibitions on manipulative and deceptive behaviour.[9] The concept of a "Short Sale Ineligible Security" is a "backstop" in the event that the repeal of price restrictions on short sales had an "unintended" impact on short selling activity or if short sales were found to be a principal reason for inordinate "failures" in the settlement of trades in a particular security.

IIROC does not believe that a designation will have to be made in "real time". The circumstances which will lead to the need to designate a security will build over a period time (e.g. for a particular security, IIROC may see an increasing number of Failed Trade Reports, issuance of "buy-in" notices by CDS, an increasing proportion of short sales, unusual price or volume movements etc.) No one factor would necessarily lead to IIROC determining to seek a designation. Also, it is not possible to provide quantitative "thresholds" for each of the factors that would be taken into account by IIROC. IIROC would consider the circumstances of the particular issuer (e.g. whether the issuer has outstanding securities in respect of which conversion or other rights are tied to the market price of the security or whether the issuer has announced an intention to undertake a significant public offering, private placement or rights offering).

IIROC will only designate a security as a "Short Sale Ineligible Security" with the concurrence of the applicable securities regulatory authorities. IIROC will seek that concurrence in a designation from:

- each securities regulatory authority governing the conduct of trading of a marketplace on which the security is listed or quoted;
- each securities regulatory authority of a jurisdiction in which the issuer of the listed or quoted security is a reporting issuer; and
- each securities regulatory authority that has given notice to IIROC that it wishes to be consulted on a designation.

While IIROC does not believe that a designation will have to be made in "real time", IIROC nonetheless believes that any designation will have to be "timely" in order to address situations arising in the marketplace. If IIROC detects "unusual circumstances" and that a "problem" was developing, IIROC would generally intend to issue an IIROC Notice providing market participants with notice that, with respect to the particular security, they should ensure their ability to borrow or obtain securities for settlement in advance of any sale. This notice by IIROC would provide an "early warning" to those securities regulatory authorities that would be asked to concur in the designation of any security as being a "Short Sale Ineligible Security". IIROC would continue to monitor trading in the particular security to determine if further action was warranted.

Under the Amendments, a short sale of a security that is designated as a "Short Sale Ineligible Security" may not be made. The Amendments contain a number of exemptions from this prohibition including if the order is entered on a marketplace:

- in furtherance of the applicable Market Maker Obligations in accordance with the Marketplace Rules of that marketplace;
- for the account of a derivatives market maker and is entered:
    - in accordance with the market making obligations of the seller in connection with the security or a related security, and
    - to hedge a pre-existing position in the security or a related security;
- as part of a Program Trade in accordance with Marketplace Rules;

[9] Policy 2.2 of UMIR regarding False or Misleading Appearance of Trading Activity or Artificial Price provides that "entering an order for the sale of a security without, at the time of entering the order, having the reasonable expectation of settling any trade that would result from the execution of the order" would constitute a manipulative and deceptive activity. The provision does not require that the dealer make a "positive affirmation" that it has the ability to settle the trade but merely have a "reasonable expectation" at the time of the entry of the order. Essentially, a Participant may enter a short sale of a security until such time as the Participant knows, or should reasonably have known, that it can no longer borrow the securities to effect settlement. Among the activities precluded by Policy 2.2 is the so-called "death spiral" situations. Historically, a "death spiral" had occurred when an issuer was undergoing certain types of arrangements or capital reorganizations (including voluntary or involuntary conversion of debt to a class of listed equity) that tied the conversion or reorganization ratios to the market price of the security to be issued. As the market price of the listed security fell the number of securities to be issued rose. In anticipation of receiving additional listed securities on the completion of the transaction, investors would sell the additional listed security short into the market resulting in further downward pressure on the market price of the listed security. Since the securities that would be issuable on the arrangement or reorganization would not be available to settle the sales in the ordinary course, the sales would be considered "short sales" for the purposes of UMIR.

- to satisfy an obligation to fill an order imposed on a Participant or Access Person by any provision of UMIR or a Policy; or

- that is of a class of security or type of transaction that has been designated by a Market Regulator.

Exercise of Options, Rights and Warrants

Under the definition of "short sale" in Rule 1.1 of UMIR, a seller shall be considered to own a security under various circumstances including if the seller, directly or through an agent or trustee:

- has purchased or has entered into an unconditional contract to purchase the security, but has not yet received delivery of the security;

- owns another security that is convertible or exchangeable into that security and has tendered such other security for conversion or exchange or has issued irrevocable instructions to convert or exchange such other security;

- has an option to purchase the security and has exercised the option; or

- has a right or warrant to subscribe for the security and has exercised the right or warrant.

The Amendments clarify the circumstances when a seller will be considered to have "converted", "exchanged" or "exercised" securities for the purposes of the definition. Under the Amendments, the seller must have taken all steps necessary to become legally entitled to the security, including having:

- made any payment required;

- submitted to the appropriate person any required forms or notices; and

- submitted, if applicable, to the appropriate person any certificates for securities to be converted, exchanged or exercised.

If the seller has not taken all necessary steps to become legally entitled to the security, the seller will be considered to be making a short sale.

Variation and Cancellation of Trades After Execution

The Amendments introduce a requirement that a trade cannot be cancelled or varied (with respect to: the price of the trade; the volume of the trade; or the date for settlement of the trade) except if the cancellation or variation was made by:

- IIROC in accordance with UMIR; or

- with notice to IIROC immediately following the variation or cancellation of the trade in such form and manner as may be required by IIROC.

Prior to the settlement of the trade, each Participant or Access Person who is a party to a trade may not agree to a cancellation or variation of the trade (with respect to: the price of the trade; the volume of the trade; or the date for settlement of the trade) except through the procedures and facilities offered by the marketplace on which the trade was executed or the clearing agency through which the trade is or was to be cleared and settled. The use of the procedures and facilities provided by the marketplace or the clearing agency will ensure that information regarding the cancellation or variation can be disseminated to the appropriate information vendors.

The addition of the notice requirement should not impose, in the ordinary course, a greater administrative burden upon a Participant or Access Person. The current practice for a Participant or Access Person is to contact CDS to add, vary or cancel trades prior to settlement. CDS reports these variations or cancellations to the marketplace for review and, in turn, the marketplace forwards the report to IIROC. If IIROC concludes that there are no market integrity concerns and agrees with the change, the marketplace amends the official record of the trade. However, if the trade cancellation or variation is made after the settlement of the trade by the clearing agency, notice of the trade cancellation or variation shall be provided to IIROC by each Participant and Access Person that is a party to the trade.

The purpose of the amendment is to ensure that a trade variation or cancellation is not effected outside the normal processes of the marketplaces and CDS unless IIROC is notified of the variation or cancellation and has the opportunity to review the change for possible market integrity concerns. Notice of a trade cancellation or variation will allow IIROC or another regulation services

provider to ensure that the cancellation or variation of the trade is for a bona fide reason and not as part of a manipulative or deceptive manner of trading (including the establishment of a price that would permit other trading activity to then be conducted in nominal compliance with UMIR or other securities regulatory requirements).

Handling of Failed Trades

Report of an Extended "Failed Trade"

Securities regulators generally have a concern regarding the relationship between failed trades and preserving market integrity. In order to ensure that the audit trail for any trade is accurate and that IIROC has sufficient information to evaluate whether trading activity has been conducted in compliance with UMIR and other regulatory requirements, the Amendments introduce a requirement that each Participant or Access Person is required to report to IIROC if a trade that has failed to settle on the settlement date remains unresolved 10 trading days following the settlement date. These reports will allow IIROC to determine if the trade has failed to settle for an "improper" reason (for example, if a sale had been executed as an undeclared short sale).

Once an initial report of a "failed trade" had been filed with IIROC, the Participant or Access Person will be required to file a second report once the account has cured the default. In this way, IIROC will be in a position to monitor trends in "failed trades" including the steps which a Participant or Access Person may be taking to rectify the default. Information from the reports will be used by IIROC in making a determination whether a particular security should be designated as a "Short Sale Ineligible Security". (See "Definition of "Short Sale Ineligible Security" on pages 10 to 12.)

IIROC expects that both the initial report of a failed trade and the report of the closing out of the position will be filed electronically with IIROC in a standard form that permits IIROC to assemble the information in a database for analysis purposes. The Amendments provide that such reports are to be filed at such time as may be required by IIROC. At this time, IIROC expects that the initial report will be provided to IIROC on the eleventh trading day following the "failure" and that the "close-out" report will be provided to IIROC by the end of trading day following the cure of the default. (See "Implementation Plan" on pages 17 and 18.)

The initial failed trade will indicate the steps that have been taken to resolve the "failure" in the preceding 10 business days and which are proposed to be taken to resolve the failure. A "close-out" report is also required to be filed which will indicate the steps which were ultimately taken to resolve the failure. During the period between the initial report and the close-out report, IIROC would be in a position to inquire of a Participant or Access Person as to whether additional steps had been taken since the filing of the initial report. In making such requests, IIROC would rely on its general investigative power under Rule 10.2 of UMIR in the same manner as IIROC does in a review or investigation of other trading activity.

Definition of a "Failed Trade"

The Amendments define a "failed trade" as a trade resulting from the execution of an order entered by a Participant or Access Person on a marketplace on behalf of an account and,

- in the case of a sale other than a short sale, the account failed to make available securities in such number and form;
- in the case of a short sale, the account failed to make:
  - available securities in such number and form, or
  - arrangements with the Participant or Access Person to borrow securities in such number and form; and
- in the case of a purchase, the account failed to make available monies in such amount,

as to permit the settlement of the trade at the time on the date contemplated on the execution of the trade. The definition also confirms that a trade shall be considered a "failed trade" irrespective of whether the trade has been settled in accordance with the rules or requirements of the clearing agency. The definition measures the existence of a "failed trade" at the account level and the default of the account holder in meeting settlement obligations. For example, if a Participant "fails" to settle both the purchase and sale of a given amount of a particular security, the position of the Participant at the clearing agency may be "accurate" as a result of continuous net settlement but there remain two accounts which have defaulted on their settlement obligations. If this default persisted for a period of ten trading days beyond the normal settlement date, each of the accounts would be considered to have a "failed trade".

Each Participant is already "monitoring" each trade failure. Presently, the "failure" is a credit issue as the account which made a sale has failed to deliver the securities or has delivered securities which are not in a "good delivery" form (e.g. the securities are

subject to a legend which has not been removed) or failed to deliver cash in the case of a purchase. The Participant is obligated to settle any trade which it has executed and may be subject to "buy-in" procedures. If the Participant has settled the trade, the Participant must recover either the securities or the money from the account which made the trade. IIROC acknowledges that the current policies and procedures of most Participants do not necessarily provide for this information to come to the attention of the compliance department. The change which is introduced by the Amendments will only require this information to be made available to compliance for the purposes of making a report to IIROC in the event that the failure has persisted for a period of more than 10 days.

Anti-Avoidance Provisions

The trigger for the reporting obligation with respect to a failed trade is for the account to have been in default for a period of 10 trading days after the original settlement date of the trade. The Amendments make a consequential amendment to Policy 2.1 to confirm that entering into a transaction or series of transactions in an attempt to "re-age" the default such that a report of the original failed trade would not have to be filed would be considered a violation of the requirement to conduct trading openly and fairly.

