



SHIBLEY RIGHTON LLP
Barristers and Solicitors

John F. O'Donnell
Direct Line (416) 214-5207
Direct Fax (416) 214-5407
john.odonnell@shibleyrighton.com

TORONTO OFFICE
250 University Avenue, Suite 700, Toronto, Ontario, M5H 3E5
Main 416 214-5200 Toll free 1-877-214-5200
Facsimile 416 214-5400

WINDSOR OFFICE
2510 Ouellette Avenue, Windsor, Suite 301, Ontario, N8X 1L4
Main 519 969-9844 Toll free 1-866-422-7988
Facsimile 519 969-8045

www.shibleyrighton.com

Please Reply to the TORONTO OFFICE

DELIVERED

May 23, 2003

Ontario Securities Commission
20 Queen Street West
Suite 1900
Toronto, ON M5H 3S8

Attention: Paul Hayward

Dear Sir:

**Re: Submission re Proposed Amendments and Restatement of Rule 45-501, and Ontario
Regulatory Requirements re Issuance of Securities for Acquisition of Mining Claims**

Further to our recent telephone conversation, I enclose a diskette containing an electronic copy of my submission dated May 13, 2003 in WordPerfect format.

Should you require anything further, please do not hesitate to contact the undersigned.

Yours very truly,
SHIBLEY RIGHTON LLP

John F. O'Donnell

/bw
Encl.

**GREAT LAKES
LAW**





John F. O'Donnell
Direct Line (416) 214-5207
Direct Fax (416) 214-5407
john.odonnell@shibleyrighton.com

TORONTO OFFICE
250 University Avenue, Suite 700, Toronto, Ontario, M5H 3E5
Main 416 214-5200 Toll free 1-877-214-5200
Facsimile 416 214-5400

WINDSOR OFFICE
2510 Ouellette Avenue, Windsor, Suite 301, Ontario, N8X 1L4
Main 519 969-9844 Toll free 1-866-422-7988
Facsimile 519 969-8045

www.shibleyrighton.com

Please Reply to the TORONTO OFFICE

May 13, 2003

Ontario Securities Commission
20 Queen Street West
Suite 1900
Toronto, ON M5H 3S8

Attention: Paul Hayward

Dear Sir:

Re: Submission re Proposed Amendments and Restatement of Rule 45-501, and Ontario Regulatory Requirements re Issuance of Securities for Acquisition of Mining Claims

Further to our recent conversation respecting the above-noted matter, I would like to take this opportunity to make the following submission with respect to the proposed amendments and restatement of Rule 45-501 *Exempt Distributions*. As an interim measure, I would propose the procedure outlined below to address the apparent lack of a formal mechanism to determine what escrow or pooling agreements might be required by the Director of the OSC in relation to the issuance of securities of non-TSX listed companies for an interest in mining claims pursuant to the prospectus and registration exemptions contained in clause 72(1)(m) and paragraph 35(2)14 of the *Securities Act* (Ontario) (the "Act") respectively.

The prospectus exemption is contained in clause 72(1)(m) of the Act which provides as follows:

"(m) the trade is made by an issuer in a security of its own issue in consideration of mining claims where the vendor enters into such escrow or pooling agreement as the Director considers necessary or where the security proposed to be issued, or the security underlying that security, is listed and posted for trading on a stock exchange recognized for the purpose of this clause by the Commission and the issuer has received, where required by the by-laws, rules or policies of that stock exchange, the consent of that stock exchange to the issuance of the security."

The registration exemption is contained in paragraph 35(2)14 of the Act which provides as follows:

"Securities issued by a mining company or a mining exploration company as consideration for mining claims,

- (i) where the vendor enters into such escrow or pooling agreement as the Director considers necessary, or
- (ii) where the security that is proposed to be issued, or the security underlying that security, is listed and posted for trading on a stock exchange recognized for the purpose of this paragraph by the Commission and the issuer has received (where required by the by-laws, rules or policies of that stock exchange) the consent of that stock exchange to the issuance of the security.”

Although on the surface, the prospectus and registration exemptions appear to be comparable, there is a technical gap which causes some difficulty on this issue.

Recognition Order 21-901 - Stock Exchange Recognition Order provides that the OSC “recognizes the TSE and CDNX for the purposes of clause 72(1)(m) of the Act.”

The OSC became aware that there was a disparity between the provisions of clause 72(1)(m) and paragraph 35(2)14 (as then in effect) and attempted to rectify the problem.

OSC Staff Notice 45-701 - Paragraph 35(2)14 of the Act dated November 10, 2000 provides as follows:

“On November 7, 2000, the Ontario Securities Commission recognized The Toronto Stock Exchange (the “TSE”) for the purpose of clause 72(1)(m) of the Securities Act (Ontario) (the “Act”). Clause 72(1)(m) of the Act provides an exemption from the prospectus requirement for:

[a trade] by an issuer in a security of its own issue in consideration of mining claims where the vendor enters into such escrow or pooling agreement as the Director considers necessary or where the security proposed to be issued, or the security underlying that security, is listed and posted for trading on a stock exchange recognized for the purpose of this clause by the Commission and the issuer has received, where required by the by-laws, rules or policies of that stock exchange, the consent of that stock exchange to the issuance of the security.

