IN THE MATTER OF A HEARING UNDER SECTIONS 3.1(1) and 134(1)(b) OF THE SECURITIES ACT, 1998, S.S. 1988-89, c. S-42.2

AND

IN THE MATTER OF A HEARING AND REVIEW UNDER SECTIONS 104 AND 127 OF THE SECURITIES ACT, R.S.O. 1990, c. S.5

AND

IN THE MATTER OF CANNIMED THERAPEUTICS INC.

APPLICATION
OF AURORA CANNABIS INC.

(In connection with a proceeding under sections 3.1(1) and 134(1)(b) of the *Securities Act, 1988*, S.S. 1988-89, c. S-42.2 and sections 104 and 127(1) of the *Securities Act*, RSO 1990, c S.5)

A. ORDER SOUGHT

1. The Applicant, Aurora Cannabis Inc. ("**Aurora**"), applies for a joint hearing before the Financial and Consumer Affairs Authority of Saskatchewan (the "**FCAAS**") and the Ontario Securities Commission (the "**OSC**", and together with the FCAAS, the "**Commissions**") pursuant to sections 3.1(1) and 134(1)(b) of the *Securities Act, 1988*, S.S. 1988-89, c. S-42.2 (the "**Saskatchewan Act**") and sections 104 and 127 of the *Securities Act*, R.S.O. 1990, c. S.5 (the "**Ontario Act**") and section 6.1(1) of National Instrument 62-104 – *Take-Over Bids and Issuer Bids* ("**NI 62-104**"), for: (i) an order granting exemptive relief from the requirements set forth in section 2.28.1 of NI 62-104 on the basis set out below; and (ii) an order to cease trade the shareholder rights plan agreement (the "**SRP**") between CanniMed Therapeutics Inc. ("**CanniMed**") and Computershare Investor Services Inc. dated November 28, 2017. Consideration should be given to the actions of CanniMed in response to the unsolicited take-over bid by Aurora (the "**Offer**") for the issued and outstanding common shares of CanniMed (the "**Common Shares**"), which includes an assessment of a variety of matters including the entering into of an arrangement agreement between CanniMed and Newstrike Resources Ltd. ("**Newstrike**") dated November 17, 2017 (the "**Arrangement Agreement**") and the SRP.

Aurora seeks the following relief:

(a) an order pursuant to section 104 of the Ontario Act and section 6.1(1) of NI 62-104 that section 2.28.1 of NI 62-104 does not apply to the Offer, subject to the condition that the Offer allow Common Shares to be deposited for an "initial deposit period" of at least 35 days from the date the Offer is made (the "**Deposit Period Order**");

(b) a permanent order pursuant to section 127 of the Ontario Act and sections 3.1(1) and 134(1)(b) of the Saskatchewan Act and in accordance with the guidance in National Policy 62-202 – *Take-Over Bids – Defensive Tactics* ("**NP 62-202**") that all trading cease in respect of any securities issued, or that are proposed to be issued, in connection with the SRP (the "**Cease Trade Order**");

(c) an order for an expedited hearing;

(d) an order that the issues herein be addressed in a joint hearing between the FCAAS and the OSC pursuant to section 22 of the *Financial and Consumer Affairs Authority of Saskatchewan Act*, S.S. 2012, c. F-13.5 and Rule 30 of the OSC's Rules of Procedure and Forms; and

(e) such further and other relief as counsel may advise and the Commissions may deem appropriate.

2. On November 22, 2017, Aurora filed a joint exemptive relief application to the Directors of the FCAAS and OSC for a Deposit Period Order (the "**Application**"). On November 30, 2017, staff of the FCAAS and OSC, upon being informed that Aurora would also seek the Cease Trade Order, jointly agreed that Aurora should reconstitute the Application as an application to be heard by the Commissions and to include in such application the request to grant the Cease Trade Order. The Application is attached to this application as Schedule "A", however, its substance is captured herein. On December 1, 2017, counsel to Aurora received CanniMed's response to the Application (the "**Response to the Application**"), a copy of which is attached as Schedule "B".