Summary of the Impact of the Amendments

The following is a summary of the most significant impacts of the adoption of the Amendments:

- limits the ability to vary (with respect to price, volume or settlement date) or cancel a trade after execution unless notice has been provided to a Market Regulator;
- requires a report of a "failed trade" be made if the reason for the failure is not resolved within ten trading days following the original settlement date of the trade; and
- provides that the Market Regulator may designate particular securities or class of securities as being ineligible for short selling.

Certain of the Amendments, while approved by the applicable securities regulatory authorities, will become effective on a future date. ***See "Implementation Plan" on pages 17 and 18.***

The provisions of the Short Sale and Failed Trade Proposal to:

- ***remove the restrictions on the price at which a short sale may be executed; and***
- ***eliminate the requirement to file "Short Position Reports"***

have been deferred and are not part of the Amendments.

Summary of Changes from the Short Sale and Failed Trade Proposal

The Amendments specifically vary aspects of the Short Sale and Failed Trade Proposals, including:

(a) the deferral of the proposal to repeal the price restrictions on short sales;

(b) setting out the factors to be taken into account by the Market Regulator in determining whether to designate a particular security as being a "Short Sale Ineligible Security";

(c) introducing an exemption from the requirement for the marking of short sales if the order has been automatically generated by the trading system of an Exchange or QTRS in accordance with the Marketplace Rules in respect of the applicable Market Maker Obligations;

(d) introducing an exemption to permit a short sale of a "Short Sale Ineligible Security" if the sale is undertaken in furtherance of Market Maker Obligations or by a derivatives market maker;

(e) deleting the proposed power of a Market Integrity Official to cancel certain failed trades if there was no reasonable prospect that the "failure" would be rectified;

(f) making editorial changes to the definition of "short sale" to further clarify when a seller will be considered to hold a security;

(g) making an editorial change to refer to "UMIR" rather than "the Rules" to reflect drafting changes made to

UMIR consequential on the merger of RS and IDA; and

(h) the deferral of the proposal to repeal the requirement for Participants and Access Persons to prepare and file a "short position report".

Implementation Plan

Reports of Extended "Failed Trades"

With the approval of Amendments related to a Participant or Access Person providing notice to IIROC of an extended "failed trade", IIROC will implement a secure electronic method for a Participant or Access Person to provide such notice or report to IIROC. In order to provide Participants and Access Persons with an opportunity to make changes to their policies and procedures to accommodate the introduction of these notice and reporting obligations, implementation of the various provisions related to the provision of notice to IIROC of such extended failed trades is deferred until March 1, 2009.

On or before February 1, 2009, IIROC will issue an IIROC Notice setting out the content of the required reports and the procedures for filing such report electronically with IIROC. As presently contemplated, the report would include the identification of:

- the trade, including the security, volume and price;
- the marketplace including the time of execution and any identification number assigned by the marketplace to the trade;
- the dealers that were parties to the trade;
- the holder of the account that "failed" including the account name and number;
- the trader or investment adviser entering the order on behalf of the account;
- the type of order entered and any terms, conditions or consents attached to the handling of the order;
- the markers attached to the order, including whether the order was a short sale, jitney order, insider order or significant shareholder order;
- reason for the failure;
- the steps taken in the preceding 10 business days to resolve the failure; and
- the additional steps proposed to be taken to resolve the failure.

Reports of Trade Variations and Cancellation

With the approval of Amendments related to a Participant or Access Person providing notice to IIROC of a variation or cancellation of a trade subsequent to its execution, IIROC will implement a secure electronic method for a Participant or Access Person to provide such notice or report to IIROC. (Prior to the settlement of the trade, any notice of variation or cancellation would be provided to IIROC by the marketplace or clearing agency). In order to provide Participants and Access Persons with an opportunity to make changes to their policies and procedures to accommodate the introduction of these notice and reporting obligations, implementation of the various provisions related to the provision of notice to IIROC of such trade variations and cancellation is deferred until March 1, 2009. On or before February 1, 2009, IIROC will issue an IIROC Notice setting out the content of the required reports and the procedures for filing such report electronically with IIROC.

Appendices

- Appendix "A" sets out the text of the Amendments to the Rules and Policies respecting short sales and failed trades; and
- Appendix "B" sets out a summary of the comment letters received in response to the Request for Comments on the Short Sale and Failed Trade Proposal set out in Market Integrity Notice 2007-017 - *Request for Comments – Provisions Respecting Short Sales and Failed Trades* (September 7, 2007). Appendix "B" also sets out the response of IIROC to the comments received and provides additional commentary on the revisions the Amendments made to the Short Sale and Failed Trade Proposal.

Appendix "A"

Provisions Respecting Short Sales and Failed Trades

The Universal Market Integrity Rules are hereby amended as follows:

1. Rule 1.1 is amended by:

(a) adding the following definition of "failed trade":

"failed trade" means a trade resulting from the execution of an order entered by a Participant or Access Person on a marketplace on behalf of an account and

(a) in the case of a sale, other than a short sale, the account failed to make available securities in such number and form;

(b) in the case of a short sale, the account failed to make:

(i) available securities in such number and form, or

(ii) arrangements with the Participant or Access Person to borrow securities in such number and form; and

(c) in the case of a purchase, the account failed to make available monies in such amount,

as to permit the settlement of the trade at the time on the date contemplated on the execution of the trade provided a trade shall be considered a "failed trade" irrespective of whether the trade has been settled in accordance with the rules or requirements of the clearing agency.

(b) varying the definition of "short sale" by:

(i) inserting at the end of the opening the phrase ", directly or through an agent or trustee",

(ii) inserting at the beginning of clause (b) "owns another security that is convertible or exchangeable into that security and",

(iii) deleting clause (e) and substituting the following:

(e) has entered into a contract to purchase a security that trades on a when issued basis and such contract is binding on both parties and subject only to the condition of issuance or distribution of the security,

(c) adding the following definition of "Short Sale Ineligible Security":

"Short Sale Ineligible Security" means a security or a class of securities that has been designated by a Market Regulator to be a security in respect of which an order that on execution would be a short sale may not be entered on a marketplace for a particular trading day or trading days.

2. Part 3 of UMIR is amended by adding the following as Rule 3.2:

3.2 Prohibition on Entry of Orders

(1) A Participant or Access Person shall not enter an order to sell a security on a marketplace that on execution would be a short sale:

(a) unless the order is marked as a short sale in accordance with subclause 6.2(1)(b)(viii) or subclause 6.2(1)(b)(ix); or

(b) if the security is a Short Sale Ineligible Security at the time of the entry of the order.

(2) Clause (a) of subsection (1) does not apply to an order automatically generated by the trading system of an Exchange or QTRS in accordance with the Marketplace Rules in respect of the applicable Market Maker Obligations.

(3) Clause (b) of subsection (1) does not apply to an order entered on a marketplace:

(a) in furtherance of the applicable Market Maker Obligations in accordance with the Marketplace Rules of that marketplace;

(b) for the account of a derivatives market maker and is entered:

(i) in accordance with the market making obligations of the seller in connection with the security or a related security, and

(ii) to hedge a pre-existing position in the security or a related security;

(c) as part of a Program Trade in accordance with Marketplace Rules;

(d) to satisfy an obligation to fill an order imposed on a Participant or Access Person by any provision of UMIR or a Policy; or

(e) that is of a class of security or type of transaction that has been designated by a Market Regulator.

3. Adding the following as Rule 7.10

7.10 Extended Failed Trades

(1) If within ten trading days following the date for settlement contemplated on the execution of a failed trade, the account:

(a) in the case of a sale, other than a short sale, that failed to make available securities in such number and form;

(b) in the case of a short sale, that failed to make:

(i) available securities in such number and form, or

(ii) arrangements with the Participant or Access Person to borrow securities in such number and form; and

(c) in the case of a purchase, that failed to make available monies in such amount,

as to permit the settlement of the trade at the time on the date contemplated on the execution of the trade has not made available such securities or monies or has not made arrangements for the borrowing of the securities, as the case may be, the Participant or Access Person that entered the order on a marketplace shall give notice to the Market Regulator at such time and in such form and manner and containing such information as may be required by the Market Regulator.

(2) If a Participant or Access Person is required to provide notice of a failed trade to the Market Regulator in accordance with subsection (1), the Participant or Access Person shall, upon the account making available the applicable securities or monies or making arrangement for the borrowing of the applicable securities, give notice to the Market Regulator at such time and in such form and manner and containing such information as may be required by the Market Regulator.

4. Adding the following as Rule 7.11

7.11 Variation and Cancellation of Trades

No trade executed on a marketplace shall, subsequent to the execution of the trade, be:

(a) cancelled; or

(b) varied with respect to:

(i) the price of the trade,

(ii) the volume of the trade, or

(iii) the date for settlement of the trade,

except:

(c) by the Market Regulator in accordance with UMIR; or

(d) with notice to the Market Regulator immediately following the variation or cancellation of the trade in such form and manner as may be required by the Market Regulator and such notice shall be given, if the variation or cancellation is made:

(i) prior to the settlement of the trade, by:

(A) the marketplace on which the trade was executed, or

(B) the clearing agency through which the trade is or was to be cleared and settled, and

(ii) after the settlement of the trade, by each Participant and Access Person that is a party to the trade.

The Policies to the Universal Market Integrity Rules are hereby amended as follows:

1. Policy 1.1 is amended by adding the following Parts:

Part 3 – Definition of "Short Sale"

Under the definition of "short sale", a seller shall be considered to own a security under various circumstances including if the seller, directly or through an agent or trustee:

- owns another security that is convertible or exchangeable into that security and has tendered such other security for conversion or exchange or has issued irrevocable instructions to convert or exchange such other security;
- has an option to purchase the security and has exercised the option; or
- has a right or warrant to subscribe for the security and has exercised the right or warrant.

In each of these circumstances, the seller must have taken all steps necessary to become legally entitled to the security, including having:

- made any payment required;
- submitted to the appropriate person any required forms or notices; and
- submitted, if applicable, to the appropriate person any certificates for securities to be converted, exchanged or exercised.

Part 4 – Definition of "Short Sale Ineligible Security"

Under the definition of a "short sale ineligible security", the Market Regulator may designate a security or class of securities in respect of which an order that on execution would be a short sale may not be entered on a marketplace for a particular trading day or trading days. In determining whether to make such a designation, the Market Regulator shall consider whether:

- based on reports of failed trades submitted to the Market Regulator in accordance with Rule 7.10 or other information known to the Market Regulator, there is in a particular security or class of securities an unusual number or pattern of failed trades by more than one Participant or Access Person;

- the number or pattern of failed trades is related to short selling; and
- the designation would be in the interest of maintaining a fair and orderly market.

