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To Whom It May Concern::

**Re: Borden Ladner Gervais LLP RE: Comments on Proposed Changes to National Instrument 41-101 *General Prospectus Requirements***

The following comprises our comments to the members of the Canadian Securities Administrators (the "CSA") on proposed National Instrument 41-101 *General Prospectus Requirements* ("NI 41-101"), and its correlating Forms and Companion Policy. The members of CSA have assembled a very comprehensive list of documents and have provided an impressive array of information for the industry. We note that the proposal includes amendments to a significant number of other National Instruments, related Companion Policies and forms. Given the volume of the proposed additions and alterations to various National Instruments, we have chosen to focus on addressing certain questions outlined in the Canadian Securities Administrators Notice and Request for Comment dated December 21, 2006 (the "Notice and Request for Comment"). For ease of reference, those questions addressed have been incorporated into this letter, and precede each corresponding comment.

Our comments have been compiled with input from various lawyers in our Securities and Capital Markets Group from multiple Borden Ladner Gervais LLP offices, and therefore represent our firm's opinions and perspectives nationally.

Our comments do not necessarily reflect the opinions of, or feedback from, our clients, however, we have had an opportunity to discuss the proposed amendments with certain clients to gain a better understanding of potential consequences to the industry.

***General Comments***

In general, we are supporters of a proposed NI 41-101 which purports to provide consistency and harmonization to the filing of long form prospectuses in Canada. Many issuers, both senior and junior, are filing prospectuses in more than one jurisdiction on a regular basis and this initiative of the CSA addresses that market reality. However, the new proposals will not achieve complete uniformity as certain jurisdictions, most notably Ontario, are excluded from various significant aspects of a long form prospectus. This diminishes the anticipated goal of consistency and harmonization in the marketplace. Notable examples include (i) certification and the requirement for a "substantial beneficiary" to sign a certificate except in Ontario; and (ii) the delivery of a personal information form for every "substantial beneficiary" except in Ontario.

***Certificate requirements***

1. *Except in Ontario, Proposed NI 41-101 includes a new certificate requirement for "substantial beneficiaries of the offering". Does a person or company that controls the issuer or a significant business have the best information about the issuer or significant business? Should a person or company who also receives proceeds from the distribution be liable for any misrepresentations in the prospectus about the issuer or a significant business? Are the definitions of substantial beneficiary of the offering and significant business broad enough to cover this class of persons and companies?*

2. *The definition of "significant business" in Section 5.13 of Proposed NI 41-101 is based on the significance tests for acquisitions. Are these tests the most appropriate measure of significance for the purposes of determining prospectus liability?*

3. *Control of a significant business and direct or indirect receipt of 20% of the proceeds of an offering are both required to bring a person or company within the definition of substantial beneficiary of the offering. Is this dual threshold too limited?*

4. *Is receipt of 20% of the proceeds of the offering the appropriate threshold for paragraph 5.13(2)(b) of Proposed NI 41-101?*

We would submit that the answer to the question "does a person or company that controls the issuer or a significant business have the best information about the issuer or significant business?" is neither "yes" or "no", but "maybe, depending on the circumstances". The problem with establishing a "bright line" threshold is that it catches all the circumstances in which the answer would clearly be "no".

The Notice and Request for Comment states that the introduction of the new concept "substantial beneficiaries of the offering" is because "...a person or company that controls the issuer or a significant business has the best information about the issuer or significant business. Such a person who also receives proceeds from the distribution should be liable for any misrepresentations in the prospectus about the issuer or a significant business". While this new

concept certainly has theoretical merit, certain issues arise when applied to industry practice. In theory, the concepts of knowledge and control can be inclusive of each other. This is particularly the case for a non reporting issuer completing its initial public offering. However, knowledge and control are not strictly equatable, and can certainly be disparate in particular circumstances. For instance, where an ongoing reporting issuer is conducting business in the ordinary course or carrying out an aggressive acquisition strategy, a certification requirement which captures historical relationships going back a year and is not simply limited to the current structure of the issuer, would create a situation where prior control does not equate contemporary knowledge.

We note that NI 41-101 will require that a prospectus contain a certificate of any "substantial beneficiary of the offering" if the issuer intends on filing a prospectus and has or is contemplating acquiring a "significant business". The definition of "substantial beneficiary of the offering" as proposed in section 5.13 of NI 41-101 means "...any person or company that, (a) whether individually or in conjunction with one or more persons or companies acting in concert by virtue of an agreement, arrangement or commitment or understanding, directly or indirectly, **holds or held, within the year preceding the date of the prospectus** [emphasis added], or following the completion of any transaction or series of transactions disclosed in the prospectus is reasonably expected to acquire (i) control of the issuer or a significant business of the issuer, or (ii) voting securities carrying 20% or more of the voting rights attached to any class of voting securities of the issuer or a significant business of the issuer; and (b) together with its affiliates and associates, is reasonably expected to receive, **directly or indirectly, 20% or more of the proceeds of the offering of securities under the prospectus** [emphasis added]...".

