Borden Ladner Gervais LLP
Lawyers • Patent & Trade-mark Agents
1200 Waterfront Centre
200 Burrard Street, P.O. Box 48600
Vancouver, B.C., Canada V7X 1T2
tel: (604) 687-5744 fax: (604) 687-1415
www.blgcanada.com

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BORDEN LADNER GERVAIS

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Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

Sheryl Thomson
Senior Legal Counsel, Corporate Finance
British Columbia Securities Commission
P.O. Box 10142 Pacific Centre
701 West Georgia Street
Vancouver, BC V7Y 1L2

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

Dear Sirs/Mesdames:

**Re: Notice and Request for Comment: Proposed Repeal and Replacement of National Instrument 43-101 *Standards of Disclosure for Mineral Projects*, Form 43-101F1 *Technical Report*, and Companion Policy 43-101CP (the "Notice")**

We are pleased to provide our comments to the members of the Canadian Securities Administrators ("**CSA**") on the proposed Repeal and Replacement of National Instrument 43-101 *Standards of Disclosure for Mineral Projects*, Form 43-101F1 *Technical Report*, and Companion Policy 43-101CP.

Our comments on the proposed instruments have been compiled with input from the lawyers in our National Securities and Capital Markets Group and our National Mining Group, in consultation with issuers in the Canadian mining sector, investment funds, and firms within the Canadian investment dealer community. Our comments do not necessarily reflect the opinions of our clients or any of the other issuers, funds or firms whose views we solicited. We expect that a number of our clients and other interested parties will provide their comments directly to the CSA. For purposes of this comment letter, we have adopted and use the same defined terms as in the Notice and Request for Comment.

We agree with the CSA's assessment that, after nine years in force, there are certain areas where the Current Mining Rule can be improved and applaud the CSA for this welcome initiative. In what follows we offer some general comments in support of a number of the most material amendments. We also recommend areas where we believe the proposed amendments might be improved and highlight two areas of concern where the proposed amendments may have negative, and we suspect unintended, consequences for producing mining issuers. We conclude by addressing the CSA's specific requests for comment.

**General comments in support of the proposed changes**

**1. Elimination of the short form prospectus trigger**

We support the elimination of the short form prospectus trigger. The obligation to prepare and file a technical report in connection with a short form prospectus offering has reduced the flexibility of issuers in the Canadian mining sector to access the capital markets during favourable market windows, while providing only marginally improved technical disclosure and little practical benefit to investors.

***(a) The short form prospectus trigger limits issuers' flexibility to access capital markets during favourable market windows***

We have experienced first hand numerous circumstances – some of which have been described in the responses prepared by our clients – where the short form prospectus trigger has prevented issuers from accessing the capital markets during favourable market windows because a required technical report was not ready for filing. In a number of these circumstances, the issuers (and, indirectly, their shareholders) incurred additional dilution by raising capital during a less opportune market window when the technical report was finally ready for filing. A technical report is a complex document requiring significant time to prepare. The time required to prepare and file a technical report can constrain an issuer's ability to access a favourable market window for financing, even where sufficient technical information is available to provide appropriate prospectus disclosure and satisfy the due diligence procedures of management, boards of directors and underwriters. While issuers can apply for discretionary relief from the requirement to file a technical report in connection with a short form prospectus offering, the process of applying for and obtaining discretionary relief is time consuming and can itself result in material delays in an issuer's ability to access a market window. Not unsurprisingly, we are aware of only a few circumstances where such relief has been sought and granted. Accordingly, we view the elimination of the short form prospectus trigger as a positive development for issuers, removing a significant constraint on their ability to access capital.