2. Part 1 of Policy 2.1 is amended by deleting the second paragraph and substituting the following:

> Participants and Access Persons who intentionally organize their business and affairs with the intent or for the purpose of avoiding the application of a Requirement may be considered to have engaged in behaviour that is a failure to conduct business openly and fairly or in accordance with just and equitable principles of trade. For example, the Market Regulator considers that a person who is under an obligation to enter orders on a marketplace who "uses" another person to make a trade off of a marketplace (in circumstances where an "off-market exemption" is not available) to be violating the requirement to conduct business openly and fairly or in accordance with just and equitable principles of trade. Similarly, the Market Regulator considers that a person who enters into a transaction for the purpose of rectifying a failure in connection with a failed trade prior to the time that a report must be filed in accordance with Rule 7.10 and such person knows or ought reasonably to know that such transaction will result in a failed trade to be engaging in "re-aging" for the purpose of avoiding reporting obligations contrary to the requirement to conduct business openly and fairly or in accordance with just and equitable principles of trade.

Appendix "B"

Comments Received in Response to
Market Integrity Notice 2007-017 – *Request for Comments - Provisions Respecting Short Sales and Failed Trades*

On September 7, 2007, Market Integrity Notice 2007-017 – *Request for Comments – Provisions Respecting Short Sales and Failed Trades* was published requesting comments on proposed amendments to UMIR respecting various aspects of short sales and failed trades ("Short Sale and Failed Trades Proposal"). Comments were received on the Short Sale and Failed Trades Proposal from:

Absolute Software Corporation ("Absolute")
Acuity Investment Management Inc. ("Acuity")
Alternative Investment Management Association ("AIMA")
BMO Nesbitt Burns ("BMO")
Canaccord Capital ("Canaccord")
Canada Pension Plan Investment Board ("CPPIB")
Canadian Security Traders Association, Inc. ("CSTA")
Canadian Trading and Quotation System Inc. ("CNQ")
Donald Coates ("Coates")
Connor, Clark, & Lunn Investment Management Ltd. ("CCLIM")
Globex Mining Enterprises Inc. ("Globex")
International Association of Small Broker-Dealers and Advisers ("IASBDA")
Investment Industry Association of Canada ("IIAC")
ITG Canada Corp. ("ITG")
Morgan Stanley Canada ("MS")
David Patch ("Patch")
Platinum Group Metals Ltd. ("Platinum")
RBC Dominion Securities ("RBC")
Sentry Select Capital Corp. ("Sentry")
Simon Romano ("Romano")
Swift Trade Inc. ("Swift")
TD Newcrest ("TD")
Trinidad Energy Services Income Trust ("Trinidad")
TSX Group Inc. ("TSX Group")
Virgin Metals Inc. ("Virgin")

A copy of each comment letter submitted in response to the Short Sale and Failed Trade Proposal is publicly available on the IIROC website (www.iiroc.ca under the heading "Policy" and sub-heading "Market Proposals/Comments"). The following table presents a summary of the comments received on the Short Sale and Failed Trade Proposal together with the response of IIROC to those comments. Column 1 of the table highlights the revisions to the Short Sale and Failed Trade Proposal made by IIROC in response to these comments and the comments of the Recognizing Regulators.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
1.1 Definitions **"failed trade"** means a trade resulting from the execution of an order entered by a Participant or Access Person on a marketplace on behalf of an account and (a) in the case of a sale, other than a short sale, the account failed to make available securities in such number and form; (b) in the case of a short sale, the account failed to make: (i) available securities in such number and form, or	BMO – Does not fundamentally disagree with proposed definition of "failed trade" but has concerns regarding administrative burden of failed trade reporting.	See responses to comments on Rule 7.10.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
(ii) arrangements with the Participant or Access Person to borrow securities in such number and form; and (c) in the case of a purchase, the account failed to make available monies in such amount, as to permit the settlement of the trade at the time on the date contemplated on the execution of the trade provided a trade shall be considered a "failed trade" irrespective of whether the trade has been settled in accordance with the rules or requirements of the clearing agency.		
"short sale" means a sale of a security, other than a derivative instrument, which the seller does not own either directly or through an agent or trustee and, for this purpose, a seller shall be considered to own a security if the seller, directly or through an agent or trustee: (a) has purchased or has entered into an unconditional contract to purchase the security, but has not yet received delivery of the security; (b) owns ~~directly or through an agent or trustee~~ another security that is convertible or exchangeable into that security and has tendered such other security for conversion or exchange or has issued irrevocable instructions to convert or exchange such other security; (c) has an option to purchase the security and has exercised the option; (d) has a right or warrant to subscribe for the security and has exercised the right or warrant; or (e) ~~is making a sale of a security that trades on a when issued basis and the seller~~ has entered into a contract to purchase a security that trades on a when issued basis ~~such security which~~ and such contract is binding on both parties and subject only to the condition of issuance ~~of~~ or ~~distribution~~ of the security, but a seller shall be considered not to own a security if: (f) the seller has borrowed the security to be delivered on the settlement of the trade and the seller is not otherwise considered to own the security in accordance with this	**Romano** – The "agent or trustee" qualification in paragraph (b) of the definition of "short sale" should also apply to (a), (c), (d) and (e).	IIROC has made the suggested change and in doing so has made certain consequential amendments to Part 3 of Policy 1.1 and to clause (e) of the definition to ensure consistent structure.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
definition; (g) the security held by the seller is subject to any restriction on sale imposed by applicable securities legislation or by an Exchange or QTRS as a condition of the listing or quoting of the security; or (h) the settlement date or issuance date pursuant to: (i) an unconditional contract to purchase, (ii) a tender of a security for conversion or exchange, (iii) an exercise of an option, or (iv) an exercise of a right or warrant would, in the ordinary course, be after the date for settlement of the sale.		
"Short Sale Ineligible Security" means a security or a class of securities that has been designated by a Market Regulator to be a security in respect of which an order that on execution would be a short sale may not be entered on a marketplace for a particular trading day or trading days.	**Absolute** – Difficult to rationally implement due to the challenge of determining appropriate characteristics to qualify for inclusion on the list.	IIROC believes that a subjective rather than an objective test is the most appropriate. IIROC intends to look at the "situation" of a particular security in relation to its historic "record" of trading activity.
	BMO – Generally, supports ability to designate, but would like further clarification as to threshold of failed trades or other factors used to determine designation and queries whether such factors will be published.	The criteria which IIROC would use in pursuing a designation of a security were set out in the Market Integrity Notice containing the Proposed Amendments. The Amendments vary the Proposed Amendments and incorporate these criteria as Part 4 of Policy 1.1. If, based on reports of failed trades submitted to IIROC in accordance with the Rule 7.10 or other sources of information, IIROC became aware of systemic failures to settle trades in a particular security or class of securities that were related to short selling activity, the Amendments permit IIROC to designate the particular security or class of securities as being ineligible for a short sale in the interest of a fair and orderly market. Since the

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
		study by IIROC of failed trades indicated that short selling was not the primary reason for the existence of failed trades, IIROC is of the view that a statistical threshold would not by itself be appropriate and IIROC must determine that short selling is exacerbating the situation before determining to seek to designate the security as being ineligible for further short selling.
	Canaccord – Notes that removing a security or class of securities from the new pricing regime may entail a great deal of effort from multiple vendors, exchanges and ATSs to build an exception facility.	IIROC expects that the designation of a security as being a "Short Sale Ineligible Security" would be a relatively "rare" occurrence. Provision for system enforcement of the prohibition on short sales could be at the level of marketplaces, service providers and/or the Participants and Access Persons. If the restriction is not system enforced at one of these levels, IIROC would expect a Participant to employ its "special handling procedures" to route sell orders for the particular security to a trade desk.
	CSTA – IIROC must further quantify reasons for designation as ineligible for short sale. Failed trades may not be the only consideration.	See response to BMO comment above.
	IIAC – In the absence of specific criteria and guidelines, IIROC should allow an efficient market to dictate.	The test is the ability to maintain a fair and orderly market. IIROC does not believe that a uniform pre-determined threshold is appropriate for varying market conditions and types of securities. See response to BMO comment above.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
	ITG – An "ineligible" designation may have a negative impact as such trades provide needed liquidity. More appropriate for IIROC to use UMIR 2.2 to address integrity issues.	The application of the restrictions in Rule 2.2 on the ability to make a short sale is determined by the circumstances of the particular Participant or Access Person. The "Short Sale Ineligible" designation would apply when the failures to settle are becoming systemic such that a fair and orderly market for the particular security ceases to exist or there are other recognized risks to market integrity arising out of continued short selling of the security. IIROC questions whether a trade that has a significant likelihood of failing or that is a risk to market integrity has provided "needed liquidity".
	MS, TD and **TSX** – Supports IIROC ability to monitor, intervene and designate a security or class as ineligible to be sold short where market conditions warrant.	IIROC acknowledges support for the proposal.
	RBC – Clearly defined criteria are needed with clarification on how the list will be communicated. Asks: Can a dealer short if he can locate, even if security is on the list?	See response to BMO comment above. If IIROC designated a security, IIROC would intend to communicate that fact through the issuance of a Rules Notice. The purpose of the designation would be to preclude any short sale even if the seller can locate a source to lend the security.
	Romano – Proposed definition should allow for IIROC to establish terms and conditions under which otherwise ineligible short sales would be permitted. Alternatively, current exemptions in UMIR 3.1(2) should be allowed in all cases.	IIROC has the ability to grant exemptions on a case by case basis pursuant to Rule 11.1. However, IIROC acknowledges that market makers (for both the equity and underlying derivatives) may need to complete short sales even in circumstances when the security is otherwise ineligible for a short sale. For this reason, the Amendments revised the Proposed Amendments and added subsections (2) and (3) to what will become Rule 3.2.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
	Trinidad – Requests criteria be set out publicly.	See response to BMO comment above.
3.1 Restrictions on Short Selling (1) Except as otherwise provided, a Participant or Access Person shall not make a short sale of a security on a marketplace unless the price is at or above the last sale price. (2) A short sale of a security may be made on a marketplace at a price below the last sale price if the sale is: (a) a Program Trade in accordance with Marketplace Rules; (b) made in furtherance of the applicable Market Maker Obligations in accordance with the Marketplace Rules; (c) for an arbitrage account and the seller knows or has reasonable grounds to believe that an offer enabling the seller to cover the sale is then available and the seller intends to accept such offer immediately; (d) for the account of a derivatives market maker and is made: (i) in accordance with the market making obligations of the seller in connection with the security or a related security, and (ii) to hedge a pre-existing position in the security or a related security; (e) the first sale of the security on any marketplace made on an ex-dividend, ex-rights or ex-distribution basis and the price of the sale is not less than the last sale price reduced by the cash value of the dividend, right or other distribution; (f) the result of: (i) a Call Market Order, (ii) a Market-on-Close Order (iii) a Volume-Weighted Average		Given the initiatives which are being undertaken or proposed by foreign securities regulators with respect to the conduct of short sales, IIROC has determined to defer consideration of the proposal to remove price restrictions on all short sales. The Impact Study will analyze the effect of the repeal of price restrictions on the trading of securities inter-listed between the TSX and other exchanges in the United States that became effective in July of 2007. Until additional information can be gathered on the effect of the price restrictions, Rule 3.1 will be retained and the provision in the Proposed Amendments that would have been Rule 3.1 will be renumbered as Rule 3.2.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
Price Order (iv) a Basis Order, or (v) a Closing Price Order; (g) a trade in an Exchange-traded Fund; or (h) made to satisfy an obligation to fill an order imposed on a Participant or Access Person by any provision of UMIR or a Policy.		
3.2 Prohibition on Entry of Orders (1) A Participant or Access Person shall not enter an order to sell a security on a marketplace that on execution would be a short sale: (a) unless the order is marked as a short sale in accordance with subclause 6.2(1)(b)(viii) or subclause 6.2(1)(b)(ix); or (b) if the security is a Short Sale Ineligible Security at the time of the entry of the order. (2) Clause (a) of subsection (1) does not apply to an order automatically generated by the trading system of an Exchange or QTRS in accordance with the Marketplace Rules in respect of the applicable Market Maker Obligations. (3) Clause (b) of subsection (1) does not apply to an order entered on a marketplace: (a) in furtherance of the applicable Market Maker Obligations in accordance with the Marketplace Rules of that marketplace; (b) for the account of a derivatives market maker and is entered: (i) in accordance with the market making obligations of the seller in connection with the security or a related security, and (ii) to hedge a pre-existing position in the security or a related security; (c) as part of a Program Trade in accordance with Marketplace Rules;	**Absolute, Globex and Platinum** – The removal of the restrictions threatens investors in low-volume Canadian issuers and the issuers themselves with an increased likelihood of market manipulation. The volatility and downward price pressure associated with minimally restrained short selling can artificially reduce shareholders' returns and negatively impact small cap issuers' ability to access capital as share prices decouple from underlying fundamentals and react to amplified market pressures. The change could cause issuers and investors to lose confidence in the fairness of Canadian markets.	In the ordinary course, the objective of a short seller is no different than the seller of a security from a long position in that they want to maximize the proceeds of any sale. Persons who enter orders with the intention of effecting an "artificial" price (either through a purchase or sale or through the use of margin or a short sale) is engaging in manipulative behaviour which is proscribed by existing rules and detected by existing alerts in the monitoring systems of IIROC.
	Acuity and **Sentry** – Opposed to the outright repeal of price restrictions due to potential to increase volatility and create unnecessary concern on the part of retail investors.	As indicated in the Market Integrity Notice, a significant number of securities in the United States (including the Nasdaq Small Cap Market) were never subject to price restrictions on short sales and others were covered by the Pilot Project described in the notice. IIROC will undertake an "Impact Study" to determine if the repeal of price restrictions on inter-listed securities has any measurable effect on price volatility in the Canadian context (e.g. have the inter-listed securities had a pattern of volatility that is statistically significant from the pattern experienced by Canadian securities that remain subject to price restrictions on short sales). The Pilot Project in the US indicated that the repeal of price restrictions on short sales