B. GROUNDS

I. OVERVIEW

3. On November 13, 2017, Aurora submitted the Aurora Proposal (as defined below) to the board of directors of CanniMed (the "**Board**"). Aurora advised that if the Board did not respond

to the Aurora Proposal by 5:00 p.m. (PST) on November 17, 2017, Aurora would formally commence the Offer.

4. CanniMed did not respond to the Aurora Proposal by the requisite deadline. Shortly prior to the deadline, however, CanniMed issued a press release announcing that it had entered into the Arrangement Agreement.

5. On November 24, 2017, Aurora formally launched the Offer to holders of Common Shares (the "**Shareholders**").

6. Pursuant to the Offer, a Shareholder will receive, for each Common Share, 4.52586207 common shares of Aurora, subject to a maximum of $24.00 in common shares of Aurora.

7. The Offer, based on Aurora's closing price of $6.42 of November 22, 2017, will result in Shareholders receiving the cap price of $24.00 in common shares of Aurora, which represents a 56.9% premium over the closing price of the Common Shares on November 14, 2017 (the last trading day before Aurora publicly announced the Aurora Proposal) and a 74.7% premium over the volume weighted average price over the last 20 trading days ended on November 14, 2017.

8. Notably, Aurora advised the Board that it had significant support for the Offer and had locked up Shareholders holding approximately 38% of the Common Shares in support of its take-over bid.

9. Rather than engage in any discussion with Aurora, on November 28, 2017, CanniMed adopted the SRP without shareholder approval. The SRP prevents Aurora from, amongst other things: (i) acquiring any additional Common Shares pursuant to section 2.2(3) of NI 62-104; (ii) entering into additional lock-up agreements; or (iii) amending the Offer consistent with the terms of NI 62-104.

10. CanniMed has called a Shareholders' meeting for January 23, 2018 to vote on the Arrangement Agreement. Newstrike has called a shareholders' meeting for January 17, 2018 to vote on the Arrangement Agreement.

11. Unless the Deposit Period Order is obtained, the Offer must remain open for 105 days, specifically March 9, 2018 (the "**Expiry Time**").

12. CanniMed has publicly emphasized that the arrangement with Newstrike pursuant to the terms of the Arrangement Agreement (the "**Arrangement**") should be preferred over the Offer as a way to maximize the value of the Common Shares.

13. Aurora respectfully submits that the actions of the Board are contrary to the public interest and also constitute inappropriate defensive tactics against the Offer.

14. The Arrangement Agreement is, in spirit and fact, an alternative transaction preferred by the Board which the Board believes is superior to the Offer.

15. The terms of the Arrangement Agreement and the SRP are coercive, unique and largely off-market. The primary, if not sole, intent of these tactics is to prevent Shareholders from being in a position to adequately consider the Offer.

16. The Arrangement Agreement contains a number of coercive features including dual non-solicitation provisions and dual break-fees (in the case of CanniMed, a $9.5 million fee payable to Newstrike).

17. Similarly, the SRP contains a number of highly abnormal provisions, including provisions that are inconsistent with securities law, prevent the entering into of lock-ups and provide the Board with unprecedented discretion to take further defensive steps without scrutiny or approval of the Shareholders.

18. The behaviour of the Board engages the general mandate of the FCAAS to protect investors, and foster fair and efficient capital markets and confidence in the capital markets, as well as the public interest mandate of the OSC. The behaviour necessitates intervention by the Commissions to protect Shareholders and shareholders of Aurora and perhaps most importantly, to preserve the integrity of the capital markets.

19. Aurora seeks the Deposit Period Order to provide Shareholders the opportunity to adequately consider the Offer concurrently with the Arrangement. The request for a shortened window for which the Offer must remain open is true to the policy objectives of the exception for "alternative transactions" set out in NI 62-104 and in the public interest. In addition, Aurora also seeks the Cease Trade Order, as the SRP is inconsistent with NI 62-104, is being used as a defensive tactic to the Offer and is abusive.