***(b) The elimination of the short form prospectus trigger will not compromise the accuracy of technical disclosure***

It is our view that the elimination of the short form prospectus trigger will not compromise the accuracy of scientific or technical disclosure contained in a short form prospectus. We submit that the requirement for qualified person preparation, or supervision of the preparation, of new scientific or technical information disclosed in a short form prospectus in combination with the due diligence procedures routinely undertaken by management, boards of directors and underwriters in prospectus offerings, and the statutory rights of action available to investors in the event of a misrepresentation, are adequate to ensure the accuracy of technical disclosure contained in a short form prospectus. Under subsection 4.2(5)(a) of the Amended Instrument, issuers will also be required to file a technical report supporting disclosure contained in a short form prospectus within 45 days if a short form prospectus contains material, first time disclosure of a preliminary economic assessment, mineral resources, mineral reserves or a change thereto. This future filing obligation will provide a mechanism to check and verify the scientific or technical disclosure included in a short form prospectus,

as well as support the due diligence efforts conducted in connection with short form offerings.

***(c) A technical report is of little or no benefit to purchasers in the context of many short form prospectus offerings***

A technical report provides some marginal benefit to investors in the context of a fully marketed short form prospectus offering, in terms of additional scientific and technical disclosure. However, many short form prospectus offerings in the Canadian mining sector (and, certainly, the majority in terms of proceeds raised) are completed either on a "bought deal" basis or through an overnight marketed offering. On a "bought deal", the decision to purchase securities is made generally before the short form preliminary prospectus and associated technical reports are filed. In an overnight offering, investors simply do not have sufficient time to conduct a meaningful review of a technical report before making an investment decision. Accordingly, it is our view that a technical report provides little or no benefit to purchasers in the context of many short form prospectus offerings (and, certainly, the majority in terms of proceeds raised). This view is supported by the input we have received from members of the Canadian underwriting community and investment funds which purchase in such offerings.

The one caveat that has been expressed by some members of the Canadian underwriting community and some independent directors of Canadian mining issuers we have canvassed is a concern that the elimination of the short form prospectus trigger may increase their risk of exposure to prospectus liability in connection with short form prospectus offerings, where statements of a technical or scientific nature are included in a short form prospectus and cannot be directly attributed to a technical report. The majority view among the underwriters and directors we surveyed, however, is that any additional risk of exposure to prospectus liability associated with the elimination of the short form prospectus trigger can be appropriately managed through their due diligence procedures, which will likely include a review of underlying scientific or technical data or early drafts of technical reports required to be filed within 45 days after the short form prospectus filing pursuant to subsection 4.2(5)(a) of the Amended Instrument. We agree with this view.

We also note in this regard that the Notice at p.3709, as well as the Companion Policy at Section 4.2(13), suggest that the qualified person responsible for any new technical information referenced in the short form prospectus would likely be considered an expert and required to provide an expert's consent. Accordingly, to the extent any information contained in the short form prospectus is so expertised, the underwriters' risk is also mitigated. Having said that, we are puzzled by the difference in wording between the Notice and the Amended Companion Policy: the Notice says the QP "<u>would likely</u> be considered an expert…and <u>so would be required</u> to provide and expert consent" while the Amended Companion Policy says the QP "<u>could be required</u> to provide an expert consent". If the view of the CSA is in fact that an expert's consent is likely to be required, we would recommend that the Amended Companion Policy be more definitive on the point. In fact, it would be most helpful if it explicitly stated the circumstances when an expert's consent would <u>not</u> be required.

* * *

We believe the elimination of a short form prospectus trigger will provide issuers in the mining sector with greater flexibility to access capital, without compromising the interests of investors or the accuracy of technical disclosure contained in short form offering documents. We strongly support the elimination of the short form prospectus trigger.

**2. Updated certificates and consents**

We strongly support the proposed removal from subsection 4.2(8) of the Amended Instrument of the current requirement to file updated certificates and consents of qualified persons where the remaining conditions of subsection 4.2(8) are met. This proposal addresses one of the most common frustrations encountered by Canadian mining issuers in complying with the Current Instrument – the frequent practical difficulties in locating the qualified person who authored a previously filed technical report. It is often very difficult to arrange for an individual technical report author, who may be working in a remote and inaccessible field location, or who may no longer be employed by the same issuer or consulting firm, to review the final version of a time-sensitive disclosure document and provide a consent before filing. Given these difficulties, we agree with CSA's conclusion that an updated consent should not be required where all material scientific or technical information concerning the subject property is supported by an existing technical report.