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(d) to satisfy an obligation to fill an order imposed on a Participant or Access Person by any provision of UMIR or a Policy; or (e) that is of a class of security or type of transaction that has been designated by a Market Regulator.		resulted in lower volatility for larger stocks but there were some evidence of increased volatility for smaller and less liquid securities.
	AIMA, IIAC, ITG, Swift and **TD** – Supports the repeal of price restrictions.	IIROC acknowledges support for the proposal.
	BMO, CPPIB and **CSTA** – Supports the repeal of price restrictions. Elimination of price restrictions will have the effect of facilitating efficient price discovery and enhancing liquidity and best execution.	IIROC acknowledges support for the proposal.
	Canaccord – Supports the repeal of price restrictions but acknowledges that less liquid stocks may prove more problematic (and IIROC should monitor to ensure no undue pressures).	The repeal of price restrictions on short sales would not effect existing "anti-manipulation" provisions under UMIR. As short sales will be marked, IIROC would, in the event of the repeal of all price restrictions on short sales, be able to continue to monitor the effect of short selling activity using existing alerts for the detection of possible manipulative behaviour. This is currently the case with respect to the monitoring of trading on inter-listed securities that are covered by the Inter-listed Exemption.
	CCLIM – Supports the repeal of price restrictions as such restrictions add to trading costs, reduce market efficiency and do not prevent manipulation. Existing restrictions inhibit efficient price discovery by requiring a "passive execution approach to short sales" thereby sacrificing "immediacy and execution certainty". The tick test does not prevent manipulation and reliance should instead be put on Policy 2.2.	IIROC acknowledges support for the proposal.
	CNQ - Tick test is unnecessary as manipulation is prohibited under other provisions of UMIR.	See response to Canaccord above.
	Patch – "Piggybacking" on the US analysis may be disastrous for the Canadian market. US markets have become volatile and unruly since	IIROC proposes to test the effect of the repeal of the price restrictions on short sales through an "Impact Study". In

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	the removal of the tick test. Eliminating tick test while allowing naked shorting is a recipe for disaster.	the near term, such a test will involve a comparison of trading in securities which are currently exempt from short sale restrictions with those that remain subject to such restrictions.
	RBC – Supports the repeal of price restrictions but believes other safeguards must be put into place to prevent unrestrained downward pressure on securities.	See response to Canaccord above.
	Sentry – Allowing unfettered short selling by hedge funds and arbitrageurs would promote "bear raids" against many Canadian long-term savings. Since exchange rules preclude issuer bids being executed on an "uptick", downticking by short sellers would prevent management from acting in best interests of long-term shareholders during "bear raids". Expectation that the absence of price restrictions on short sales will increase volatility and in time of significant market pullbacks it will exacerbate the situation and potentially result in market crashes.	Other rules exist to preclude manipulative behaviour whether it is abusive short selling or "upticking" for the purpose of establishing an artificial price. In the ordinary course, hedge funds or arbitrageurs in executing a short sale have the same objective as a "long-term" investor selling from a long position and that is to maximize proceeds from any sale. Attempts to establish an artificial price, either high or low, is considered manipulative. Issuer bids are to be executed at the lowest price available thereby maximizing value for the remaining shareholders. Purchases under an issuer bid can maintain the price but not increase it. The proper parallel to restricting short sales to a price at or above the last sale price would be to restrict purchases by investors on margin to a price at or below the last sale price.
	Swift – General market manipulation rules are sufficient, and in fact preferable.	See response to Canaccord above.
	Trinidad – Data should be collected through a "pilot project" on the adequacy of existing system monitors before implementation of tick test changes. IIROC must look at all alternatives (since IIROC has stated that US-style locate rule is not the answer).	Existing alerts detect possible manipulative trading behaviour irrespective of whether the order is from a long, short or undeclared short position. IIROC proposes to add additional alerts which detect significant changes in the

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		pattern of short sales for a particular security. IIROC has questioned the applicability of locate requirements to reduce failed trades as there is no evidence in Canada of a relationship between short sales and failed trades.
	TSX Group – Supports the repeal of all price restrictions. System enforced freeze capabilities administered by TSX and TSXV (freezes trading in a security if price movement exceeds predetermined amounts) will assist IIROC in identifying any manipulation.	IIROC acknowledges that the existing "freeze parameters" used by TSX and TSXV (and also CNQ) will also curtail any move to increased volatility that may accompany a repeal of the price restrictions on short sales.
	Virgin – Concerned that unfettered short selling during a period when a company can not announce the extent of "efforts in-progress" will affect the share price and negatively impact the ability of the company to complete a financing. Also concerned on the impact on the grant of options.	Rates of short selling vary significantly based on the liquidity of the particular security (e.g. more than 30% of sales of securities on the TSX inter-listed with a US market to only 2% to 4% in general for securities listed on the TSXV or CNQ). See also response to Sentry comment above.
6.2 Designations and Identifiers (1) Each order entered on a marketplace shall contain: … (b) a designation acceptable to the Market Regulator for the marketplace on which the order is entered, if the order is: (i) a Call Market Order, (ii) an Opening Order, (iii) a Market-on-Close Order, (iv) a Special Terms Order, (v) a Volume-Weighted Average Price Order, (v.1) a Basis Order, (v.2) a Closing Price Order, (vi) part of a Program Trade,	**BMO** and **CSTA** – Supports the elimination of the "short exempt" marker.	IIROC acknowledges support for the proposal. However, with the decision of IIROC to defer final consideration of that aspect of the Short Sale and Failed Trade Proposal regarding the repeal of all price restrictions on short sales, provisions related to "short exempt" orders will also be deferred.
	ITG - Supports elimination of the "short exempt" marker but concerned as to how this will affect bundled trades and asks for clarification from IIROC on how bundled trades should be marked and entered. Recommend that bundled trades should continue to be entered as a single trade but marked "short".	Generally, a sale order from a long position may not be bundled together with a sell order from a short position and entered on a marketplace as a single order. Reference should be made to Market Integrity Notice 2005-025 – *Guidance – Bundling Orders from a Long and Short Position* (July 27, 2005). Once price restrictions on short sales are removed, one of the principal reasons for wanting to be able to enter a bundled order also will be removed. In the event that a short sale is bundled with a

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(vii) part of an intentional cross or internal cross, (viii) a short sale which is subject to the price restriction under subsection (1) of Rule 3.1, (ix) ~~[repealed]~~a short sale which is exempt from the price restriction on a short sale in accordance with subsection (2) of Rule 3.1, (x) a non-client order, (xi) a principal order, (xii) a jitney order, (xiii) for the account of a derivatives market maker, (xiv) for the account of a person who is an insider of the issuer of the security which is the subject of the order, (xv) for the account of a person who is a significant shareholder of the issuer of the security which is the subject of the order, or (xvi) of a type for which the Market Regulator may from time to time require a specific or particular designation.		sale from a long position, IIROC has required that the order be marked with the most restrictive applicable markers. IIROC has introduced new procedures to permit the order markings to be corrected in these circumstances. Reference should be made to IIROC Notice 08-0033 - Rules Notice – Guidance Note – UMIR – *New Procedures for Order Marker Corrections* (July 15, 2008).
	MS – Supports continuation of marking "short sale" orders. Existing requirement to mark "short exempt" is unnecessary and undue burden.	IIROC acknowledges support for the proposal. See response to comments of BMO and CSTA above.
7.10~~4~~ Extended Failed Trades (1) If within ten trading days following the date for settlement contemplated on the execution of a failed trade, the account: (a) in the case of a sale, other than a short sale, that failed to make available securities in such number and form; (b) in the case of a short sale, that failed to make: (i) available securities in such number and form, or (ii) arrangements with the Participant or Access Person to borrow securities in such	**BMO** – IIROC Statistical Study found that failed trades usually due to administrative error and found no evidence of impact on market integrity. Administrative burden of reporting not warranted. Implementation of NI 24-101 imposes requirement to settle trades within prescribed timeframes. Impact Study could compare fail rates and short sales before and after implementation of NI 24-101.	It is not accurate to say that the IIROC Statistical Study found "no evidence of impact on market integrity". It found that the primary reason for trade failure was administrative error. IIROC acknowledges in the Market Integrity Notice that NI 24-101 imposes a requirement to match trades within prescribed timeframes. The reporting requirement under Rule 7.10 is triggered at 10 days following the date otherwise established for settlement is well beyond the timeframe contemplated in NI 24-101. IIROC does not expect a large number of reports of failed trades.

