

March 30, 2007

British Columbia Securities Commission  
Alberta Securities Commission  
Saskatchewan Financial Services Commission  
Manitoba Securities Commission  
Ontario Securities Commission  
Autorité des marchés financiers  
Nova Scotia Securities Commission  
New Brunswick Securities Commission

Dear Sirs/Mesdames:

**Re: Notice and Request for Comment dated December 21, 2006 (the "Notice") on Proposed National Instrument 41-101 General Prospectus Requirements and Companion Policy 41-101 CP General Prospectus Requirements**

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This is our firm's response to the CSA request for comment dated December 21, 2006 relating to Proposed National Instrument 41-101 (the "**Proposed Rule**") and Companion Policy 41-101 CP (the "**Proposed Companion Policy**") and amendments to related instruments referred to in the Notice.

In general we support the purposes of the Proposed Rule and the underlying principles of harmonizing and consolidating prospectus requirements across Canada, harmonizing the general prospectus requirements with the continuous disclosure and short form prospectus regimes and having the Proposed Rule reflect current policy. However, we have significant concerns with certain aspects of the Proposed Rule. Our comments on the specific questions raised by the CSA and on other aspects of the Proposed Rule and related amendments are set out below.

**Questions 1 to 4 Certificate Requirements**

We believe that the proposals for certificates to be signed by substantial beneficiaries of offerings are seriously misguided and would have significant detrimental effects on offerings generally, on sales of "significant businesses" as defined in the Proposed Rule to Canadian public issuers and on the competitiveness generally of Canadian public issuers. Our major concerns with these proposals are as follows:

- (1) As no separate form of certificate is specified, it appears that a full issuer certificate would be signed by the substantial beneficiary of the offering. The full issuer certificate would involve certification by the substantial beneficiary of the

full contents of the prospectus, which would require the beneficiary to do full due diligence on the issuer. This would impose an undue burden on the beneficiary and could significantly impact the timing of an offering. This could effectively preclude bought deal financings for acquisition transactions. The delays encountered would impair the efficiency of the capital markets. We note that the primary justification for the certificate appears to be the contention that the beneficiary has the best information related to the significant business. While this may be true in some cases, we also note that the beneficiary does not have the best, or in most cases any, information relating to the remaining assets or business of the issuer and it is accordingly unfair to impose liability on the vendor for other information relating to the issuer. Nor do we believe it is an answer to impose a limited certificate requirement on the beneficiary, because in many cases the information relating to the acquired business will be integrated with other information relating to the issuer, making segregation impossible or impractical. In addition, we anticipate that most vendors, having specifically negotiated representations and warranties in the sale agreement, will not be prepared to expose themselves to any third party liability resulting from the sale.

- (2) There is no assurance that a purchasing issuer would in fact be able to obtain the signatures to the certificate when required or at all. It is anticipated that this could particularly be a problem where the vendor is a foreign entity.
- (3) The proposals could negatively impact the costs of financing or alternatively the ability of smaller issuers to access the capital markets. We expect that a vendor selling a business in circumstances where a prospectus certificate could be required would respond in one of the following manners:
  - (a) refuse to sell to a purchaser if to do so could involve a requirement to sign a prospectus certificate; or
  - (b) impose a one-year no public financing covenant on the purchaser. This would force purchasers to do non-public bridge financing or private placements for a year until the certificate requirement is not applicable. This may not be in the best interests of the purchaser or its security holders. Alternatively, this could force issuers to do “war chest” financings so that they have funds to do future acquisitions, which is contrary to what we believe securities administrators generally prefer; or
  - (c) impose a cost obligation on the issuer consisting of a higher sales price or an indemnity for the costs of the vendor incurred in connection with the prospectus and for liability that it may incur as a result of signing the certificate. It is not unreasonable to conclude that this would adversely impact in a very significant manner the cost of offerings in these circumstances.

