

**AUSTRALASIAN
JOINT ORE RESERVES
COMMITTEE (JORC)**



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THE MINERALS INSTITUTE



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A submission by the Australasian Joint Ore Reserves Committee on the proposal by Canadian Securities Authorities (CSA) to extend the requirement for submission to jurisdiction and appointment of an agent for service to include foreign experts

This submission is addressed to Canadian securities regulatory authorities, as below:

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission – Securities Division
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Superintendent of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Superintendent of Securities, Northwest Territories
Superintendent of Securities, Yukon Territory
Superintendent of Securities, Nunavut

This submission is lodged with the following representatives of the Canadian securities regulatory authorities (CSA) in accordance with the CSA's request for comment.

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JORC was notified by Dr Bill Shaw of Golder Associates of e-mail advice received on 20 September 2011 from the British Columbia Securities Commission (BCSC) drawing attention to "a proposal the Canadian Securities Administrators are seeking public comment on, which could have a significant impact on qualified persons under NI 43-101 and their mining company clients".

The specific matter drawn to JORC's attention was a proposal which is "part of proposed amendments to NI 41-101 General Prospectus Requirements, which CSA published for comment on July 15, 2011. The proposal is to extend the requirement to file a submission to jurisdiction and appointment of agent for service to all foreign experts, including qualified persons under NI 43-101. At present, only the issuer, the directors and officers who sign the prospectus on behalf of the issuer, and certain individuals specified in Part 5 of NI 41-101, are required to file a submission to jurisdiction and appointment of agent, so this proposal would significantly expand the current requirements".

The BCSC e-mail went on to advise that “if adopted, this proposal will have an impact on the mining industry because of the extensive reliance by mining companies on foreign qualified persons. We therefore urge you to discuss the implications of this proposal with your legal counsel and provide written comment letters to CSA by October 15, 2011.”

JORC has now discussed these matters within the committee and with its parent bodies and sees it as appropriate to lodge a submission to CSA because of the implications for global minerals reporting, but more specifically because of the potential effects on the quality and efficiency of public reporting for the minerals industry in Canada.

JORC refers also to paragraph (g) on page 7 of the CSA Notice and Request for Comment to which the questions below are directly related. JORC notes that while the proposed changes refer to prospectuses, all reporting under NI 43-101 is also potentially likely to be caught as technical reports prepared by the foreign qualified person experts are commonly likely to be incorporated by reference into prospectuses, so extending the reach of the proposed changes.

The relevant questions are posed on page 13 of the CSA Notice and Request for Comment as follows:

Questions relating to Non-Issuer’s Submission to the Jurisdiction and Appointment of Agent for Service:

(a) Do you believe that it is appropriate to extend the requirement to file a non-issuer’s submission to the jurisdiction and appointment of an agent for service form to foreign experts who have consented to the disclosure in a prospectus of information from a report, opinion or statement made by them given that these persons are liable under our statutory liability regime for misrepresentations in the prospectus that are derived from that report, opinion or statement? Why or why not?

Response: JORC does not believe that is appropriate to extend the requirement to file a non-issuer’s **submission to the jurisdiction and appointment of an agent for service form to foreign experts** for the following reasons:

- (1) As noted by CSA, the qualified person is already liable for the quality of the opinions provided, so there is no increase in protection for investors by the adoption of this measure as applied to foreign qualified person experts.
- (2) Safeguards already exist to protect Canadian investors, both via the Canadian legal system and the ethical and professional practices provisions of the qualified person’s Accepted Foreign Association as listed in the NI 43-101 Companion Policy.
- (3) The likelihood of additional administrative (and hence financial) burden is high, particularly for individual qualified persons, although JORC is not in a position to quantify that increase. Hence it may make experts less likely to be prepared to act as qualified persons, or may lead them to increase what they charge if they chose to act.
- (4) This may be exacerbated if the qualified persons perceive an increase in exposure. As noted, the scope of liability does not change but the proposed requirement will make it easier for complainants to bring an action against a foreign qualified person expert. It may be more likely that foreign qualified person experts will be added to claims made against the issuer and its directors (ie where a complainant sues all involved parties) if the foreign qualified person expert has an address in Canada to which service can be made.