**3. Alternative consents under the proposed amendment to National Instrument 44-101**

We strongly support the proposed amendments to National Instrument 44-101, that would allow a consulting firm, whose employee prepared a technical report, to consent to the use of the technical report for a short form prospectus where the employee is not available or is no longer employed by the consulting firm.

We recommend that this amendment be taken one step further, allowing issuers in the same circumstance to consent to the use of internally prepared technical reports for a short form prospectus. Issuers who have elected to internally prepare their technical reports face precisely the same logistical challenges faced by independent consulting firms where an employee whose consent is required is working in a remote and inaccessible field location or is no longer employed by the issuer. We believe the rationale articulated by the CSA in support of the proposed amendment to National Instrument 44-101 applies equally in the case of issuers relying upon internally prepared technical reports. We submit that the New Mining Rule should not produce a different regulatory outcome simply because an issuer has the resources and expertise to produce technical reports internally.

**4. Preliminary economic assessments based on inferred mineral resources**

We strongly support the proposal, set out in subsection 2.3(3) of the Amended Instrument, to provide issuers with greater flexibility in their ability to disclose the results of preliminary economic assessments that include, or are based on, inferred mineral resources. We have experienced first hand a number of situations where issuers have been forced to withhold meaningful information from the public as a result of the restrictions set out in section 2.3 of the Current Instrument and subsection 2.3(2) of the Current Companion Policy. For example, issuers that have prepared a preliminary feasibility study on, or are mining:

(a) an initial deposit on a property, and later conduct a preliminary assessment on a newly discovered satellite deposit on the same property;

(b) an open pit mine, and later conduct a preliminary assessment on underground mining beneath the pit; or

(c) the oxide portion of a deposit, and later conduct a preliminary assessment on the sulphide portion of the deposit (or vice versa),

are currently prohibited from disclosing the preliminary assessment to the market, even though the original preliminary feasibility study may not have contemplated the newly discovered deposit, underground operations or sulphide portion of the deposit. This is the case even if the results of the preliminary assessment represent a material change or material fact with respect to the issuer. We believe the proposed amendments will better facilitate disclosure of pertinent economic analyses to the market.

**5. Extension of the 45 day filing deadline for property acquisitions**

We strongly support the extension of the 45 day filing requirement for technical reports on newly acquired properties set out in subsection 4.20(7) of the Amended Instrument. A properly prepared technical report, reflecting the development or operating strategies and plans of a new owner (who may bring different operational expertise or synergies to a property than the previous owner), takes significant time and resources to prepare and frequently cannot be completed within the current 45 day time frame. As a result, acquiring issuers are often forced to file a technical report that is nothing more than a re-addressed version of the most recent technical report filed by the prior owner and which is based on the development or operating strategies and plans of the prior owner in order to satisfy the 45 day filing requirement, even though these development or operating strategies and plans may not match those of the new owner (ultimately, necessitating the preparation and filing of another significantly revised and updated technical report reflecting the new owner's strategies and plans for the property). The proposed change will provide acquiring issuers with sufficient time to prepare a technical report that reflects their strategies and plans for developing or operating a new property, without the time and expense required to file what is effectively an interim report which is of little value to the market.

**6. Other positive developments in the Amended Instrument and Amended Form: comparable foreign standards, exemption for royalty holders**

We note our support for four additional material developments in the Amended Instrument and the Amended Form:

- We support the proposal to replace the current prescriptive list of acceptable associations with broader objective standards that professional associations must meet in order to have their members be eligible to act as qualified persons. This change reflects the fact that Canadian issuers have mineral properties world-wide, and provides issuers with the opportunity to use local experts as qualified persons for international properties where they meet the objective criteria set out in the Amended Instrument. We are not, however, clear on why there is a double standard regarding experience for foreign experts as a result of paragraph (c)(iv)B of the definition of qualified person.