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number and form; and (c) in the case of a purchase, that failed to make available monies in such amount, as to permit the settlement of the trade at the time on the date contemplated on the execution of the trade has not made available such securities or monies or has not made arrangements for the borrowing of the securities, as the case may be, the Participant or Access Person that entered the order on a marketplace shall give notice to the Market Regulator at such time and in such form and manner and containing such information as may be required by the Market Regulator.		Rather, IIROC expects Participants will ensure that policies and procedures adopted for the purposes of NI 24-101 and UMIR will maximize resolution of trades prior to the time at which a failed trade report would be required. IIROC has revised the title of the rule to add the word "Extended" to clearly indicate the intention that the reporting obligation applies to a limited subset of failed trades.
	Canaccord – No evidence exists that (i) proves a correlation between short selling and trade failure or that (ii) Participating Organizations have a systematic problem with trade failures. Trade fails reporting is unnecessary. It adds no integrity value but adds unnecessary overhead costs.	IIROC acknowledges that there is no direct correlation between short selling and trade failure. For this reason, IIROC opposes the concept of a US-style "fails" list. However, trade failure is an integrity matter and IIROC is introducing a requirement to report failed trades that have not been resolved within a "reasonable period of time" (e.g. 10 days following the intended settlement date). In the view of IIROC, this additional time would allow for the correction of administrative errors.
	CNQ – Supports proposal that dealers must report delivery failures more than 10 trading days old. Reports will give IIROC early warning of situations where stock to cover shorts may be difficult to borrow.	IIROC acknowledges support for the proposal.
	IASBDA – Proposed disclosure of fails requirement is a more effective tool than those used in the U.S. (eg. locate requirement), as it will provide a good understanding of why the trades failed and will allow you to take further action, only if needed. Suggests modifying to exempt small trades, so that IIROC can concentrate on larger trades.	IIROC acknowledges support for the proposal but notes the suggestions that small trades be exempted. IIROC would consider introducing such an exemption if the reporting requirement proved burdensome and the reports from small failed trades did not reveal meaningful information. However, IIROC would also note that manipulative behaviour (particularly to set an artificial price) often involves one or more orders for relatively small volumes.

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	IIAC – Proposal fails to recognize that there are a number of factors that may cause a fail. Many of these do not relate strictly to an actual trade. As such UMIR is not the appropriate place to address the issue and the "generic" approach suggested will not address all factors. Suggests that IIROC monitor its concerns for now as NI 24-101 may deal with many of the areas of concern. Reporting proposal will create administrative burden, particularly in cases where there is a reorganization or cross-border issue. Costs for new systems, etc. will be great and will be disproportionately borne by small firms. IIROC should attempt to obtain information from CDS.	IIROC recognizes that the primary reasons for trade failures are administrative. As a result, a report is not required until the failure has persisted for 10 days beyond the date scheduled for settlement. The Study by IIROC estimated that a report would be required in connection with approximately 0.01% of trades. IIROC would anticipate that the percentage would be further reduced by procedures adopted in accordance with NI 24-101 and in contemplation of a reporting obligation. The objective of the reporting requirement is to reduce the number of "prolonged" failures and to alert IIROC to trades that may have integrity concerns (e.g. is the failure due to an undeclared short sale). Information on trade failures available through CDS are on a continuous net settlement basis. While this provides information on the systemic level of trade failures, the risks to market integrity reside with the continuing failure on the part of the original party to the trade.
	ITG – States that UMIR may not be the appropriate place to address failed trades. There are a number of factors that may cause a fail and these may not relate to the actual trade itself (ie. issues at custodian or prime broker). Reporting fails over 10 days will create an administrative burden where securities are subject of reorganization or tender offer. Reporting will require significant resources and systems. Advisable to first examine impact of NI 24-101.	See response to IIAC comment above.
	Patch – States that enforcing the 10-day window after settlement is critical. IIROC should monitor which firms are involved in these extended fails, whether patterns emerge and how large fails are closed.	IIROC would note that such monitoring is one of the purposes of the report.
	RBC – Asks: Does the reference to "arrangements … to borrow" impose	Failure is measured at the account level and not at the

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	US style SHO obligations? Does reporting apply to DAP/cash/margin accounts? Does it apply to client fails/CNS/DP fails? Please clarify the term "resolved" – does the item remain outstanding until the position is fully covered? If IDA members are under SEG, should they be prohibited from short selling? National Instrument 24-101 requires a "confirmation" not a "locate" therefore compliance with 24-101 is not indicative of an ability to settle. What happens if 10 day requirement is not met? Why was 10 chosen (not 13 as it is in the U.S.)? Will clients be notified? What if fail occurs because of "tight" market conditions? What is the form and content of the report? Report is onerous.	level of the firm. If a sale is made ostensibly from a long position and the account fails to provide the Participant with the securities, the trade would be considered a failed trade until the account holder provided the securities or made arrangements with the Participant to borrow the securities through the Participant. Part 7 of NI 24-101 requires a dealer to establish, maintain and enforce polices and procedures designed to facilitate settlement of the trade on the standard settlement date unless the trade has been entered into as a special terms trade. If the short sale occurred at a time when there were "tight" market conditions, the question that would have to be answered is whether there was a "reasonable expectation of settling" the trade at the time of the entry of the order. If not, the entry of the order would have been considered manipulative behaviour pursuant to Rule 2.2 of UMIR.
	Trinidad – States that 10 days after settlement is an excessively long delay before a report is filed (T+3 + 10 is over four times longer than the normal settlement period). The report requirement should apply after 5 days or fewer. If majority of fails are as a result of administrative error, 5 days is sufficient. If fail occurred for improper reason, many will resolve before 10 days and be unreportable to the regulator, who will not be able to make a good assessment of causes of fails or to designate as ineligible. Information on failed trades must be publicly available (identify the issuer, the dealer and whether the trade was short).	The 10-day period is designed to minimize the administrative burden on Participants and to give them an adequate period of time to resolve the reason for the failure. If IIROC detects "integrity concerns" in a significant number of the trades which are subject to the reporting requirement, IIROC would consider proposing a reduction in the time period. Since trades can fail for any number of reasons, IIROC does not believe that it is appropriate to make information on failed trades publicly available.

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(2) If a Participant or Access Person is required to provide notice of a failed trade to the Market Regulator in accordance with subsection (1), the Participant or Access Person shall, upon the account making available the applicable securities or monies or making arrangement for the borrowing of the applicable securities, give notice to the Market Regulator at such time and in such form and manner and containing such information as may be required by the Market Regulator.		
7.11~~2~~ Variation and Cancellation of Trades No trade executed on a marketplace shall, subsequent to the execution of the trade, be: (a) cancelled; or (b) varied with respect to: (i) the price of the trade, (ii) the volume of the trade, or (iii) the date for settlement of the trade, except: (c) by the Market Regulator in accordance with UMIR ~~the Rules~~; or (d) with notice to the Market Regulator immediately following the variation or cancellation of the trade in such form and manner as may be required by the Market Regulator and such notice shall be given, if the variation or cancellation is made: (i) prior to the settlement of the trade, by: (A) the marketplace on which the trade was executed, or (B) the clearing agency through which the trade is or was to be cleared and settled, and (ii) after the settlement of the trade, by each Participant and Access Person that is a party to the trade.	**BMO** – Supports provisions requiring notice for post-trade amendments to price, volume or settlement criteria of a trade. Adjustments for bona fide errors should be exempt.	IIROC presently receives notice of any variation or cancellation made through the facilities of a marketplace or clearing agency. IIROC wishes to ensure receipt of notice of any other variation or cancellation in order to be in a position to determine that such variation or cancellation is being made for a bona fide reason.
	ITG – Agrees that any changes to price and volume should be reported to IIROC. However, notes that this should be done by the marketplace and should not apply to settlement date changes. The Participant should be able to accommodate a client's request if it can ensure settlement on T+3 with the counterparty. IIROC could monitor these variations by working with CDS.	The Amendments essentially require that any variation or cancellation prior to settlement be done through the facilities of a marketplace or clearing agency (and IIROC presently receives notice from these sources). IIROC does not believe an exemption should be made for changes to the settlement date. Special terms orders are not subject to "best price" obligations under UMIR and IIROC needs to be able to verify that the settlement date has not been varied in an attempt to avoid displacement obligations.
	RBC – States that there are numerous reasons for varying or cancelling, therefore the proposal is unworkable. Asks: Is the notice pre/post amendment/cancellation? Approval or notification from IIROC? Can/will IIROC refuse an amendment/cancellation? How does cancellation affect counterparty? Do any other regulators restrict short sales in this manner?	The Amendment is quite clear that the notice is to be given to IIROC "immediately following the variation of cancellation". Under Rule 10.9, a Market Integrity Official has the power to vary or cancel any trade which is unreasonable or not in compliance with UMIR. See response to ITG comment above.

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~~**10.9 Power of Market Integrity Officials**~~ ~~(1) A Market Integrity Official may, in governing trading in securities on the marketplace:~~ ~~...~~ ~~(e.1) cancel any trade that is a failed trade in respect of which notice has been, or should have been, provided to the Market Regulator in accordance with Rule 7.11 if, in the opinion of such Market Integrity Official:~~ ~~(i) the account has failed to diligently pursue making available the applicable securities or monies or making arrangement for the borrowing of the applicable securities,~~ ~~(ii) there is no reasonable prospect that the failure will be rectified pursuant to the rules, requirements or procedures of the marketplace on which the trade was executed or the clearing agency through which the trade was to be settled, and~~ ~~(iii) the cancellation of the trade is appropriate in the interest of a fair and orderly market;~~ …	**BMO** – Does not support cancellation of failed trades due to negative implications it may have to the counter-party.	IIROC deleted the provision from the Amendments. IIROC will monitor the reports of failed trades that are received pursuant to Rule 7.10 to determine the extent of the problem with "chronic" fails. As noted in the Market Integrity Notice, the cancellation power would have been used as a last resort essentially when the settlement of the trade would be for the economic benefit of the seller but the seller has not pursued settlement. Before exercising the power, the Market Integrity Official would have to have been satisfied that there was no reasonable prospect that the failure will be rectified in accordance with the requirements of the marketplace or clearing agency.
	Canaccord – Buy-in and Continuous Net Settlement (CNS) processes in Canada work extremely well. Do not see value in the ability for IIROC to cancel a trade.	The proposed amendment was intended as a "backstop" when other provisions of the marketplace or clearing agency had not worked and there was no reasonable prospect that such provisions would rectify the continuing failure.
	IIAC – IIROC cannot cancel a failed trade under the circumstances provided in the proposal. In the interest of the parties and those who rely on report of trades, the requirement should instead be to close out the position within 10 days (the U.S. requirement).	See response to BMO and Canaccord comments above.
	ITG – Believes that it is not appropriate for IIROC to cancel trades. Current buy-in facilities exist to ensure the buyer ultimately receives the securities. Many intervening events unrelated to settlement could make this problematic to the buyer even if he would benefit from the cancellation.	One of the tests that would have had to have been met in cancelling the trade was that the cancellation be in the interest of a fair and orderly market. Cancellation would have been pursued only when in the interest of the non-defaulting party. See response to BMO and Canaccord comments above.