- (4) This is not a requirement of U.S. securities laws or, to our knowledge, the laws of other jurisdictions. Such a provision would provide encouragement for Canadian based issuers to seek to list and raise funds under the laws of other jurisdictions and would also provide encouragement for foreign issuers who are looking to list in Canada to list in other markets which do not have these requirements.
- (5) It could reasonably be expected to have a negative effect on the market for the sales of "businesses" and could result in foreign purchasers, non-publicly traded purchasers or issuers which do not require access to the public capital markets becoming favoured purchasers. This could distort the market for sales and also result in Canadian public issuers having reduced commercial opportunities available to them.
- (6) The reach of the provisions is unduly broad. There have not, to our knowledge, been significant instances of misrepresentations in connection with acquisition transactions and the Proposed Rule does not offer adequate justification for such a significant change in the securities laws. The reach of the provisions is unduly broad as they apply to all issues and issuers regardless of their size and whether the issuer is doing an IPO or repeat offering. For example, there have been two recent instances where very significant well established Canadian public issuers have acquired significant businesses from U.S. based vendors and financed the acquisitions with contemporaneous offerings of subscription receipts. One may question whether the investors in these issues require the protection of a certificate of the vendor. One may also question if these Canadian public companies would have been successful bidders if they had been required to negotiate signature of a prospectus certificate by the vendors of the business. If there are specific problems that the commissions consider of concern, they should be more specifically addressed rather than through provisions with such a broad reach and potential negative consequences.
- (7) The definition of business for this purpose is too broad, particularly insofar as it applies to oil and gas properties. The impact of these provisions will be particularly felt in Alberta due to the inclusion in the definition of business of an interest in an oil and gas property to which reserves have been attributed. Oil and gas properties frequently change hands and major companies frequently dispose of "non-core" properties which may not be material to them but which could be considered material to the purchaser. This could result in major companies who sell properties being required to certify the contents of a prospectus of a smaller purchaser. It is not unreasonable to expect that major companies would not sell to a purchaser if a prospectus certificate could be required by the vendor. As noted above, this may force the purchaser to limit its financing options, which may not be in the best interests of the purchaser or its security holders. Since oil and gas properties are not stand alone businesses and there is significant independent third party information available with respect to such properties (for example,

independent third party reserve reports), the underlying rationale for the inclusion of a certificate by the vendor is not present.

- (8) It is not clear whether the provisions will only apply to transactions that are completed after the effective date of the Proposed Rule or if they could apply to transactions completed prior to the effective date. In this respect, it is our view that the provisions, if implemented, should only apply to transactions that are completed after the effective date, as the parties to transactions completed prior to that date will not have negotiated the transactions with these provisions in mind.
- (9) Question 4 relates to the appropriateness of the thresholds. It is our view that any threshold imposed could give rise to the significant negative impacts set out above. As noted above, if there are specific problems that are of concern to the commissions and require addressing, they should be more specifically addressed rather than through provisions with such a broad reach and potential negative consequences.
- (10) While we acknowledge that the prospectus liability provisions of securities acts may contemplate liability for anyone who signs a certificate in a prospectus, we question the appropriateness of the commissions making such a fundamental extension to prospectus liability without a specific amendment being made to the securities acts.

In summary, it is our view that to proceed with this proposal in any way, shape or form is misguided and should be abandoned. It is our view that the proper approach is to leave the responsibility for disclosure on issuers and their directors, officers and underwriters and to ensure (as the Proposed Rule does) that there is disclosure in the prospectus of the information available to the issuer relating to the acquired business, who it was acquired from, the terms of the acquisition, the use of the proceeds and who may in effect be direct or indirect beneficiaries of the offering. Armed with such information, investors are able to determine if they are comfortable with investing in these circumstances. We believe that the goal of securities legislation and rules is not, and should not be, to eliminate risk and provide absolute protection to investors, but rather should continue to be to ensure that investors have appropriate information (including cautions where that information is derived from third parties or is unverifiable) and to allow investors to make their investment decision based on the risk associated with the circumstances.

#### **Additional comments on Certificate Requirements**

- (11) Section 5.13(1) of the Proposed Rule includes a prospective aspect which could require a certificate of a beneficiary to be provided even though the sale has not been completed. It is hard to imagine a vendor agreeing to sign a certificate in a prospectus of a third party purchaser before the transaction has closed.

- (12) Section 5.5 of the Proposed Rule makes provision for certificates by Trust Issuers and requires the certificate to be signed both by persons who perform CEO and CFO like duties as well as by the Trustee. In many cases, a corporate trustee, such as Computershare Trust Company of Canada or Valiant Trust Company, is the Trustee but all administrative power is delegated to a third party administrator. In these cases the certificate should be signed by representatives of the actual administrator rather than the corporate trustee as the corporate trustee has no power over or involvement in the business. From a practical perspective, it is unlikely that the CEO, CFO and two directors of the corporate trustee are going to agree to certify the information in a prospectus. It is suggested that the proper approach is to extend the carve out in subsection 5.5(3) that currently applies to investment funds to situations involving corporate trustees of trust issuers where management authority has been delegated.
- (13) In the case of reverse take-overs, Section 5.8 extends the certificate requirement to include all directors of the reverse take-over acquiror. We do not understand the rationale for requiring the signature of all directors. This will create significant logistical problems for issuers, particularly those with directors who reside outside of Canada.

#### **Questions 5 and 6 Material Contracts**

The provisions referred to in questions 5 and 6 are illustrations of the inherent problems with a "rules" based system which attempts to draft finite rules applicable to all issuers regardless of their size, business or assets. It is practically impossible to draft rules of this nature that will not create more problems than they solve. This is particularly true of the provisions in section 9.1(2) which attempts to designate which provisions must be disclosed. It is suggested that guidance of this nature is more appropriately provided in a companion policy which is a more flexible format than being contained in the Proposed Rule.

