



## Securities Law Alert

January 31, 2005

Macleod Dixon LLP  
3700 Canterra Tower  
400 Third Avenue SW  
Calgary, Alberta T2P 4H2 Canada  
Tel: 403 267 8222 Fax: 403 264 5973  
Web: [www.macleoddixon.com](http://www.macleoddixon.com)

### ***Changes to TSX Private Placement and Security Based Compensation Rules***

*Effective January 1, 2005, significant changes to the TSX Company Manual dealing with private placements and security-based compensation arrangements became effective. Certain of these changes must be considered in preparing 2005 proxy material. The following is a summary of the more significant amendments.*

#### **New Definition of "Market Price"**

- The definition of market price, which is relevant for private placements and security based compensation arrangements, has been changed from the closing price on the day before the TSX received notice of the transaction, to the volume weighted average trading price of the securities for the five trading days immediately preceding the relevant date (which is the date provided for in the binding agreement obligating the issuer to issue the securities, which can either be the date of the agreement or a future date, or the date the Section 602 Notice is received by the TSX requesting price protection).
- A Staff Notice published by the TSX indicates that notwithstanding this definition, the TSX will continue to accept as the exercise price for stock options a closing price at the time of grant or a reasonable pre-determined formula, based on a weighted average trading price or average daily high and low board lot prices for a short period prior to the time of

the grant. Plans must contain and consistently use a method of determining the exercise price.

#### **Private Placements, Acquisitions & Warrants**

Under the previous rules, security holder approval was required for any private placement transactions which could result in more than 25% of the issuer's capital being issuable in a six month period and, in addition, the TSX had unwritten rules with respect to transactions that affected control or involved insiders. The amendments contain a comprehensive series of rules that specify when security holder approval is required.

- ***Transactions That Materially Affect Control or Have Significant Insider Involvement:*** In addition to any specific requirement for security holder approval, the TSX requires security holder approval to:
  - Any transaction (regardless of size) which may materially affect control (defined as the ability to influence the outcome of a vote, including the ability to block significant transactions). A transaction that results or could result in a new holding of more than 20% of the voting securities by one security holder or combination of persons acting together is considered to materially affect control unless the circumstances indicate

otherwise. Previously, approval was generally only required if the dilution exceeded 25%; and

- Transactions that provide consideration to insiders in excess of 10% of the market capitalization and have not been negotiated at arm's length.
- **Issuances Priced At or Above Market Price:** The issuance of securities priced at or above market price will not be reviewed by the TSX or require security holder approval (even if in excess of 25% of the issued securities), unless it materially affects control, has significant insider involvement or involves a material change in the nature of the business.
- **Issuances Priced Below Market Price:** Transactions priced below market price but within the allowable discounts (which have not changed) require security holder approval if the transaction exceeds 25% of the issued capital. The 25% threshold is now calculated on a per transaction basis rather than accumulated over a six month period as was previously the case.
  - For the purpose of this rule and the rule relating to issuances at or above market price, listed securities issuable upon the exercise of warrants and flow through securities are considered as having a price lower than the market price as are the underlying listed securities of a private placement of convertible securities unless the conversion price of the convertible security is defined as at least market price at the time of conversion.
- **Issuances Below Allowable Discounts:** The previous rules did not permit private placements to be priced below the allowable discount in any circumstances. The amendments permit securities to be issued at less than the allowable discount if the issuer has received disinterested security holder approval.
- **Significant Insider Involvement:** Disinterested security holder approval is required for private placements that during any six month period are to insiders for listed securities or options, rights or other

entitlements to listed securities greater than 10% of the number of securities outstanding prior to the date of closing of the first private placement to an insider during the six month period.