(b) If foreign experts are required to file a non-issuers’ submission to the jurisdiction and appointment of an agent for service form, do you anticipate that this obligation will impose any significant practical or financial burden on these experts or issuers? If so, please explain why.

Response: JORC is of the opinion that:

- (1) Foreign qualified person experts are already liable so theoretically there is no additional potential cost if an action is warranted. As noted above, given the increase in ease of lodging a legal action including the foreign qualified person (whether warranted or not), then the qualified persons’ fees structure will need to recognise that increased risk.
- (2) It is already difficult to obtain professional indemnity insurance for activities in the United States at a reasonable cost and it would seem that as this proposal will increase potential for liability to be tested (whether warranted or not) it will be more difficult or at least more

expensive for foreign qualified person experts to obtain professional liability cover for reporting in Canada. This would automatically make it more difficult for Canadian issuers to retain the services of foreign qualified person experts, but certainly make their services more expensive.

- (3) There will undoubtedly be an increase in costs, but JORC is not well placed to quantify that increase. More seriously for Canadian issues and exchanges is the likelihood of foreign qualified person experts declining to act as qualified persons for Canadian reports thus potentially affecting the quality and timeliness of information available to the market.

(b) Would your response change if the form requirement for foreign experts only concerned either submission to the jurisdiction or an appointment of an agent for service?

Response: No it would not.

JORC considers that the proposed additional requirements on foreign qualified person experts are unnecessary given that satisfactory legal safeguards already exist to protect Canadian investors, both via the Canadian legal system and the ethical and professional practices provisions of the qualified person's Accepted Foreign Association as listed in the NI 43-101 Companion Policy. JORC is concerned that the proposed changes may cause serious (perhaps unintended) consequences relating to the availability of properly qualified and experienced professionals to prepare and take responsibility for technical reports and prospectuses in Canada, and may also lead mineral companies to choose to list elsewhere.

JORC is concerned about the lack of clarity around the potential extent of the effects of the proposed changes which on first glance do not appear to be unreasonable. One of the opinions JORC has reviewed, from a Canadian law firm, states:

"As an example, if the QP was part of a company then the company may be required to register in British Columbia, conceivably on the basis that it is carrying on business in British Columbia even though the only connection to British Columbia would be the report. If there is a requirement to register in British Columbia, particularly in the case of a consulting company, it would then be obligated to file annual reports, potentially file tax returns and comply with other reporting requirements under the various *Business Corporations Acts* applicable, potentially in case of most issuers, other jurisdictions in Canada as well as British Columbia. It is not clear whether a QP would submit to one jurisdiction or all 13 in Canada and if more than one jurisdiction, the compliance costs could be excessive to say the least.

There is also the risk that if a QP is submitted to the jurisdiction that they would then become obligated to register under the *Professional Engineers and Geoscientists Act* of British Columbia or similar statutes in other jurisdictions and this would impose additional regulatory requirements on foreign QPs. This appears to be an extension of extra territorial jurisdiction and this would likely not be well received by foreign QPs."

Should these amendments be enacted without substantial modification, there is a serious possibility that it will be the end of the international Qualified Person/Competent Person Recognised Overseas (Foreign) Professional Organisation (ROPO) system as we know it, as a requirement for foreign qualified persons to be registered in Canada would undoubtedly lead to reconsideration of the recognition of the Canadian professional bodies in the Australian and Southern African ROPO systems and potentially isolate Canadian professionals from participation in the international minerals and investment marketplace.

Yours sincerely,

SIGNATURE REMOVED

Peter Stoker
Chairman JORC