- Similarly, we support the proposal to replace the current prescriptive list of acceptable foreign codes with an objective standard for determining which codes are acceptable, and to remove the requirement to reconcile mineral resource and reserve categories under acceptable foreign codes to the CIM definition Standards on Mineral Resources and Mineral Reserves (the "**CIM Standards**"). However, we would recommend that mineral resource and reserve disclosure under an acceptable foreign code should state with equal prominence that such disclosure has not been prepared in accordance with the CIM Standards and briefly summarize the material differences, if any, between mineral resource and reserve categories under the acceptable foreign code and under the CIM Standards to ensure market participants are alerted to the use of an acceptable foreign code and do not inadvertently make apples to oranges comparisons of mineral resources and reserves under different codes.

- We support the exemption, set out under subsection 9.2(1) of the Amended Instrument, for issuers holding a royalty interest in a mineral project. We agree that technical reports prepared by issuers holding a royalty interest in a mineral project are of limited value.

- We support the exemption of producing issuers from the requirement to include information under Item 22 of the Amended Form for their producing properties. Such disclosure under the Current Form often struck us as unnecessary, awkward and even slightly misleading for producing properties.

**Areas of concern regarding the Amended Form, the Amended Companion Policy and recommendations**

We respectfully submit that two of the new disclosure requirements included in the Amended Form may, we suspect unintentionally, prejudice Canadian mining issuers, without offering any corresponding benefit to investors.

**1. New requirement to disclose commercially sensitive marketing studies and contracts under Item 19 of the Amended Form may cause significant prejudice to senior producers**

As it is currently drafted, Item 19 of the Amended Form may cause significant economic and competitive prejudice to many of Canada's mining producers. Item 19 would require issuers to (a) provide a summary of reasonably available information concerning markets for the issuer's production, including the nature and material terms of any agency relationships and the results of any relevant market studies, commodity price projections, product valuation, market entry strategies and product specification requirements; and (b) identify any contracts material to the issuer that are required for property development, including mining, concentrating, smelting, refining, transportation, handling, sales and hedging, and forward sales contracts or arrangements. This requirement is appropriate in the context of non-producing issuers, where investors will benefit from disclosure regarding markets for the issuer's future production and material contracts relating to the development of an issuers' property. We submit that this disclosure, however, is not appropriate for producing issuers, as the Amended Form would require disclosure of commercial sensitive pricing information that, to date, has remained confidential.

This new disclosure requirement could be particularly damaging to some of Canada's most senior producers that market significant volumes of commodities - particularly potash, uranium, coal and diamonds – in international commodity markets where a material portion of global sales are controlled by a limited number of producers or refiners. Such senior Canadian producers may have significant pricing power and may generate substantial margins from the pricing of their long and short term commodity sales. Forcing these senior Canadian producers to disclose their internally prepared price projections would significantly compromise their ability to negotiate favourable pricing with international and domestic commodity buyers and would also place them at a significant competitive disadvantage to foreign producers. This disclosure also would allow foreign competitors to tailor their production strategies to the detriment of senior Canadian producers. In certain circumstances, disclosing internally prepared price projections also could be considered "price signalling", potentially in violation of competition law.

More broadly, the proposed disclosure requirement set out in Item 19 will be detrimental to all producing issuers who enter into long-term sales contracts. Forcing Canadian issuers to disclose sensitive pricing information negotiated under the terms of long-term sales contracts will compromise such issuers' ability to negotiate favourable terms in future negotiations and, once again, place Canadian firms at a competitive disadvantage to their foreign competitors.