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	Patch – Queries the benefit of cancelling the trade. This simply gives seller opportunity to eliminate risk that would exist in settling. Cancellation should be a last resort as each trade has an immediate impact on the market.	See response to BMO and Canaccord comments above.
	TD – Opposes cancellation by IIROC, except in most serious cases of abuse, as not fair to purchasers. Should be dealt with through buy-in rules. IIROC must apply a "reasonableness" test.	See response to BMO and Canaccord comments above.
10.10 Report of Short Positions *[The Short Sale and Failed Trade Proposal recommended the repeal of the requirement to prepare and file semi-monthly a Report on Short Positions. Consideration of this proposal has been deferred until IIROC and the Recognizing Regulators are satisfied that adequate alternative information on short sales executed on a marketplace has become available.]* (1) A Participant shall calculate, as of 15th day and as of the last day of each calendar month, the aggregate short position of each individual account in respect of each listed security and quoted security. (2) Unless a Participant maintains the account in which an Access Person has the short position in respect of a listed security or quoted security, the Access Person shall calculate, as of the 15th day and as of the last day of each calendar month, the aggregate short position of the Access Person in respect of each listed security and quoted security. (3) Unless otherwise provided, each Participant and Access Person required to file a report in accordance with subsection (1) or (2) shall file a report of the calculation with a Market Regulator in such form as may be required by the Market Regulator not later than two trading days following the date on which the calculation is to be made.	**AIMA** – CSPR is not meaningful. Decision to continue production of CSPR in any form should be made by market participants who may use it but IIROC must make sure that burdens do not outweigh benefits. Use of trade markers to differentiate between types of shorts may be cumbersome and result in trade information leakage without any material offsetting benefit to the market.	While more detailed marking of short sales was one of the options considered by IIROC, IIROC rejected this option as being unduly burdensome to Participants and Access Persons.
	BMO, Canaccord, CNQ, IIAC and **ITG** – Supports elimination of CSPR.	IIROC acknowledges support for the proposal.
	BMO – Does not support replacing CSPR with another report (e.g. report of failed trades or those involving categorizing by markers such as covered, hedged, naked, etc.) that would increase order execution complexity. Is not in favour of any requirement that would eliminate ability to bundle long and short sales.	The ability to bundle long and short sales is already restricted. Reference should be made to Market Integrity Notice 2005-025 – *Guidance – Bundling Orders from a Long and Short Position* (July 27, 2005).
	Canaccord – Distribution of new information will require an effort to educate investors, issuers clearly detailing the change.	IIROC acknowledges that the "replacement" to the CSPR will require an education process. For this reason, IIROC will require that both style of reports be available for a period of time and that the any proposal to repeal of the requirement to prepare and file the CSPR would only be pursued if the replacement information proved to be "adequate". The Impact Study will look at the relationship between information in the

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		CSPR and any periodic summary reports that may be produced. The findings of the Impact Study on this and other aspects of the Amendments will be published.
	CNQ – Disagree with replacing CSPR with a report that would impose an administrative burden on marketplaces without making the case that the new report would be more meaningful than the old.	The information is readily available to each marketplace and it would also be available through the regulatory feed provided to IIROC by each marketplace. As noted in the Market Integrity Notice, it would be the preference of IIROC for the marketplaces to co-operatively agree on the procedure for the preparation and distribution of the reports.
	CPPIB – States that it does not currently use CSPR, as information therein is inaccurate. If proposed changes do not produce meaningful information, IIROC should consider dropping all requirements. Concerned with suggestion of prohibiting bundling of "long" and "short" sales. Prohibition could reveal trading. Improvement to audit trail that does not serve a market integrity purpose (no market integrity issues found with short sales) should not be pursued at the expense of trading practices.	As noted in the Market Integrity Notice, information on short trading on marketplaces could be produced by a number of sources. See response to BMO comment above.
	CSTA – Concur that CSPR could be retained to categorize a short position as "covered", "hedged", "naked" etc. to give more accurate reading of a company's "true" short position.	While this information would provide a more accurate view of the "true" short position, IIROC concluded that the administrative burden that would be imposed on Participants and Access Persons would not be worth the benefit.
	ITG – IIROC should work with marketplaces and a data consolidator to provide statistical information about short selling.	See response to CNQ comment above.
	RBC – Agrees with the change as the accuracy and consistency of current CSPR is questionable. Requires clarification on who would disseminate summary reports going forward ad what role Participants would play. Requires further	See response to CPPIB comment above. The Amendments do not change any of the requirements regarding the marking of short sales.

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	guidance on what is expected in terms of order marking policies and procedures (for example with regard to dealer sponsored access clients).	Currently, short sales must be marked whether the order is handled by the Participant or entered by a client with dealer-sponsored access.
	TD – Believes that it is not practical to make marketplaces accountable for reporting short positions. Unbundling trades will increase order handling burden and information leakage. Even if trade were unbundled, it would still be impossible to know aggregate short positions. Current reporting systems should be strengthened by IIROC, rather than introducing new proposals.	The ability to bundle long and short sales is already restricted. Reference should be made to Market Integrity Notice 2005-025 – *Guidance – Bundling Orders from a Long and Short Position* (July 27, 2005).
Policy 1.1 Definitions **Part 3 – Definition of "Short Sale"** Under the definition of "short sale", a seller shall be considered to own a security under various circumstances including if the seller, directly or through an agent or trustee: • owns ~~directly or through an agent or trustee~~ another security that is convertible or exchangeable into that security and has tendered such other security for conversion or exchange or has issued irrevocable instructions to convert or exchange such other security; • has an option to purchase the security and has exercised the option; or • has a right or warrant to subscribe for the security and has exercised the right or warrant. In each of these circumstances, the seller must have taken all steps necessary to become legally entitled to the security, including having: • made any payment required; • submitted to the appropriate person any required forms or notices; and • submitted, if applicable, to the appropriate person any certificates, in good delivery form, for securities to be converted, exchanged or exercised.	**BMO** – If price restrictions are not removed, the requirement for payment to be effected before a seller owns the security (long) may be detrimental to efficient market price determination. Tick requirement may result in pricing inefficiencies between derivative and underlying. In the case of options, a requirement that payment must be effected prior to sale may have negative effect on price discovery.	The clarification introduced by the Amendments corresponds to corporate law requirements. The revisions to the provision from the Short Sale and Failed trade Proposal correspond to drafting changes made in the definition of "short sale".

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
Policy 1.1 Definitions **Part 4 – Definition of "Short Sale Ineligible Security"** Under the definition of a "short sale ineligible security", the Market Regulator may designate a security or class of securities in respect of which an order that on execution would be a short sale may not be entered on a marketplace for a particular trading day or trading days. In determining whether to make such a designation, the Market Regulator shall consider whether: • based on reports of failed trades submitted to the Market Regulator in accordance with Rule 7.10 or other information known to the Market Regulator, there is in a particular security or class of securities an unusual number or pattern of failed trades by more than one Participant or Access Person; • the number or pattern of failed trades is related to short selling; and • the designation would be in the interest of maintaining a fair and orderly market.		IIROC added as a policy under Rule 1.1, the criteria to be taken into account by IIROC when making a designation of a security or class of security as a "short sale ineligible security". See comments and responses on the definition of a "Short Sale Ineligible Security" above.
Policy 2.1 – Just and Equitable Principles **Part 1 – Examples of Unacceptable Activity** … Participants and Access Persons who intentionally organize their business and affairs with the intent or for the purpose of avoiding the application of a Requirement may be considered to have engaged in behaviour that is a failure to conduct business openly and fairly or in accordance with just and equitable principles of trade. For example, the Market Regulator considers that a person who is under an obligation to enter orders on a marketplace who "uses" another person to make a trade off of a marketplace (in circumstances where an "off-market exemption" is not available) to be violating the requirement to conduct business openly and fairly or in accordance with just and equitable principles of trade. Similarly, the Market Regulator considers that a person who enters into a transaction for the purpose of rectifying a failure in connection with a failed trade prior to the time that a report must be filed in accordance with Rule 7.10 and such person knows or ought reasonably to know that such transaction will		

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
result in a failed trade to be engaging in "re-aging" for the purpose of avoiding reporting obligations contrary to the requirement to conduct business openly and fairly or in accordance with just and equitable principles of trade. …		
Policy 3.1 Restrictions on Short Selling **Part 1 – Entry of Short Sales Prior to the Opening** Prior to the opening of a marketplace on a trading day, a short sale may not be entered on that marketplace as a market order and must be entered as a limit order and have a limit price at or above the last sale price of that security as indicated in a consolidated market display (or at or above the previous day's close reduced by the amount of a dividend or distribution if the security will commence ex-trading on the opening).		With the decision to defer consideration of the repeal of price restrictions on short sale, Part 1 of Policy 3.1 has not been repealed as proposed in the Short Sale and Failed Trade Proposal.
Policy 3.1 Restrictions on Short Selling **Part 2 – Short Sale Price When Trading Ex-Distribution** When reducing the price of a previous trade by the amount of a distribution, it is possible that the price of the security will be between the trading increments. (For example, a stock at $10 with a dividend of $0.125 would have an ex-dividend price of $9.875. A short sale order could only be entered at $9.87 or $9.88.) Where such a situation occurs, the price of the short sale order should be set no lower than the next highest price. (In the example, the minimum price for the short sale would be $9.88, being the next highest price at which an order may be entered to the ex-dividend price of $9.875). In the case of a distribution of securities (other than a stock split) the value of the distribution is not determined until the security that is distributed has traded. (For example, if shareholders of ABC Co. receive shares of XYZ Co. in a distribution, an initial short sale of ABC on an ex-distribution basis may not be made at a price below the previous trade until XYZ Co. has traded and a value determined). Once a security has traded on an ex-distribution basis, the regular short sale rule applies and the relevant price is the previous trade.		With the decision to defer consideration of the repeal of price restrictions on short sale, Part 2 of Policy 3.1 has not been repealed as proposed in the Short Sale and Failed Trade Proposal.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
Specific Matters on Which Comments Were Requested 1. *Should IIROC consider a "pilot project" to evaluate the effect of the repeal of price restrictions on the short sale of illiquid securities rather than the outright repeal of all price restrictions?*	**Acuity** – Opposed to the outright repeal of price restrictions. Recommends a "pilot project" be completed to evaluate the effect of repeal on all Canadian securities. Study would be able to determine a size threshold below which the repeal of price restrictions may have a detrimental impact on volatility.	By itself, volatility is not a market integrity concern but one of market quality. For market integrity, the test is whether the price movement is "real" rather than the result of artificial or manipulative behaviour.
	AIMA – A "pilot project" is not necessary or beneficial. A body of knowledge to support the proposed amendments already exists. Proposed "Impact Study" is sufficient to see if further amendments are required to mitigate any potential increase in volatility.	IIROC acknowledges that the consensus of commentators is supportive of the approach recommended by IIROC for a repeal of price restrictions accompanied by the conduct of the Impact Study. That aspect of the Short Sale and Failed Trade Proposal dealing with the repeal of price restrictions on all short sales has been deferred and this proposal is not included in the Amendments.
	Canaccord – Little value in "pilot project" for TSXV securities where IIROC is already monitoring for market manipulation. IIROC should continue to monitor illiquid stocks across TSX and TSXV for short sales that might create manipulative volatility.	See response to AIMA comment above.
	CCLIM – Smaller cap stocks should experience a larger increase in volatility – measured as a range in price over a specified period divided by the price of the security. This is a result of an increase in proactive trading and the volatility calculation method and is not a result of a deterioration of market quality. Relative spreads (quoted bid-ask spread divided by price) increase for smaller stocks. Short sellers may hit bids ("cross the spread") more often without a tick test thereby increasing volatility but this is a natural result of an increase in trading.	See response to AIMA comment above.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
	CPPIB – Answers: No. Improvements to market efficiency too compelling to delay full implementation of changes. UMIR prohibition against manipulation gives IIROC the tools to address abuses.	See response to AIMA comment above.
	CSTA – "Pilot project" should identify non-inter-listed highly-liquid stocks and illiquid stocks, similar to the SEC trials. Inter-listed securities should remain exempt from the trial period in order to remain competitive.	See response to AIMA comment above.
	IASBDA – A "pilot program" is not useful because it may not be relevant to a period of significant volatility. The U.S. pilot failed to adequately foretell what would happen in a volatile market. Instead, would suggest slowly phase in the elimination of the tick test starting with most liquid. This should occur only after solidifying disclosure of fails requirement (ie. be cautious when removing one short sale limitation and imposing another).	See response to AIMA comment above.
	ITG – Does not support a "pilot project". US reviews did not show materially negative impact on illiquid securities. Marketplaces must make necessary changes within timelines suggested by IIROC to ensure that industry can benefit form changes and do not have to incur costs to develop temporary fixes.	See response to AIMA comment above.
	MS – "Pilot project" not necessary to evaluate effectiveness of repeal of price restrictions as continuation of monitoring for two regimes (Canadian and U.S.) is burdensome to dealers. Concur with Impact Study proposal.	See response to AIMA comment above.
	RBC – Yes. The SHO Pilot Project did not adequately reflect the Canadian marketplace. The IIROC Statistical Study may not have provided an accurate correlation between short selling and failed trades. Details of "pilot project" and interim results should be made public. Should be	In part, the SHO Pilot Project did not adequately reflect the Canadian marketplace because securities traded on the Nasdaq Small Cap Market, the Bulletin Board and the Pink Sheets have not been subject to price restrictions on short sales. See response to Acuity