II. SUMMARY OF FACTS

The Companies

20. Aurora, a leading producer and distributor of medical marijuana, is governed by the *Business Corporations Act* (British Columbia) and is a reporting issuer in each province of Canada. Aurora's common shares are listed on the Toronto Stock Exchange (the "**TSX**"). Aurora's wholly-owned subsidiaries, Aurora Cannabis Enterprises Inc., Peloton Pharmaceuticals Inc. (through 10094595 Canada Inc.) and Pedianos GmbH, are Aurora's main operating subsidiaries. Aurora Cannabis Enterprises Inc. has two licenses to produce cannabis pursuant to Health Canada's Access to Cannabis for Medical Purposes Regulations. Pedianos GmbH is a licensed importer of Cannabis pursuant to the German Narcotic Law.

21. CanniMed, a Canadian-based, international plant biopharmaceutical company, is incorporated pursuant to the *Canada Business Corporations* Act and is a reporting issuer in each province in Canada other than the Province of Québec. The Common Shares are listed on the TSX.

22. Newstrike, the owner of Up Cannabis Inc., is incorporated pursuant to the *Business Corporations Act* (Ontario) (the "**OBCA**") and is a reporting issuer in the Provinces of Alberta, British Columbia and Ontario. Newstrike's common shares are listed on the TSX Venture Exchange.

Aurora's Proposal

On November 13, 2017, Aurora submitted a proposal to the Board to purchase all of the Common Shares for consideration of 4.52586207 shares of Aurora, subject to a maximum of $24 in common shares of Aurora (the "**Aurora Proposal**") which represents a 56.9% premium over the closing price of the Common Shares on November 14, 2017 (the last trading day before Aurora publicly announced the Aurora Proposal) and a 74.7% premium over the volume weighted average price over the last 20 trading days ended on November 14, 2017.

23. Upon completion of the transactions contemplated pursuant to the Aurora Proposal, Shareholders would hold approximately 16% of the issued and outstanding common shares of Aurora.

24. After the close of the TSX on November 14, 2017, Aurora announced the terms of the Aurora Proposal by press release. The press release stated Aurora intended to commence the Offer if the Board did not respond to the Aurora Proposal prior to 5:00 pm (PST) on Friday November 17, 2017.

25. The press release stated Aurora intended to commence the Offer if the Board did not respond to the Aurora Proposal prior to 5:00 pm (PST) on Friday November 17, 2017.

26. Shareholders holding, in aggregate, approximately 38% of the Common Shares (the "**Locked-up Shareholders**") support the Offer and have entered into lock-up agreements (the "**Lock-up Agreements**"). These include the three of the largest Shareholders of CanniMed, being Golden Opportunities Fund Inc. (holding 17.33% of the Common Shares), Vantage Asset Management (holding 8.71% of the Common Shares) and SaskWorks Venture Fund Inc. (holding 8.42% of the Common Shares).

27. While the Board acknowledged receipt of the Aurora Proposal on November 14, 2017, no other communication was received by Aurora from CanniMed prior to the Aurora Proposal deadline of 5:00 p.m. (PST) on November 17, 2017. On November 15, 2017, Stikeman Elliott LLP, representing that they were counsel to CanniMed, did request copies of the executed Lock-up Agreements directly from Aurora. McMillan LLP, as counsel to Aurora, responded on behalf of Aurora that the Lock-up Agreements would be made available when required by law.

CanniMed Publicly Announces Arrangement; Details of Arrangement

28. At 4:46 pm (EST) on November 17, 2017, CanniMed issued a press release (the "**Announcement**") announcing that it had entered into the Arrangement Agreement, with approval of the Board. The Arrangement Agreement provides that each shareholder of Newstrike will receive 0.033 Common Shares in exchange for each share of Newstrike held, and that upon closing of the Arrangement, Newstrike would become a wholly-owned subsidiary of CanniMed. Shareholders would own, in aggregate, approximately 65% and Newstrike shareholders would own, in aggregate, approximately 35% of CanniMed.