We offer the following specific comments on this part of the Proposed Rule:

- (1) It does not provide a useful definition of what is a material contract;
- (2) The 20% threshold in Paragraph 9.1(1)(c ) may be realistic and material for some issuers who are large in size and whose assets are of a nature to make such test relevant whereas for other issuers, such as many junior oil and gas companies, it will require disclosure of information that is not significant or useful to an investor; and
- (3) We do not concur with the amendments being proposed to NI 51-102 Continuous Disclosure as issuers should be permitted to redact information which it considers seriously prejudicial even if it is constitutes one of the designated items as being "necessary to understanding the contract" as provided in section 9.1(2) of the Proposed Rule. Redaction is a particularly important right, and even the provision

of names of contracting parties can in some cases (particularly for technology or IT companies) be of extreme importance. We believe that filed material contracts are generally of more interest to competitors and professional advisers than to investors.

#### **Question 7 Personal Information Forms**

Although we question the need for the information provided in these forms beyond that which was previously provided, in general we have no objection to the requirement to file Personal Information Forms from directors and executive officers of the issuer provided that the form is interchangeable with the similar forms required by the Toronto Stock Exchange and the information will in fact serve a useful purpose for the commissions. We question the need to in effect re-file these forms every three years. It should be noted that the requirement to file PIFs will impose a significant administrative and timing burden on both the issuers (who will need to file these manually in each jurisdiction in which they file a prospectus since the forms are not suitable for SEDAR filing) and for the commissions (who will require dedicated resources to review the forms and maintain them in a manner consistent with the highly confidential nature of the forms). We question whether all commissions will really want to receive and deal with the large number of forms that will be filed with them. The Proposed Rule should make it clear that an individual who holds multiple directorships does not have to file more than once every three years.

We object to the inclusion in section 9.2(b)(ii)(C) and (D) of Personal Information Forms for directors and executive officers of substantial beneficiaries of the offering. The purpose of the form is presumably to enable the commissions to assess the suitability of the directors and executive officers of an issuer and not those from whom it may have acquired a business. In addition, whether a director or executive officer of a substantial beneficiary of the offering is prepared to complete and sign such a form is beyond the control of the issuer and could substantially delay or impede financings.

#### **Question 8 Over Allocation**

We defer to comments provided by underwriters on this question.

#### **Question 9 Distribution of Securities Under A Prospectus**

We defer to comments provided by underwriters on this question.

#### **Question 10 Waiting Period**

We concur with the proposal not to impose a minimum waiting period between the issuance of a receipt for a preliminary prospectus and the receipt for the final prospectus. We note that National Policy 43-201 - Mutual Reliance System For Prospectuses already effectively imposes a waiting period by setting out in sections 5 and 7.5 the time frames in which a principal regulator has to issue a comment letter or MRRS decision document.

### **Question 11 Amendments to Preliminary or Final Prospectus**

We favour retention of the existing provisions or alternatively establishing a material adverse change test for both the preliminary and final prospectus. Imposing a test that will require more frequent amendments to a final prospectus will add uncertainty to the markets and potentially unnecessarily delay the completion of offerings.

### **Question 12 Bona Fide Estimate of Offering Price**

We believe that issuers should have the right but not the obligation to insert an estimate of the offering price and size in a preliminary prospectus. We believe that mandatory insertion in a preliminary prospectus of a *bona fide* estimate of the offering price and disclosure at the mid point of the range would not provide information that is not otherwise available to those who wish to receive it or that is in many cases useful to a prospective purchaser as it has not at that time been agreed to by the issuer and the underwriter and the range may change during the marketing period. We believe that issuers should have the optional right to include such information if the issuer feels that such information is useful to an understanding of the offering.

### **Question 13 2 Year Financial History**

We concur with the attempt to harmonize the financial disclosure requirements of the long form and short form prospectus systems, but believe clarification is required with respect to Item 32 of the Proposed Form 41-101F1, how the exemption available in section 32.4(a) works in concert with the requirement set out in section 5.3(1) of the Companion Policy and Item 32 of Appendix A to the notice with respect to the "primary business" situation.

### **Additional Comments**

#### ***Restricted Securities***

We believe the requirement imposed on issuers under section 12.3(1) of the Proposed Rule to seek shareholder approval on a class basis for the prospectus distribution has an undesirable impact on small companies which do not meet the definition of "private issuers" and were not reporting issuers at the time of the reorganization which created the restricted securities.

#### ***Risk Factors***

We believe that the requirement to place the risk factors in order of importance is not appropriate in the Proposed Rule because it gives rise to the question of the consequences of being incorrect, when the assessment of order of importance is highly subjective. If guidance is provided it should be done in the Proposed Companion Policy, which is a more flexible format.

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We hope that these comments will be of assistance to you and would be happy to discuss any questions you may have with respect to our comments.

Yours truly,

MACLEOD DIXON LLP

A handwritten signature in black ink, appearing to read "K. Johnson", written in a cursive style.

Kevin E. Johnson