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
	designed/conducted by a third-party statistician.	comment above.
	Swift – No need for a pilot project and its associated costs and administrative burdens.	See response to AIMA comment above.
	TD – Believes that there is no need for the "pilot project".	See response to AIMA comment above.
	Trinidad – States that data should be through a "pilot project" collected on adequacy of existing system monitors before implementation of tick test changes. Suggests that the difficulties including TSXV securities in a "pilot project" are not sufficient reason not to conduct the project. TSXV securities are much less liquid.	See response to RBC comment above.
	TSX Group – Strongly disagrees with "pilot project" proposal. Subjecting a control group of illiquid securities will cause confusion, be administratively burdensome and may encourage dealers to stop trading the control group securities. Instead, strongly supports the idea of the "Impact Study".	See response to AIMA comment above.
	Virgin – Given the possible increased volatility for small venture firms, suggests that US experience should be monitored for a 2-5 year period. Delay would allow time to see impact of SEC's rules on OTC and Pink Sheet companies.	The Impact Study will be conducted for a period of at least 12 months. While the repeal of price restrictions on all short sales was deferred and not included in the Amendments, the exemption from price restrictions for various securities including the Inter-listed Exemption will continue in place. IIROC has indicated that price restrictions could be re-instituted even before the completion of the Impact Study if abuses or changes in trading patterns warranted the re-introduction. Price restrictions on short sales did not apply to OTC or Pink Sheet companies in the US (or the NASDAQ Small Cap Market) and as such the US rule change to repeal restrictions should have no impact.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
2. *If IIROC were to undertake a pilot project, what should be the duration of the pilot project?*	**Acuity** – Not less than four quarters, to account for seasonality.	The consensus of the commentators supporting a "pilot project" was for a period of 6 months to a year. As proposed, the Impact Study would cover a period of up to year following the implementation of the Amendments. With the decision to defer consideration of the repeal of all price restrictions, the Impact Study will look at the impact on securities covered by the Inter-listed Exemption in comparison to securities which remain subject to price restrictions.
	CSTA – Six months.	See response to Acuity comment above.
	MS – Does not agree with "pilot project" but, if undertaken, should be no longer than one year and should attempt to minimize time, expense and systems impact for dealers.	See response to Acuity comment above.
	RBC – Should be recommended by a third-party statistician.	See response to Acuity comment above.
	TD – One year.	See response to Acuity comment above.
3. *How should a pilot project be implemented for TSXV-listed securities if the TSXV does not support the "short exempt" marker?*	**CSTA** – TSXV should support "short exempt" marker to ensure complete evaluation of repeal of price restrictions in "pilot project".	The timing for the implementation of a "short exempt" market on the TSXV could significantly defer the commencement of any pilot project (perhaps to the first quarter of 2009 or later).
	MS – Does not agree with "pilot project" but, if undertaken, market centres should bear the responsibility for supporting "short sale" indicators without mandating use of the "short exempt" marker.	See response to CSTA comment above.
	RBC – Project should deal with only core TSX securities.	There are significant differences in the liquidity profile of a security that trades on the TSX as compared to TSXV. Reference should be made to the table on page 16 of the Market Integrity Notice. UMIR is intended to apply

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
		across marketplaces and therefore there should be policy reasons to justify different treatment. While IIROC would expect greater volatility on junior markets as a result of the elimination of price restrictions on short sales, there is currently no evidence that this would result in increased risks to market integrity.
	TD – TSX and TSXV trading engines should be reprogrammed to reflect the rule change.	See response to CSTA comment above.
4. *What costs or administrative burdens would marketplaces, Participants and Access Persons incur in connection with a pilot project?*	**Acuity** – Costs should be borne by those market participants who are interested in having the proposed price restriction repeal adopted.	IIROC notes the comment that any costs associated with a pilot project should be borne by Participants and Access Persons.
	MS – Dealers would have an obligation to (i) implement systems changes to satisfy temporary rules, followed by additional changes subsequent to amendments and (ii) maintain two sets of protocols for pilot and non-pilot securities.	IIROC acknowledges that one problem with a "pilot project" is the need for Participants to deal distinctly with securities that are included in the pilot as compared to those that are excluded. If Participants handle all securities as if restrictions continued to apply (in order not to breach any rule) the resulting information from the pilot project would be "compromised".
	RBC – A prolonged implementation period leading to an uneven Canada/U.S. playing field would be a potential administrative burden.	The timing for the implementation of a "short exempt" market on the TSXV could significantly defer the commencement of any pilot project (perhaps to the first quarter of 2009 or later). If the pilot project lasted for a period of one year, the subsequent time period for preparation of the report and adoption of rule changes would realistically mean difference in the regimes in Canada and the United States until late 2010 or early 2011.
5. *Would there be any specific costs or benefits associated with UMIR adopting provisions comparable to those in the United States related to short sales (such as a mandatory locate requirement, and documentation*	**Acuity** – Broker-dealers should be required under UMIR to borrow, enter into an agreement to borrow or have reasonable grounds to believe they can borrow, a security	Rule 2.2 of UMIR presently requires that there be a "reasonable expectation" of settling any trade at the time of the entry of the order.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
requirements for sales from a long position) and/or failed trades (such as the maintenance of a fails list and close-out requirements for securities on the fails list)?	before effecting a short sale in that security. This will ensure potentially abusive "naked" short selling does not occur. This will also avoid an imbalance in buying and selling; the volume of a security available for short selling should not be limitless.	
	AIMA – Costs of harmonizing with the U.S. not necessary or beneficial. Existing policies and policies in proposed amendments sufficient to safeguard against fails resulting from shorts.	IIROC notes the consensus of the commentators is opposition to a "fails list", "locate" requirement and "close-out requirement" comparable to those in the United States.
	Canaccord – Canadian regulators should not follow the provisions made in the U.S.	See response to AIMA comment above.
	IASBDA – UMIR should not include "locate" requirement as it has proven ineffective and difficult to enforce.	See response to AIMA comment above.
	IIAC – Whilst supportive of removal of tick test, does not wish to move to U.S. style pre-borrow system. Naked shorting has not been shown to be a problem in Canada. Requirement to pre-borrow would result in smaller firms being placed at a financial disadvantage, as stock borrowing is controlled in Canada by the larger industry participants.	See response to AIMA comment above.
	MS – Locate and documentation requirements would impose unnecessary burdens and costs not warranted by generally low rates of failures in Canada. If U.S.-style regime is adopted, it must be consistent with the U.S. regime.	See response to AIMA comment above.
	RBC – Asks: Have the long term implications of misalignment between the proposed regime and the US regime been assessed?	The US regime would impose significant administrative and compliance burdens on Canadian market participants without significant benefits as trade failure rates are significantly lower in Canada than in the US.
	Swift – No need for US-style "locate" in Canada given available evidence on failed trades.	See response to AIMA comment above.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
	TD – Believes that dealer costs for technology and processes would not be substantial. These costs would be more than offset by benefits of aligning with US rules.	See response to AIMA comment above.
	Trinidad – Suggests that IIROC should run a US-style fail list. IIROC will have the necessary data. Cost of electronic dissemination would be minimal. Canadian dealers who short sell in the US will already have systems in place.	Canadian dealers that forward orders to the United States, forward such orders to dealers registered in the United States for intermediation. The US-registered dealer will have the responsibility for compliance with requirements applicable in the United States.
General Comments	**AIMA** – Very supportive of proposed amendments. Market volatility is not analogous to market integrity. UMIR provisions on manipulative and deceptive trading are sufficient to deal with abuses.	IIROC notes the support for the proposal.
	BMO – Existing mechanisms available to regulators are adequate to ensure manipulative and deceptive practices are detected and contained. As such, do not support any alternatives to repeal of price restrictions set out in the MIN as they add unnecessary complexity (ie. exemption from price restrictions only for highly liquid).	IIROC notes the opposition to available alternatives to the repeal of price restrictions.
	CPPIB – States that IIROC should consider changing sanction guidelines for short sale markers to reflect that infractions will have an administrative (not market integrity) impact.	While the audit trail should be accurate, IIROC acknowledges that errors will be made in order marking but the concern of IIROC is in circumstances when errors in order marking are accompanied by manipulative or other violative behaviour.
	CSTA – In light of elimination of price restrictions, regulatory bodies must continue efforts to detect manipulative and deceptive activity and respond with enforcement.	The existing tools available to IIROC detect patterns of trading activity that are indicative of an “artificial price” either high or low or other forms of manipulative behaviour. IIROC also proposes to introduce new alerts that will be generated on significant changes in the pattern of short selling for a particular security.