The question above asks "Control of a significant business and direct or indirect receipt of 20% of the proceeds of an offering are both required to bring a person or company within the definition of substantial beneficiary of the offering. Is this dual threshold too limited?". Our response is that this may be too broad rather than too limited and that it may not be an appropriate threshold in all circumstances, which could result in undue hardship. In the event that the concept of "substantial beneficiaries of the offering" remains in NI 41-101 it is imperative that a "stepped" percentage threshold be applied. As noted above, there are many junior issuers, particularly in the natural resource sector, where the application of the 20% threshold could create an artificial level of materiality within the industry and as a result may potentially prohibit a junior issuer from successfully negotiating an acquisition. Junior issuers will be faced with a material disadvantage during the negotiation of an acquisition if the potential vendor is required to subsequently execute a certificate in a long form prospectus of the junior issuer. Any potential vendor, and particularly a larger sized vendor, will not be willing to undertake the necessary due diligence and other steps to facilitate the regulatory requirements of a junior company. Therefore, a junior issuer must decide whether to pursue the acquisition and finance it by alternate means or forego the acquisition entirely. The very nature of a junior company often requires the completion of several acquisitions which, because of the need for financing and the application of the 20% threshold, could be caught. Although of particular concern to junior issuers, these same concerns are of course applicable to a wide range of issuers.

In addition, we are concerned with the application of the "one year" to certain aspects of the "substantial beneficiaries of the offering". Again in the context of junior issuers, a junior issuer can look significantly different within a one year period and a vendor or party to a transaction that was "significant" at the time may be *di minimus* in current ownership or not involved in any meaningful way to the junior issuer a year later. From a review of the proposed amendments, we

believe that the purpose of this amendment is to have relevant parties with full knowledge of the issuer be held responsible for the contents of the prospectus. This intention is laudable, however, we respectfully submit that the application of a mathematical threshold will not achieve those results. The "one year look back" provision may have the result of capturing parties that have no knowledge of the current status of an issuer (whether junior or senior). The ability of an issuer to subsequently involve a party that has no continued relationship with the issuer will be time consuming, at best, with a realistic consequence of being unable to obtain the certificate. For instance, where it is unknown at the time of sale whether an offering of securities will be undertaken to finance the deal within the next year, there would be no way for an issuer to know if confirmation from the vendor will eventually be required, and obtaining certification from the vendor a year subsequent to the completion of the sale may be impossible.

***Material contracts***

5. *Should each type of contract listed in subsection 9.1(1) of Proposed NI 41-101 be excluded from the exemption to file contracts entered into in the ordinary course of business? Are there other types of contracts not listed that should be excluded from the exemption to file contracts entered into in the ordinary course of business? If so, please identify the type of contract and explain why they should be excluded.*

6. *Is the list of provisions that are "necessary to understanding the contract" set out in subsection 9.1(2) of Proposed NI 41-101 appropriate?*

The current definition of material contracts permits the issuers to make a determination of the "ordinary course of business" and to consider the industry in which they carry on business in making this assessment. We feel that there is a difference between making a contract "not a contract entered into in the ordinary course of business" for purposes of a prospectus and amending the very definition of material contracts, such that the determination of "materiality" is removed from the issuer. We note that the Summary of Significant Provisions in the Proposed Rule provided by the CSA states that further to proposed amendments to NI 51-102 "...to address inconsistency in filings and confusion about what is in the ordinary course of business, we will develop further guidance for the companion policy in conjunction with a project to harmonize the long form prospectus requirements". We would suggest that the section on material contracts (and the subsequent amendments to NI 51-102) be broadened to permit some determination of "materiality" by the issuer, or at a minimum, have some dollar value threshold attached.

***Personal information form and authorization***

7. *Subparagraph 9.2(b)(ii) of Proposed NI 41-101 will require an issuer to deliver a completed personal information form and authorization for every individual described in this subparagraph with the first preliminary prospectus filed by the issuer after the Proposed Rule becomes effective. Are there significant practical difficulties an issuer may have in complying with this requirement?*

We are uncertain as to the policy reason for establishing another filing for issuers to be obligated to obtain and file if the issuer is already a reporting issuer and is listed on a Canadian exchange (or filing an initial public offering with an application to be listed on a Canadian exchange).

The participants required to provide a personal information form is also broader than required by a Canadian exchange. Particularly, the requirement to have personal information forms for each "substantial beneficiary" of an offering or the directors and executive officers of each "substantial beneficiary" is extremely onerous and in most cases, completely outside the control of an issuer. As noted in the introductory paragraph, we are unclear as to the practicalities of having these personal information forms required everywhere but in Ontario.

***Distribution of securities under a prospectus to an underwriter***

8. *Section 11.3 of Proposed NI 41-101 permits compensation options or warrants to be acquired by an underwriter under the prospectus where the securities underlying such compensation options or warrants are, in the aggregate, less than 5% of the number or principal amount of the securities distributed under the prospectus. Is 5% an appropriate limit?*

We are of the opinion that this constraint is likely unnecessary. Limiting issuers' ability to remunerate underwriters in options or warrants to the 5% threshold, may have the unintended consequence of causing issuers to pay more compensation in cash. We view these limitations on issuer payment flexibility negatively.

***2 years' financial statement history***

9. *We are proposing to harmonize the requirements between the short form and long form prospectus systems for reporting issuers. Do you agree that reporting issuers using the long form system should only have to provide the same number of years financial history they would normally provide under the short form system?*

We feel that this is an excellent modification, which amounts to a significant improvement, and commend the CSA in its attempt to harmonize the requirements between the short form and long form prospectus systems for reporting issuers.

We hope that our comments in regards to NI 41-101 have been of assistance to the CSA. If further discussion concerning these comments would be useful, please contact either Melinda Park at (403)-232-9795 or Dan Kolibar at (403)-232-9559.

Yours truly,

**BORDEN LADNER GERVAIS LLP**

**for MELINDA PARK**

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