29. The Announcement further provided that upon closing of the Arrangement, the Board would include two persons nominated by the "Investors" (as defined in the Arrangement Agreement). The "Investors" and the interest they hold in Newstrike and will hold in CanniMed, have not be publicly disclosed. In addition, such Investors would be entitled to nominate two persons to the Board at CanniMed's 2018 annual Shareholders' meeting and would have the right to nominate one person to the board at each annual meeting for so long as they hold 10% of the outstanding Common Shares.

30. The Arrangement Agreement contains a number of unusual and coercive elements designed to discourage Shareholder acceptance of the Offer. It is particularly striking that CanniMed

has agreed to provide strong target deal protection provisions in favour of Newstrike in circumstances where CanniMed has clearly asserted it "is not being acquired" (see paragraph 42 of the Response to the Application). The following is a summary of unusual or coercive provisions in the Arrangement Agreement:

- broad non-solicitation provisions binding both parties;
- a $9.5 million termination fee (which is representative of 3.8% of the deal value) payable by CanniMed to Newstrike in the event the Arrangement is not concluded and the Offer is completed, which is curiously, substantially less than the $5 million corresponding termination fee that would be payable by Newstrike;
- in certain circumstances, expense reimbursement of up to $600,000 will be payable by CanniMed to Newstrike in the event the Arrangement Agreement is terminated; and
- a five-day matching right in favour of Newstrike to allow it to propose an amendment to the Arrangement Agreement that would constitute a superior proposal to a competing offer for CanniMed.

31. In addition to the above, CanniMed has chosen to redact the identity of the Investors and the Shareholders that have signed lock-up agreements with CanniMed. Aurora has issued a complaint to the Commissions (copying the TSX) with respect to CanniMed's failure to comply with its continuous disclosure obligations under NI 51-102 – *Continuous Disclosure Obligations* and is awaiting responses from the Commissions and the TSX.

32. In the Announcement, CanniMed stated that it had recommended that Shareholders vote in favour of the Arrangement. CanniMed then incorrectly stated that the terms of any offer from Aurora were unknown to CanniMed, while the transaction with Newstrike was fully negotiated and contained reasonable closing conditions. This statement was made by CanniMed notwithstanding the terms of the Aurora Proposal were known to the Board prior to such time.

33. On November 22, 2017, CanniMed announced that it had formed a special committee of independent directors (the "**Special Committee**") in anticipation of Aurora launching the Offer.

34. Newstrike will be seeking an interim order from the Ontario Superior Court of Justice (Commercial List) approving the Arrangement Agreement pursuant to a plan of arrangement under the *OBCA* in or around early December, 2017.

CanniMed Publicly Emphasizes Value of Arrangement to Shareholders

35. CanniMed has described the Arrangement as maximizing the value of the Common Shares for the benefit of Shareholders on a number of occasions. On November 20, 2017, at 10:00 a.m. (EST), CanniMed and Newstrike held a joint conference call and webcast to discuss the Arrangement and Brent Zettl, President and CEO of CanniMed, stated that "*in our collective judgement, this business combination provides our shareholders of both companies the optimal opportunity to have significant share appreciation in near and future years*". [emphasis added].

36. Publicly, CanniMed has repeatedly drawn attention of Shareholders to the alleged benefits of the Arrangement:

- Mr. Zettl was quoted as stating "This is a *transformational strategic acquisition* for our company" and the Board, in making its recommendation to Shareholders to approve the Arrangement, considered the Newstrike acquisition as *accretive* and *highly strategic* (the Announcement);

- the Arrangement is described as an *accretive* transaction and "*Shareholders are advised to take no action on any proposal from Aurora…*" (November 22, 2017 press release);

- Mr. Zettle was quoted as stating "…[S]hareholders have an *attractive and accretive transaction* available to them now as CanniMed and Newstrike are extremely well positioned to deliver *significant shareholder value* going forward" (November 24, 2017 press release and reproduced in the Globe and Mail in an article on November 25, 2017); and

- according to the Announcement, the Newstrike transaction constitutes "*a transformational strategic acquisition*".

Aurora Commences Offer

37. Aurora announced its intention to launch the Offer by press release on November 20, 2017 and formally launched its Offer on November 24, 2017.