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
	Coates – Objects to ability of dealers to use clients' shares to be used for short selling. Wishes to be able to disallow dealer from doing so. Understands that these would also not be allowed to be used for margin. Feels that if client owns shares, then client should determine their use during the term of ownership.	Securities which are segregated by a dealer are not available for securities lending. Securities which have been pledged as security for loans by the dealer to the client are available for lending by the dealer.
	Patch – States that naked short selling is wrong. US criminals bring business to Canada to circumvent US laws simply because of the Canadian opportunity to sell short. In IIROC's study on Failed Trades, did IIROC investigate the market trading around failed trades and whether dealers utilized manipulative leverage? IIROC should be cautious when applying results of US studies (such as those conducted by the SEC OEA) to the Canadian market. The SEC manipulated the results to present a fictitious picture to the US investing public.	At the end of the day, all short positions need to be covered. Short selling accounts for approximately 25% of trading activity on marketplaces thereby providing liquidity. As noted in the Market Integrity Notice, entering a short sale without the reasonable expectation of settlement is presently considered manipulative behaviour under UMIR.
	RBC – Believes that, by increasing efficiency of transfer agents, marked improvement would be seen in failed trades. Request a solution on the re-registration of securities (ie. 144A). How will proposal affect responsibilities of market makers on TSXV and Pure? Who is responsible for determining ownership of options/rights/warrants – if the 'seller" then what responsibilities do dealers have regarding this determination?	IIROC has issued guidance to assist in the same of securities subject to US transfer restrictions. In particular, see Market Integrity Notice 2006-006 – *Guidance – Sales of Securities Subject to Certain United States Securities Laws* (February 17, 2006). The Amendments revised the Proposed Amendments by including certain additional provisions exempting market makers (including derivatives market makers) from the restrictions on the marking of short sales and from prohibitions on trading a "Short Sale Ineligible Security". See Rule 3.1 above. Under securities legislation, the "seller" has an obligation to declare to a dealer that an order is "short". In keeping with the trading supervision obligations of a Participant, a Participant has an obligation to

Text of Provisions Following Adoption of the Amendments (Changes from the Short Sale and Failed Trade Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
		inquire of an account holder if a sale is short if the securities are not otherwise held by the account holder at the Participant. The Participant must assure itself that there is a "reasonable expectation" that any trade that would result from the execution of the order will be able to settle.
	Swift – Price downturns are accentuated in those markets with the tightest short sale restrictions (e.g. certain Asian market which prohibit short sales). Removal of price restrictions allow markets to accurately price securities without "positive bias" and improves liquidity and arbitrage opportunities.	IIROC notes the comment respecting volatility effects when short selling activity is prohibited.
	Trinidad – States that naked short selling places artificial downward pressure on the price of the security by causing the number of outstanding securities to be larger than is actually the case. It is a fraud against investors, issuers and the market. Enforcement must be discussed in the next release; particularly the role the members of the CSA/SRO working group will play in enforcement against naked shorting. In the next release, IIROC should provide support for assertion that existing system can deal with abusive short sale practices.	See the response to Patch comment above. The existing tools available to IIROC detect patterns of trading activity that are indicative of an "artificial price" either high or low or other forms of manipulative behaviour.

13.1.2 MFDA Issues Notice of Settlement Hearing Regarding Dylan Brown

NEWS RELEASE
For immediate release

MFDA ISSUES NOTICE OF SETTLEMENT HEARING
REGARDING DYLAN BROWN

October 17, 2008 (Toronto, Ontario) – The Mutual Fund Dealers Association of Canada ("MFDA") today announced that it has issued a Notice of Settlement Hearing regarding the presentation, review and consideration of a proposed settlement agreement by the Central Regional Council.

The settlement agreement will be between staff of the MFDA and Dylan Brown and involves matters for which Dylan Brown may be disciplined by the Regional Council, pursuant to MFDA By-laws.

The subject matter of the proposed settlement agreement concerns allegations that the Respondent failed in his capacity as Co-Branch Manager to supervise the activities in the branch office.

The settlement hearing is scheduled to commence at 10:00 a.m. (Eastern) on Tuesday, November 18, 2008 in the Hearing Room located at 121 King Street West, Suite 1000, Toronto, Ontario. The hearing is open to the public except as may be required for the protection of confidential matters. A copy of the Notice of Settlement Hearing is available on the MFDA website at www.mfda.ca.

The Mutual Fund Dealers Association of Canada is the self-regulatory organization for Canadian mutual fund dealers. The MFDA regulates the operations; standards of practice and business conduct of its 157 Members and their approximately 75,000 Approved Persons with a mandate to protect investors and the public interest.

For further information, please contact:
Shaun Devlin
Vice-President, Enforcement
(416) 943-4672 or sdevlin@mfda.ca

13.1.3 MFDA Adjourns Hearing on Merits in the Matter of Tony Tung-Yuan Lin

NEWS RELEASE
For immediate release

MFDA ADJOURNS HEARING ON MERITS
IN THE MATTER OF TONY TUNG-YUAN LIN

October 20, 2008 (Toronto, Ontario) – The Mutual Fund Dealers Association of Canada ("MFDA") commenced a disciplinary proceeding in respect of Tony Tung-Yuan Lin by Notice of Hearing dated May 16, 2008.

The Hearing on Merits was scheduled to take place on Tuesday, October 21, 2008, however, the Hearing Panel adjourned the hearing on consent of the parties. The commencement of the hearing of this matter on the merits has been rescheduled to take place on Friday, December 12, 2008 at 10:00 a.m. (Vancouver) in the Hearing Room located at the Wosk Centre for Dialogue, 580 West Hastings Street, Vancouver, British Columbia, or as soon thereafter as the hearing can be held.

A copy of the Notice of Hearing is available on the MFDA website at www.mfda.ca.

The Mutual Fund Dealers Association of Canada is the self-regulatory organization for Canadian mutual fund dealers. The MFDA regulates the operations, standards of practice and business conduct of its 157 Members and their approximately 75,000 Approved Persons with a mandate to protect investors and the public interest.

For further information, please contact:
Shaun Devlin
Vice-President, Enforcement
(416) 943-4672 or sdevlin@mfda.ca

13.1.4 MFDA Issues Notice of Hearing Regarding ASL Direct Inc. and Adrian Samuel Leemhuis

NEWS RELEASE
For immediate release

MFDA ISSUES NOTICE OF HEARING REGARDING
ASL DIRECT INC. AND ADRIAN SAMUEL LEEMHUIS

October 20, 2008 (Toronto, Ontario) – The Mutual Fund Dealers Association of Canada ("MFDA") today announced that it has commenced disciplinary proceedings against ASL Direct Inc. and Adrian Samuel Leemhuis (the "Respondents").

MFDA staff alleges in its Notice of Hearing that the Respondents engaged in the following conduct contrary to the By-laws, Rules or Policies of the MFDA:

Allegation #1: (a) Commencing in March 2003, ASL failed to:

(i) consistently maintain minimum capital and risk adjusted capital required by MFDA Rule 3.1.1; and

(ii) consistently maintain the minimum amount of insurance required by MFDA Rules 4.1 and 4.4;

(b) Commencing in March 2004, ASL failed to:

(i) consistently maintain risk adjusted capital ("RAC") to avoid triggering early warning tests set out in MFDA rule 3.4.2(a); and

(ii) file monthly and annual financial questionnaires and reports ("FQRs") on a timely basis as required by MFDA Rule 3.5.1;

(c) Commencing in April 2008, ASL has failed to:

(i) comply with early warning requirements that were applicable pursuant to MFDA Rule 3.4.2(b); and

(ii) respond to requests for information from the MFDA Compliance Department concerning its financial circumstances, contrary to s. 22 of MFDA By-law No. 1 (the "By-law").

(d) Since May 5, 2008 when ASL was informed by MFDA Staff of its increased insurance requirements because ASL was holding nominee name assets, ASL has failed to rectify the deficiency, contrary to MFDA Rule 4.5(b).

Allegation #2: Commencing in July 2006, the Respondents failed to deal fairly honestly and in good faith with clients of ASL by operating a trailer fee rebate program for which clients were charged monthly fees and failing to pay or re-invest trailer fee rebates owed to clients in the program or to maintain adequate records or take sufficient action to administer the program effectively, contrary to MFDA Rules 2.1.1 and 5;

Allegation #3: Between March 2004 and April 2008, Leemhuis conducted securities related business that was not carried out for the account of ASL, contrary to MFDA Rule 1.1.1(a);

Allegation #4: Between February 2004 and April 2008, Leemhuis was engaged in outside business activities that were not disclosed in Form 33-109F4 or on the National Registration Database ("NRD") as required, contrary to MFDA Rules 1.2.1(d), 2.1.1(c) and National Instrument 33-109;

Allegation #5: Between May 2006 and April 2008, in response to direct inquiries from MFDA Staff, the Respondents:

(a) withheld relevant information;

(b) provided false or misleading information to the MFDA;

(c) failed to produce certain documents and information requested by MFDA investigators which the Respondents undertook to produce; and

(d) failed to comply with the requests of MFDA Staff for production of an up to date client list and client account statements,

contrary to s. 22 of MFDA By-law No. 1 (the "By-law") and MFDA Rules 2.1.1 and 5. Such information was relevant to, among other things, Leemhuis's involvement with off-shore mutual funds and other companies and ASL's compliance with its regulatory obligations.

Allegation #6: The Respondents have failed to operate ASL in a compliant manner in accordance with its regulatory obligations, as particularized below:

(a) The Respondents failed to maintain adequate records of trade supervision, contrary to MFDA Rules 2.5 and 5 and MFDA Policy No. 2;

(b) The Respondents permitted trading by mutual fund clients of ASL without first obtaining appropriately completed and approved New Account Application Forms ("NAAF") for such clients, contrary to MFDA Rule 2.2;

(c) Between the summer of 2004 and September 2007, the Respondents permitted an unregistered individual named Anil Jain to conduct securities related business for clients of ASL, contrary to MFDA Rule 1.1.5(a);

(d) The Respondents failed to implement a system to properly distribute on a cash basis, interest earned in the Member's mutual fund trust account contrary to MFDA Rule 3.3.2(h), MFDA Policy No. 4 and National Instrument 81-102;

(e) A referral arrangement engaged in by the Respondents did not comply with MFDA Rule 2.4.2(b); and

(f) The Respondents failed to process trade orders on a timely basis, contrary to National Instrument 81-102 and MFDA Policy No. 2.

The first appearance in this matter will take place by teleconference before a Hearing Panel of the MFDA Central Regional Council in the Hearing Room located at the offices of the MFDA, 121 King Street West, Suite 1000, Toronto, Ontario on Monday, November 24, 2008 at 10:00 a.m. (Eastern) or as soon thereafter as can be held.

The purpose of the first appearance is to schedule the date for the commencement of the hearing on its merits and to address any other procedural matters.

The first appearance is open to the public, except as may be required for the protection of confidential matters. Members of the public attending the first appearance will be able to listen to the proceeding by teleconference.

A copy of the Notice of Hearing is available on the MFDA website at www.mfda.ca.

The Mutual Fund Dealers Association of Canada is the self-regulatory organization for Canadian mutual fund dealers. The MFDA regulates the operations, standards of practice and business conduct of its 157 Members and their approximately 75,000 Approved Persons with a mandate to protect investors and the public interest.

For further information, please contact:
Shaun Devlin
Vice-President, Enforcement
(416) 943-4672 or sdevlin@mfda.ca

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