



**SECURITIES COMMISSION OF NEWFOUNDLAND AND LABRADOR
DEPARTMENT OF GOVERNMENT SERVICES AND LANDS
GOVERNMENT OF NEWFOUNDLAND AND LABRADOR**

**IN THE MATTER OF
THE SECURITIES ACT RSN 1990 CS-13, AS AMENDED**

AND

**IN THE MATTER OF
THE CONTRACTUAL RIGHT OF ACTION
REQUIRED TO BE DELIVERED IN RULE 45-501:
CAPITAL RAISING EXEMPTIONS**

ORDER

(Section 142.1 of the Act & Section 10.1 of Rule 45-501)

UPON the motion of the staff of the Securities Commission of Newfoundland and Labrador (the “Commission”) to the Commission for an order pursuant to section 142.1 of the Act and to the Director of Securities (the “Director”) for an exemption pursuant to section 10.1 of Rule 45-501: Capital Raising Exemptions (“Rule 45-501”) that the contractual right of action as described in section 2(1)(h) of the Act does not apply to an offering memorandum delivered under Rule 45-501;

AND UPON it appearing that:

1. Section 4.3(2) of Rule 45-501 provides that an offering memorandum delivered under section 4.1 of Rule 45-501 must contain a contractual right of action against the issuer for rescission or damages that:
 - (a) is available to the purchaser if the offering memorandum, or any record incorporated or deemed to be incorporated by reference into the offering memorandum, contains a misrepresentation, without regard to whether the purchaser relied on the misrepresentation,
 - (b) is enforceable by the purchaser delivering a notice to the issuer
 - (i) in the case of an action for rescission, within 180 days after the purchaser signs the agreement to purchase the security, or
 - (ii) in the case of an action for damages, before the earlier of:
 - A. 180 days after the purchaser first has knowledge of the facts giving rise to the cause of action, or
 - B. 3 years after the date the purchaser signs the agreement to purchase the security

- (c) is subject to the defence that the purchaser had knowledge of the misrepresentation,
 - (d) in the case of an action for damages, provides that the amount recoverable
 - (i) must not exceed the price at which the security was offered, and
 - (ii) does not include all or any part of the damages that the issuer proves does not represent the depreciation in value of the security resulting from the misrepresentation, and
 - (e) is in addition to and does not detract from any other right of the purchaser.
- 2. Section 2(1)(h) of the Act defines a contractual right of action as a right of action against an issuer for rescission or damages, which right,
 - (i) is available to an investor to whom an offering memorandum prospectus has been delivered by or on behalf of the seller of securities referred to in the offering memorandum prospectus if the offering memorandum prospectus contains a misrepresentation,
 - (ii) is exercisable on notice given to the issuer not later than 90 days after the date on which payment was made for the securities or after the initial payment, where payments after the initial payment are made under a contractual commitment assumed before, or concurrently with, the initial payment,
 - (iii) reasonably corresponds to the rights provided in section 130 applicable to a prospectus, and may be subject to defences equivalent to a defence available under subsection (2) of that section, and
 - (iv) includes a provision stating that the right is in addition to another right or remedy available at law to the investor;
- 3. Section 2(1)(cc) of the Act defines an offering memorandum prospectus, subject to certain exemptions, as a document purporting to describe the business and affairs of an issuer that has been prepared primarily for delivery to and review by prospective investors so as to assist those investors to make an investment decision in respect of securities being sold in a distribution to which section 54 or section 63 of the Act would apply but for the availability of 1 or more of the exemptions contained in paragraph 73(1)(c), (d) or (p) or paragraph 54(3)(f) of the Act.
- 4. It is unclear whether the contractual right of action described in section 2(1)(h) of the Act applies to an offering memorandum delivered under Rule 45-501.
- 5. The contractual right of action described in 4.3(2) of Rule 45-501 provides purchasers of securities under an offering memorandum delivered under Rule 45-501 with greater access to an action against an issuer for rescission or damages than the contractual right of action in section 2(1)(h) of the Act.

AND UPON it appearing that it is not prejudicial to the public interest to do so;

IT IS ORDERED pursuant to section 142.1 of the Act and section 10.1 of Rule 45-501 that the contractual right of action as described in section 2(1)(h) of the Act does not apply to an offering memorandum delivered under Part 4 of Rule 45-501.

DATED at St. John's, Newfoundland and Labrador, this 14 day of October, 2003.

Securities Commission of Newfoundland
and Labrador

Per: _____
Anthony Patey
Director of Securities