DENTONS

Dentons Canada LLP
77 King Street West, Suite 400
Toronto-Dominion Centre
Toronto, ON, Canada M5K 0A1

T +1 416 863 4511
F +1 416 863 4592

Salans FMC SNR Denton
dentons.com

June 21, 2013

BY E-MAIL

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

The Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario
M5H 2S8

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: Proposed National Instrument 62-105 *Security Holder Rights Plans* and Autorité des marchés financiers ("AMF") Consultation Paper on An Alternative Approach to Securities Regulators' Intervention in Defensive Tactics

Dentons Canada LLP is pleased to have the opportunity to comment on the proposed National Instrument 62-105 *Security Holder Rights Plans* (the "CSA Instrument") and the AMF's alternative approach to securities regulators' intervention in defensive tactics (the "AMF Proposal"), both of which were published for comment on March 14, 2013.

It is clear from both proposals that there is recognition on the part of the Canadian securities regulators that the current system for the regulation of take-over defensive tactics is flawed, and we commend the regulators for their initiative in proposing comprehensive solutions to the problems that currently exist. The present problems include the misalignment between the policy of the securities regulators and the approach of the courts, the inconsistencies among decisions of the securities regulators themselves, and the consequent inability of shareholders to assess the implications of their vote in favour of a shareholder rights plan ("rights plan"). In our view, both the CSA Instrument and the AMF Proposal represent significant improvements on the status quo.

We are particularly encouraged that despite the fact that two different proposals have been put forward for comment, both of them make specific reference to the need for harmonization among the regulators. Regardless of the ultimate decision on the regulatory regime, we consider it essential for there to be a uniform policy approach across the Canadian jurisdictions, as we do not consider regional differences to justify disparate regulation in this area.

While there is much to be said in favour of both proposals, we do have some concerns and suggestions with regard to each of them. These are outlined below, together with a suggested alternative approach.

The CSA Instrument

We agree in principle with the concept of shareholders, by a disinterested vote, making the decision as to whether a rights plan should remain in place. However, in matters as critical as the question of whether a company will be acquired by a hostile bidder, the integrity of the shareholder vote is of utmost importance. The securities regulators are aware of the issues with the proxy voting system that compromise its integrity, and consideration should be given to attaching a priority to addressing these matters in conjunction with a proposal that would elevate the consequences of the outcome of a shareholder vote in such a critical area.

Another potential difficulty with a shareholder vote in the context of a hostile take-over bid is the subjective aspect of "acting jointly or in concert". It is almost inevitable that in hotly contested votes on shareholder rights plans in the midst of hostile bids, there will be disputes as to whether certain parties are acting jointly or in concert with the bidder to defeat the rights plan and should therefore be excluded from the vote, or whether persons friendly to the target's management are acquiring shares in concert, possibly in violation of take-over bid laws or early warning requirements, so as to ensure that the shareholder rights plan will receive a favourable vote. The securities regulators will likely be caught in the middle of these disputes, and evidentiary issues may be difficult to resolve. Some guidance on the interpretation of "jointly or in concert" in this context in the Companion Policy to the CSA Instrument may be helpful.

The circumstances in which a board of directors can introduce a second rights plan when there is already a rights plan in effect, or materially amend an existing rights plan, without prior shareholder approval under the CSA Instrument might warrant further consideration. For example, if a board of directors is concerned that a rights plan will not receive a favourable vote at a pending meeting of shareholders, the CSA Instrument would allow the board to amend the rights plan or adopt a second rights plan to start a new 90-day period running (or a lesser new period if a take-over bid has been commenced). Although a securities regulator could intervene in such a case as contemplated by the Companion Policy, it may be

preferable for the CSA Instrument to be as comprehensive as possible so as to minimize the likelihood of the need for regulatory intervention and the attendant uncertainty.

We have three drafting suggestions as follows:

In the definition of "security holder approval", we suggest changing "security holders voting" in the second line to "holders of".

In subsection 2(1) we suggest removing the "announced" reference since the timing of the shareholder approval requirement does not depend on when a take-over bid is announced. Possible alternative wording for subsection 2(1) might be as follows:

> (1) An issuer must not distribute a security pursuant to the exercise of a right issued under a rights plan unless
>
> (a) subject to clause (b), the issuer obtained security holder approval of the rights plan, or a material amendment to the rights plan, on or before the 90th day following the adoption of the rights plan or the material amendment to the rights plan, or
>
> (b) if the rights plan or a material amendment to the rights plan was adopted after the commencement, and before the expiry or termination, of one or more take-over bids, the issuer obtained security holder of the rights plan, or the material amendment to the rights plan, on or before the 90th day following the earliest date on which any one of those take-over bids was commenced.

At the end of subsection 7(4), we suggest adding "or termination".

The AMF Proposal

We support much of the substance of the AMF Proposal. It would be desirable for all types of take-over defensive tactics to fall under the regulatory umbrella of a single instrument or policy since the same underlying principles are involved regardless of the tactic employed. A court would arguably be the suitable forum for resolving disputes in this area because it has broader direct remedial powers than securities regulators. The decisions of the British Columbia Securities Commission and the British Columbia courts in connection with the 2010 take-over bids for Lions Gate Entertainment Corp., which involved a rights plan as well as a subsequent private placement that was alleged to be a take-over bid defensive tactic, perhaps best illustrate the inconsistencies resulting from a combination of the limitations on the securities regulators' powers and the differences in the approach to defensive tactics as between the regulators and the courts.