38. Notice and advertisement of the Offer was placed in the November 24, 2017 edition of the Globe & Mail and the *Journal de Montréal*, and a take-over bid circular was filed on the *System for Electronic Document Analysis and Retrieval* (SEDAR). The take-over bid circular will be mailed to Shareholders upon receipt of the list of Shareholders from CanniMed.

39. The Offer remains open for acceptance until the Expiry Time, subject to receipt of the Deposit Period Order. In a press release dated November 24, 2017 announcing the Offer, Aurora acknowledged it remains open to a dialogue with CanniMed regarding the Offer.

40. The Offer is subject to customary conditions including: (i) at least 66⅔% of the outstanding Common Shares (calculated on a fully diluted basis), excluding any Common Shares held by Aurora, being deposited under the Offer, and not withdrawn; (ii) receipt of all governmental, regulatory and third party approvals that Aurora considers necessary or desirable in connection with the Offer; (iii) no material adverse change having occurred in the business, affairs, prospects or assets of CanniMed; and (iv) the Arrangement is not completed and the Arrangement Agreement is terminated.

41. Although there is a general restriction on acquisitions of securities during a take-over bid, section 2.2(3) of NI 62-104 permits the acquisition of up to 5% of the outstanding Common Shares as of the date of the Offer provided certain other conditions are met by the acquirer. In its take-over bid circular, Aurora expressed its intention to acquire or cause an affiliate to acquire beneficial ownership of up to 5% of the Common Shares by making purchases through the facilities of the TSX at any time, and from time to time, prior to the Expiry Time, subject to and in accordance with applicable law. Aurora was prepared to commence these acquisitions beginning November 29, 2017.

42. CanniMed acknowledged receipt of the Offer in a press release dated November 24, 2017. In that press release CanniMed once again "*urge[d] shareholders to take NO action in response*" to the Offer. The press release reiterated the "*accretive*" nature of the Arrangement, encouraging Shareholders to support the Arrangement.

43. On November 21, 2017, CanniMed set a meeting of Shareholders for January 23, 2018, with a record date of November 30, 2017, to obtain approval of the issuance of Common Shares under the Arrangement. On November 28, 2017, Newstrike set a meeting of its shareholders for January 17, 2018, with a record date of November 28, 2017, to obtain approval of the Arrangement.

44. At no time has the Board or the Special Committee approached Aurora to discuss the Offer. The reasons given for such refusal in the Response to the Application (namely the increase in the Aurora stock price, the supposed conditionality of the Offer and the concerns about Aurora's production capacity) are simply not believable. Based on the Response to the Application, the Board appeared to be fully committed to the Newstrike "business combination". Notwithstanding the relative size of the two companies, the Board agreed to mutual exclusivity obligations that were extended once the Board provided an undisclosed $4 million debenture financing to Newstrike. The Board has failed to satisfy its fiduciary duties and has acted in a manner contrary to the public interest.

CanniMed Adopts Shareholder Rights Plan Without Shareholder Approval

45. CanniMed announced that it had adopted the SRP without approval of the Shareholders in a press release dated November 29, 2017. The SRP prevents Aurora from acquiring any Common Shares in the market (which Aurora was permitted to do starting November 29, 2017) or from entering into any additional lock-up agreements with Shareholders.

46. CanniMed's November 28, 2017 press release provides: *"The purpose of the [SRP] is to ensure that all shareholders are fairly treated, well informed and not subject to coercive bids*", and that *"[t]he [SRP] is not intended to deter the [Offer] or any other bid*". Contrary to these statements, the SRP contains a number of highly abnormal elements that are designed to prevent Shareholders from considering the Offer.

47. The terms of the SRP are designed to thwart the Offer and are unprecedented, coercive and contrary to securities laws:

- As a result of the definition of "Permitted Bid" and contrary to section 2.28.3 of NI 62-104, an unsolicited bid must remain open for no less than 105 days in all circumstances. Accordingly, not only would the granting of the Deposit Period Order trigger the operation of the SRP, and, in effect, be nullified, but the deposit period could not be reduced by operation of section 2.28.3 of NI 62-104 without triggering the SRP.