- **Warrants:** Unlisted warrants may be issued with an exercise price at less than market price of the underlying securities if shareholder approval is obtained. Rules for the amendment of the exercise price of warrants are also provided. Amendment of warrants held by insiders requires security holder approval. Provision is made for the cashless exercise of warrants.
- **Acquisitions:** Security holder approval is required for the issuance of securities in consideration of property (which includes securities) if the number of securities issued or issuable (including those issuable as a result of assumption of security based compensation arrangements of the target and concurrent private placements) exceeds 25% of the outstanding securities, regardless of the issue price. A TSX Staff Notice indicates that an exception will apply in the case of circular take over-bids and arrangements involving reporting issuers having more than 50 security holders. Security holder approval is also required for any acquisition where insiders will receive listed securities in excess of 10% of the issued securities.
- **Blanket Approvals Not Permitted:** Security holder approvals must relate to a specific transaction and not to an unspecified future transaction and therefore blanket advance security holder approval for private placements in excess of 25% of an issuer's capital will no longer be accepted by the TSX.
- **Press Release For Written Consents:** The TSX will continue to consider written consents by the holders of more than 50% of the voting securities (other than those excluded by the TSX) in lieu of a meeting but now requires a press release to be issued at least 10 business days before the closing.
- **Pre-Clearance of Disclosure:** Prescribed disclosure must be provided to security holders in seeking security holder approval and this disclosure must be pre-cleared with the TSX.

- **Private Placement Questionnaires and Undertakings Discontinued:** Private placement questionnaires and undertakings signed by the placees will no longer be required.

## **Security-Based Compensation Arrangements**

- **Director and Security holder approval:** Essentially all security based compensation arrangements which may involve the issuance from treasury of securities (regardless of the levels of dilution or insider involvement) must be approved by the majority of the board, a majority of unrelated directors and by the security holders at a meeting. Limited exceptions from security holder approval are provided for arrangements involving inducements to employment of new officers (subject to a cap of 2% of issued capital) and assumption of arrangements in the context of acquisitions (subject to a cap of 25% of issued capital).
- **Disinterested vote:** The situations in which insiders cannot vote has been expanded so that insiders who are entitled to participate in a plan are not entitled to vote if participation by all eligible insiders in all security-based compensation arrangements could in the aggregate exceed 10% of the issued and outstanding securities.
- **Restricted Security Voting:** Holders of Restricted Securities are entitled to participate in certain votes to approve or amend security based compensation plans.
- **Rolling maximum plans:** The rules that required that plans contain a fixed number of securities have been amended to permit rolling maximum or evergreen plans provided that security holder approval is obtained to the establishment of the plan and a renewal approval is obtained every three years.
- **Certain previous option rules deleted:** The previous rules that options be non-assignable, that limited the maximum term to less than ten years, and that limited the number of options available to any one person to less than 5% of the outstanding securities have been deleted.
- **Amendments to Plans:** The circumstances in which security holder approval to

amendments to plans is required have been specified in more detail

- Amendments to security based compensation arrangements which increase the plan maximum number of securities (whether by way of an increase in a fixed maximum or a percentage increase), reduce the exercise price or purchase price or extend the original term require security holder approval.
- Other amendments may be made by the issuer without security holder approval if the plan specifically authorizes the type of amendment and that amendment provision has been approved by the security holders.
- A TSX Staff Notice indicates that a general amendment provision in a plan which authorizes the board (and if required the TSX) to approve amendments will only enable certain limited amendments to be made without shareholder approval.
- If a plan does not have amendment provisions, then the amendment of the plan to include amendment provisions must be approved by the security holders.
- **Disclosure and Pre-Clearance:** Prescribed disclosure must be provided to security holders when issuers seek security holder approval and that disclosure must be pre-cleared by the TSX. **If any plans or amendments require approval at the 2005 annual meeting, this pre-clearance is required.**
- **Annual Disclosure:** Issuers are required to annually provide prescribed disclosure to security holders relating to its security based compensation arrangements. This is a new requirement and **issuers with fiscal years ending on or after December 31, 2004 must include this disclosure in their 2005 proxy materials.**

*Please contact any member of the Macleod Dixon LLP Securities Group if you have any questions with respect to these new rules.*