Paragraph 35(2)14 of the Act provides an exemption from the registration requirement for trades in:

[s]ecurities issued by a mining company or mining exploration company as consideration for mining claims where the vendor enters

into such escrow or pooling agreement as the Director considers necessary.

Staff plans to recommend that paragraph 35(2)14 of the Act be amended to correspond with clause 72(1)(m) of the Act so as to provide a registration exemption if the security proposed to be issued, or the security underlying that security, is listed and posted for trading on a stock exchange recognized for the purpose of paragraph 35(2)14 by the Commission and the issuer has received, where required by the by-laws, rules or policies of that stock exchange, the consent of that stock exchange to the issuance of the security.

In the interim, the Director will not consider any escrow or pooling agreement to be necessary for the purpose of trades made in reliance on paragraph 35(2)14 of the Act provided that the security proposed to be issued, or the security underlying that security, is listed and posted for trading on the TSE and the issuer has received, where required by the by-laws, rules or policies of the TSE, the consent of the TSE to the issuance of the security.”

It is apparent that there was still a disparity in that both the TSE and CDNX are recognized for the purposes of clause 72(1)(m) but only the TSE is recognized for the purpose of paragraph 35(2)14. Furthermore, notwithstanding that Rule 45-102 provides specific restricted periods with respect to securities issued under the provisions of clause 72(1)(m), there does not appear to be any formal mechanism to file notice of the issuance of such securities to determine whether the Director would consider any further escrow or pooling agreement necessary in the case of non-TSX listed companies.

To date, there is no updated Recognition Order dealing with the change of names of TSE to TSX and CDNX to TSX Venture Exchange. However, we understand from Staff of the OSC that there is no issue in this regard as these are merely name changes.

This apparent difficulty was addressed in the OSC decision *In the matter of Jilbey Enterprises Ltd.* dated August 15, 2002, reported at (2002) 25 OSCB 5731. In the application by Jilbey Enterprises Ltd. (“Jilbey”), the issuer (a TSX Venture Exchange listed company) proposed to issue 400,000 common shares, in partial consideration for the assignment of an interest in mining claims, which transaction had been accepted for filing by the TSX Venture Exchange. It was represented to the OSC, *inter alia*, that “the TSX Venture Exchange is not a recognized exchange for the purpose of paragraph 35(2)14 of the Act” and further that “according to Recognition Order 21-901, the TSX Venture Exchange is a recognized exchange for the purpose of clause 72(1)(m) of the Act.” The OSC ordered that Jilbey was not subject to the requirement of paragraph 35(2)14 of the Act. The OSC further ordered that the issuer was exempt from the requirement to pay a fee in connection with the application, presumably in light of the obvious technical gap between the respective provisions of the Act and the Recognition Order.

It is clear that this unsatisfactory situation results in significant difficulties, expense, concern and ambiguity for non-TSX listed companies. Ontario reporting issuers who are not listed on any exchange but whose trades are required to be reported through the Canadian Listed Board, and the now recognized CNQ which is expected to be in operation shortly, have their own unique problems. Even if the recognition orders were amended to recognize the TSX and the TSX Venture Exchange for the purposes of both clause 72(1)(m) and paragraph 35(2)14, other non-listed issuers would still have no obvious reporting mechanism for the transaction and would otherwise be required to make an application on a transaction-by-transaction basis.

If an application is required in all similar situations, it is probable that the OSC would be overwhelmed with applications and the costs to the issuers and the OSC would be significant, particularly in view of the new OSC fee structure which provides for a \$5,000 fee for an application for discretionary relief. If it is the OSC's intent to waive the application fee for this type of application, as it did with Jilbey application, this would obviously be an unnecessary financial burden to the OSC as well. Any prolonged uncertainty as to whether or not the Director would require the imposition of a pooling or escrow agreement would put an affected issuer to considerable competitive disadvantage in acquiring mining claims or an interest therein.

I would respectfully submit that Rule 45-501 which deals with exempt transactions could be amended to provide an expedient reporting mechanism to disclose particulars of any proposed issuances of securities for an interest in mining claims. The OSC could be given an appropriate time to respond (say 5 to 10 days), failing which no additional pooling or escrow agreement would be required. Pending any formal consideration of this suggestion, I would appreciate your views as to the appropriateness of dealing with this issue on the following basis. In such circumstances, I would propose to deliver a letter to the Secretary of the OSC providing particulars of the proposed issuance of securities and advising that if I did not hear otherwise from the OSC within 10 days, I would assume that the Director did not consider necessary any escrow or pooling agreement, and would proceed to issue the securities, subject of course to the applicable restricted period prescribed by Rule 45-102. I look forward to your comments with respect to this proposal.

Yours very truly,
SHIBLEY RIGHTON LLP

John F. O'Donnell

/bw
c. Rick Whiler, Senior Accountant, Corporate Finance Branch - Team #1