In order to avoid significant economic and competitive harm to producers in the Canadian mining industry, we strongly recommend that the new disclosure requirements set out under Item 19 of the Amended Form should not apply to producing issuers. We submit that the value of this disclosure to investors in respect of producing issuers would be marginal, since investors already will have access to financial disclosure regarding sales from these issuers' annual and interim financial statements and to forward-looking analysis through these issuers' annual and interim MD&A.

**2. Item 15(a) of the Amended Form may require outdated disclosure and implicitly require updated feasibility and pre-feasibility studies, which would impose a significant new regulatory burden on issuers**

Item 15(a) of the Amended Form states that a technical report disclosing mineral reserves must provide sufficient discussion and detail of the key assumptions, parameters, and methods used in the preliminary feasibility or feasibility study, for a reasonably informed reader to understand how a qualified person converted the mineral resources to mineral reserves. The inclusion of the words "used in the preliminary feasibility or feasibility study," raises a significant potential concern for many producing issuers.

The assumptions, parameters, and methods contained in a preliminary feasibility or feasibility study and required for the purposes of an initial reserve estimate are certainly appropriate subjects for disclosure at the time such initial estimates are originally made. But, mineral reserves and the assumptions, parameters and methods used to estimate them will evolve and change over time, especially for producing mines with an extended mine life. Accordingly, the materiality of disclosure concerning the key assumptions, parameters, and methods used in the preliminary feasibility or feasibility study will decline over time and eventually become outdated. We believe that such disclosure should be superseded in subsequent technical reports by disclosure of the key assumptions, parameters, and methods employed in current mineral reserve estimates.

Unfortunately, the inclusion of the words "used in the preliminary feasibility or feasibility study," in item 15(a) of the Amended Form ties the disclosure obligation to specific historical reports, and such historical disclosure may become outdated and perhaps even misleading as mineral reserves change over a mine's life.

Of greater concern, the inclusion of the words "used in the preliminary feasibility or feasibility study," in item 15(a) of the Amended Form could be construed as imposing an obligation to update preliminary feasibility or feasibility studies as mineral reserve estimates change over a mine's life. The preparation of a preliminary feasibility study or feasibility study is an enormously costly process. It is not industry practice to update the assumptions, parameters and methods used in the preparation of a preliminary feasibility or a feasibility study on an ongoing basis. In order to comply with Item 15(a) as it is currently drafted, issuers should not have to undertake this costly exercise, which would impose a significant new regulatory burden on issuers without a corresponding benefit to investors.

We submit that removing the words "used in the preliminary feasibility or feasibility study" from the text of Item 15(a) would avoid outdated disclosure from being required in technical reports prepared later in a mine's life and also avoid any implicit suggestion of an obligation on issuers to update feasibility and pre-feasibility studies without affecting the substance of the proposed requirement.

**Other comments on the Amended Form and Amended Companion Policy: plain language, risks, shelf life of technical reports**

We provide the following additional comments regarding technical report disclosure in the Amended Form and the Amended Companion Policy:

- Instruction (3) in the Amended Form advises qualified persons to keep in mind that the intended audience for technical reports is the investing public and their advisors and, therefore, instructs that technical reports should be simplified, summarized and written in plain language. We question whether this instruction is at odds with the inherently scientific and technical nature of technical reports. Many qualified persons are not trained in plain language drafting. Accordingly, the preparation of plain language technical reports may require the involvement of third party editors, which will impose additional costs and preparation time for issuers. There is also a concern that pertinent scientific and technical data and concepts may be lost in translation if technical reports are overly simplified or summarized for plain language purposes. It may also be an erroneous presumption that technical reports are broadly read by the investing public or their advisors. Their true intended audience may be regulators and research analysts who have sufficient education and training to understand the contents of these reports without the benefit of plain language drafting. We would suggest that the principal policy rationale for the preparation of technical reports is to provide expert scientific and technical verification, back-up and support for an issuer's public statements of scientific and technical information – and not to serve as the principal disclosure vehicle for such statements. Perhaps the more appropriate focus for plain language disclosure should be on an issuer's public statements and other continuous disclosure documents (such as press releases, MD&A, annual reports, AIFs, prospectuses and website disclosure) that presently are intended for consumption by the investing public and their advisors, and

technical reports should be allowed to remain technical in nature. We suggest that the first two sentences of instruction (3) of the Amended Form should be redrafted to omit reference to intended audiences and plain language, and instead instruct that technical reports should be simplified, summarized and concise. This comment is also applicable to the guidance in section 2.1(3) of the Amended Companion Policy.