- The SRP provides that any amendment to the Offer will trigger the SRP, including an amendment required by law, unless the Offer meets the definition of "Permitted Bid". Contrary to section 2.31.1 of NI 62-104, the SRP provides that, following the satisfaction of the statutory minimum tender condition, a Permitted Bid must be

extended for a minimum period of 10 business days (as opposed to the requisite 10 days). The Offer provides that, on the satisfaction of the statutory minimum tender condition, the Offer will be extended for only 10 calendar days (as required by NI 62-104). As a result, such amendment (or any other amendment, including an increase in the consideration) would mean that the Offer would no longer be deemed a Permitted Bid.

- All securities subject to lock-up agreements regardless of the form are deemed to be beneficially owned by the offeror. Accordingly, Aurora may not enter into any additional lock-up agreements. This is an unprecedented interference with the rights of Shareholders to agree to tender to a bid and brings the capital markets into disrepute. It should be noted that the SRP introduces a novel and troubling definition of Permitted Lock-up Agreement that requires the consent of the Board. However, the defined term has no practical application within the SRP, which is evidence of the clear intention of the Board to, at all costs, thwart the Offer.

- The Board is vested with very broad discretion that is not consistent with current governance practices typically found in shareholder rights plans, including the right to amend the provisions of the SRP at will without shareholder approval and the right to waive its application indiscriminately with respect to exempt take-over bids.

III. ANALYSIS

Jurisdiction for Hearing

48. Aurora has made an outstanding Offer for CanniMed, and is directly affected by the Arrangement and the SRP. Without the Deposit Period Order, Shareholders will be prevented from considering the Offer and the Arrangement concurrently. Furthermore, the coercive and abusive elements of both the Arrangement and SRP not only constitute defensive tactics, but are also contrary to the public interest and bring the capital markets into disrepute.

49. Aurora is entitled to commence this application pursuant to sections 3.1(1) and 134(1)(b) of the Saskatchewan Act, sections 104 and 127 of the Ontario Act and section 6.1(1) of NI 62-104.

The Arrangement is, in Spirit, an Alternative Transaction

50. This Application is the first of its nature since the new rules for take-over bids came into force on May 9, 2016 (the "**New Regime**"). The goal of the New Regime, as expressed by the Canadian Securities Administrators (the "**CSA**"), was to enhance the quality and integrity of the take-over bid regime and rebalance the current dynamics among offerors, offeree issuer boards of directors and offeree issuer security holders by, among other things, providing the offeree board with additional time and discretion when responding to a take-over bid, subject to certain important exceptions.

51. Pursuant to the New Regime, section 2.28.1 of NI 62-104 requires an offeror to allow securities to be deposited under a take-over bid for an initial deposit period of at least 105 days from the date of the bid, subject to two exceptions. The minimum deposit period is reflective of the CSA policy objectives noted in the preceding paragraph.

52. Pursuant to section 2.28.3 of NI 62-104, one of the two exceptions to the minimum deposit period, securities are permitted to be deposited for an initial deposit period of at least 35 days from the date of the bid in instances where the issuer has issued a news release that it intends to effect an "alternative transaction".

53. An "alternative transaction" is defined in section 1.1 of NI 62-104 as, for an offeree issuer, including an amalgamation, merger, arrangement, consolidation, or any other transaction of the issuer, or an amendment to the terms of a class of equity securities of the issuer, as a consequence of which the interest of a holder of an equity security of the issuer may be terminated without the holder's consent, regardless of whether the equity security is replaced with another security.

54. The key reason for the "alternative transaction" exception is to "*avoid unequal treatment of offerors*". In other words, as expressed by the CSA in its Notice and Request for Comment on Proposed Amendments to Multilateral Instrument 62-104, "*since the purpose of the [105] day minimum deposit period is to provide offeree boards with a longer period of time to respond to an unsolicited bid,* ***there is no need for the [105] day minimum deposit period to apply where the offeree issuer has determined that an alternative transaction is appropriate***". [emphasis added]

55. In the situation at hand, the substance of the Arrangement aligns precisely with the policy objectives of the exception to the minimum deposit period set out in NI 62-104. The Arrangement, as publicly emphasized by CanniMed, is a transaction that is transformative and will maximize shareholder value and is to be considered by Shareholders as an alternative to the Offer.