We do, however, have a concern that in light of the Supreme Court of Canada's pronouncements in *BCE Inc. v. 1976 Debentureholders* ("*BCE*"), which was referenced in the discussion paper containing the AMF Proposal, the AMF Proposal may tilt the balance of power too far in favour of the target company's directors, making hostile take-over bids very difficult to carry out without the requisitioning of a shareholder meeting to replace the target's board. *BCE* was not decided in the context of a hostile take-over bid (as the term is normally used), and it may be that directors' duties during a hostile bid will be clarified by the Supreme Court at some point in time. Until that happens, however, *BCE* remains the last word of the country's highest court on directors' fiduciary duties and the business judgment rule in Canada, regardless of context. As noted in the AMF's discussion paper, the court in *BCE* described directors' fiduciary duties as looking to the long-term interests of the corporation and not favouring the interests of shareholders over the interests of the corporation's other stakeholders. With this judicial ammunition available to a target's board, convincing a court that a take-over bid defensive tactic meets

the "within a range of reasonableness" test of the business judgment rule (which was also reinforced by *BCE*) may not present a major challenge.

We recognize that the AMF Proposal would require targets to follow a certain process in order to avoid securities regulatory intervention, such as the establishment of a special committee and the retaining of independent financial and legal advisers. This process is currently followed by virtually all targets of hostile bids, and the logical conclusion to be drawn is that, except in cases of blatant disclosure violations, adoption of the AMF Proposal would generally result in hostile take-over disputes being settled by the courts, where the target's board would have a major advantage.

We agree with the AMF's second proposal in which certain elements of the "permitted bid" that are contained in current rights plans would be mandated for all take-over bids. Implementation of this requirement would remove the coercion aspect that is inherent in take-over bids under the current laws.

A Suggested Alternative Approach

In our view, certain previous decisions of the Canadian securities regulators regarding dual class share structures are instructive in the consideration of a policy approach to take-over bid defensive tactics. In the early 1980s, certain securities commissions held public hearings to consider policy issues relating to dual class share structures, including the question of whether they should be banned outright for public companies. A dual class share structure (where at least one class of shares of a company is non-voting or carries limited voting rights) arguably serves as a much more effective take-over defensive tactic than a rights plan, and one of the concerns of the securities commissions in initiating their review of dual class share structures was that the structures may conflict with the principles underlying take-over bid legislation.

The securities commissions ultimately decided that a combination of disclosure and, in some circumstances, a shareholder approval requirement, was preferable to an outright ban. Essentially, the view the commissions came to was that if prospective purchasers of shares were made aware of the fact that they were buying shares with restricted voting rights, and that the restriction would significantly detract from the possibility of a hostile take-over bid, this was an investment decision the purchasers were entitled to make. In the case of a capital reorganization where a dual class structure was introduced after the company was already public, the policy concerns would be addressed through the requirement of a disinterested shareholder vote, and following a favourable vote the marketplace would then be put on notice of the dual class structure through continuous disclosure.

It is arguable that similar logic applies to other take-over defensive tactics, including rights plans. If a company goes public with clear disclosure in its prospectus that the company could take defensive measures, including the introduction of a rights plan, that will permit the board of directors, in the exercise of its fiduciary duties as required by law, to "just say no" to hostile take-over bids, it would appear appropriate to allow prospective purchasers of the company's shares, whether under the prospectus or in the secondary market, to use this fact as part of the mix of factors taken into account in the making of their investment decisions.

For a company that is already public, a similar purpose can be served through disclosure in a management information circular for a meeting of shareholders in which there is a disinterested vote on whether the board of directors should be empowered to take defensive measures generally against hostile bids without a shareholder vote, or to introduce a specified measure such as a rights plan. A hostile bid target that had neither gone public with the requisite disclosure nor received the required shareholder approval but wished to introduce and maintain a newly introduced defensive tactic, such as a rights plan, would, under this regime, be required to obtain disinterested shareholder approval within a prescribed time, such as the time specified in the CSA Instrument.

In all cases, target boards would still be required to make their decisions based on their legal fiduciary duties and could be challenged in court or replaced by shareholders in accordance with corporate law. To the extent that there would be court challenges, it would be expected that clearer Canadian jurisprudence on this subject would develop.

Certain elements of the regulatory regime for dual class share structures could be incorporated into the regime for defensive tactics described above. National Instrument 51-102 could set out the applicable continuous disclosure requirements as it now does for restricted securities in section 10.1. The disinterested shareholder approval requirement could be modelled after subsection 624(n) of the Toronto Stock Exchange Company Manual in combination with section 12.3 of National Instrument 41-101, with the additional exclusion of any current bidder and its joint actors. It would be appropriate to also require approval in a separate vote in which the only votes that are excluded are those of any current bidder and its joint actors.

Under this alternative approach, a national policy could state that if issuers follow the procedures described above, the securities regulators would only intervene in cases of abuse of investors or the capital markets, with guidance on that subject being provided as in the AMF Proposal. A “just say no” defence to a take-over bid by a board of directors, regardless of how attractive the bid may appear in comparison to the pre-bid market price of the target’s shares, would not, in and of itself, constitute abuse.

We believe that the approach described above, which draws on elements of both the CSA Instrument and the AMF Proposal, may strike a reasonable balance among the various competing interests in the context of a hostile take-over bid. It would also allow the marketplace to play a larger role in shaping corporate behaviour in this area, which is one of the key underlying themes of both proposals.

Thank you for considering these comments. If you wish to discuss them, please contact Ralph Shay at 416-863-4419 or Guy Paul Allard at 514-878-8876.

Yours truly,

“Dentons Canada LLP”