- The second and third sentences of item 25 of the Amended Form require a discussion of risks and uncertainties and the reasonably foreseeable impact of those risks and uncertainties. While we concur that such a discussion is warranted in a technical report, we would suggest that this discussion be broken out into a separate item in the Amended Form. Otherwise, the conclusions discussed in item 25 may appear to be imbalanced or unduly negative as a consequence of the detailed risk discussion currently required by item 25.

- The guidance in section 4.2(6) of the Amended Companion Policy is generally, helpful, particularly the statements with respect to sensitivity analyses. However, we have concerns that the guidance seems to imply that when economic information is outdated, issuers are required file a new technical report. That is not our understanding of the triggers for the obligation to file a technical report specified in Part 4 of the Amended Instrument. We suggest that the guidance should be amended to clarify that if economic information has become outdated, it does not, in itself, trigger an obligation to file a new technical report.

**Responses to specific requests for comments**

We are pleased to provide answers to your specific questions using the same numbering scheme as set out in the Notice.

**1.** ***Do you rely on technical reports when making, or advising on, investment decisions in a short form prospectus offering? If yes, please explain how the content of a technical report, or the certification of a technical report by a qualified person, could influence your investment decisions or your recommendations.***

While we are not in the business of making, or advising on, investment decisions, in preparing our response we have canvassed the opinion of a number of firms that are. As discussed above, it is our understanding that investors and advisors generally do not rely on technical reports when making, or advising on, investment decisions in "bought deal" and overnight marketed short form prospectus offerings as the associated time-frame does not permit detailed review of a technical report prior to making an investment decision. As such, we are of the view that the content of a technical report, or the certification of a technical report by a qualified person, does not influence the investment decisions of investors, or the recommendations of advisors, in many short form prospectus offerings (and, certainly, the majority in terms of proceeds raised).

**2.** ***Do you think we should keep, or eliminate, the short form prospectus trigger? Please explain your reasoning.***

For the reasons discussed above, we strongly support the elimination of the short form prospectus trigger.

**3.** ***Please discuss how your answers to questions 1 and 2 might change in each of the three cases described in the table.***

Our answers to questions 1 and 2 remain the same for each of the three cases described in the table.

**4.** ***If we decide to eliminate the short form prospectus trigger, is the proposed guidance in subsection 4.2(13) of the Amended Companion Policy useful? Do you have any suggestions concerning this guidance?***

We believe the proposed guidance in subsection 4.2(13) of the Amended Companion Policy is useful, and have no suggestions concerning this guidance other than to improve the guidance on experts' consents, as discussed above.

**5.** ***Is the proposed new exemption relating to an acquired property helpful? Is it reasonable to expect that issuers will use the new exemption in light of the attached conditions?***

For the reasons discussed above, we believe the proposed new exemption relating to an acquired property is very helpful and expect that issuers will use the new exemption.

**6.** ***Do market participants use this exemption? Should we keep it in the Amended Instrument?***

We believe that the exemption from the site visit requirement, carried forward in subsections 6.2(2) and (3) of the Amended Instrument, is used by market participants and should be kept in the Amended Instrument.

* * *

We hope that our comments will be considered as constructive by the CSA. Please contact the Chair of our National Mining Group, Fred R. Pletcher, at 604-640-4245 if you wish to discuss these comments with us.

Yours truly,

**BORDEN LADNER GERVAIS LLP**

*(signed) Fred R. Pletcher*

By:
Fred R. Pletcher