56. Aurora acknowledges that, as structured by CanniMed, the Arrangement does not strictly constitute an "alternative transaction" under NI 62-104 because no holder of equity securities of CanniMed is having their interest in any equity security terminated. However, strictly adhering to the definition of "alternative transaction" in NI 62-104 for the present particular circumstances dangerously ignores substance over form.

57. The Arrangement is a transaction that provides the Shareholders with a competing proposal to the Offer – or, in CanniMed's own publicly expressed view, a "transformative" "business combination" designed to maximize shareholder value. It is noteworthy that, during the November 20, 2017 joint conference call and webcast, the President and Chief Executive Officer of CanniMed emphasized the optimal opportunity for shareholders of both CanniMed and Newstrike to have significant share appreciation in the combined entity in near and future years.

58. The policy rationale for an exception to the 105-day deposit period exists on the present facts as CanniMed no longer requires an extended time period to allow the Board to have an opportunity to consider unsolicited transactions and propose alternative transactions to Shareholders which may provide greater value. CanniMed has already exercised this privilege, especially when it was presented, before entering into the Arrangement Agreement, with the Aurora Proposal. The President of CanniMed has been quoted as saying the Board determined Newstrike was the "*optimal partner*".

59. The terms of the Arrangement Agreement are consistent with the public statements of officers of CanniMed and indicate that the Arrangement is, in substance, an alternative transaction. The deal protection provisions granted to Newstrike are consistent with CanniMed having decided that it had entered into a merger of equals or disposed of its business and that such transaction should be protected. Under the terms of the Arrangement Agreement, CanniMed has agreed to not solicit any transaction that would result in a change of control or otherwise interfere with its preferred business combination. It has further agreed that if an unsolicited transaction would be better for Shareholders, or even if it would lead to Shareholders rejecting the Arrangement, then Newstrike should be paid a traditional break fee. The Board did not even feel the need to ensure that it had the

right to receive a corresponding amount of break fee from Newstrike to protect against an acquisition of Newstrike, which may be indicative of what risks to the Arrangement were considered to be likely. Moreover, to further protect the Arrangement, the SRP was adopted without the consent of Shareholders.

60. In situations where an offeree issuer has agreed to an alternative option to an unsolicited bid, the offeror should be permitted to adjust the deposit period to a timeframe shorter than 105 days. Part of the policy rationale for permitting an initial deposit period of less than 105 days is to ensure that no offeror is unduly prejudiced by actions of an issuer and to avoid unequal treatment of offerors.

61. Aurora submits that the Commissions should not, in these unique circumstances, allow CanniMed to hide behind the strict definition of "alternative transaction" as a pretext for prolonging the bid window applicable to the Offer.

62. In the Response to the Application, CanniMed sought to argue that granting the Deposit Period Order would grant new powers to offerors. It then submitted that this could allow for the shortening of deposit periods merely as a result of material or other transactions which a bidder "does not like and chooses to make a condition of its take-over bid". Whether or not the termination of the "alternative transaction" in question is a condition to a bid is not relevant. The question is whether an issuer should be allowed to prevent shareholders from tendering to a bid at a time when it has put forward a business combination which it prefers to an unsolicited bid and is not, in good faith, pursuing (or has contractually agreed not to pursue) any other value enhancement transaction.

63. To accept CanniMed's argument would lead to the absurd result that an offeree issuer may simply structure alternative business combinations in a way to avoid the application of the "alternative transaction" definition and thereby effectively circumvent one of the key protections set out in the New Regime.

64. Aurora submits that Shareholders should have a right to choose. They should not be burdened with a long window for expiry of the Offer, but rather, should have the ability to make a clear choice between two concurrent opportunities for transformative events with respect to CanniMed.

65. To be clear, the relief being sought has very limited scope and would not be prejudicial to Shareholders nor would it have broader dire effects. In fact, in this case, the Offer is to the benefit of Shareholders and persons holding 38% of the Common Shares have clearly so stated.

66. The public policy reasons supporting the extension of section 2.28.3 to the present unique facts are strong. Aurora submits that Shareholders will not be in a position to make an informed decision unless the Offer and the Arrangement can be considered concurrently.

Public Interest

67. The Board has been aware of the Aurora Proposal since November 13, 2017 and failed to respond to it. Instead, CanniMed announced that it had entered into the Arrangement Agreement mere hours before it knew that the Offer was expected to be launched. In reasons for recommending the Arrangement to Shareholders, the Announcement provides that the terms of the Aurora Proposal were unknown. However, the Board did have full access to the terms of the Aurora Proposal on November 13, 2017, and the general public had highlights regarding same as of November 14, 2017.

68. The terms of the Arrangement Agreement and the SRP do not protect Shareholders and in fact, discourage consideration of competing transactions, thereby stripping the Shareholders of their ability to make an informed decision on the value of their investment in CanniMed. Aurora submits that the Board has failed to exercise its fiduciary duties in connection with the Arrangement and the Offer, and has to its knowledge taken no steps to pursue any other alternative transaction except for the Arrangement.

69. Shareholders may not be able to properly understand the choices before them and the legal implications of supporting the Arrangement. Certain Shareholders may choose to support the Arrangement because of the uncertainty around support for the Offer caused by the lengthy period for which it must stay open without the Deposit Period Order. In other words, Shareholders will be coerced into supporting the Arrangement due to the timing for the expiry of the Offer.

70. The terms of the SRP also raise significant public interest issues outside of NP 62-202. Prohibiting Shareholders from entering into lock-up agreements is unprecedented and an affront to the rights of Shareholders. The clear conflicts between the terms of the SRP and NI 62-104 are offensive and clearly abusive. Moreover, the restrictions which prevent Aurora from even amending

the Offer are unnecessary and serve only the interests of the Board and management of CanniMed in their attempt to thwart the Offer.

71. Following implementation of the New Regime in May 2016, it must be contrary to the public interest for an SRP to have provisions which are inconsistent with bid mechanics for formal take-over bids.

72. Aurora submits that the conduct of the Board and CanniMed violate the justifiable expectations of Shareholders and the capital markets in general. The mandate of the Commissions is to protect investors, enhance market efficiency and promote confidence in the capital markets each of which is engaged in these circumstances.

73. Aurora therefore submits that it is in the public interest to treat the Arrangement as an "alternative transaction" and cease trade the SRP.

Defensive Tactics

74. The unique and highly abnormal provisions in the Arrangement Agreement and the SRP are indicative of improper defensive tactics.

75. Section 1.1(2) of NP 62-202 provides that the take-over bid provisions should favour neither the offeror nor the management of the target company, and should leave shareholders of the target company to make a fully informed decision. The Commissions, along with other securities regulatory authorities in Canada, are concerned when defensive measures that are taken by management of a target company result in shareholders being denied the ability to make a fully informed decision and frustrate the take-over bid process.

76. A commission is empowered to take appropriate action in response to a shareholder rights plan, including making a cease trade order in instances where, pursuant to section 1.1(5), it becomes aware of defensive tactics that "*will likely result in shareholders being deprived of the ability to respond to a take-over bid or to a competing bid*".

77. The primary objective of the take-over bid regime is to protect the *bona fide* interests of target company shareholders, who have the ultimate right to make take-over bid decisions. Shareholder rights plans are inherently contrary to these policy objectives, and the question is generally not if a rights plan should be cease traded, but when: *HudBay Minerals Inc (Re),* 2014 BCSECCOM 154.

78. A securities regulator will consider a number of factors in assessing whether a rights plan constitutes an inappropriate defensive tactic. Such factors include: (i) whether the rights plan has been approved by shareholders; and (ii) whether the timing of the rights plan suggests that it is tactical: *Thirdcoast Limited et al.*, 2012 ONSEC 20.

79. Firstly, the SRP was not approved by Shareholders. Secondly, the timing of the adoption of the SRP by CanniMed is clearly tactical. The SRP was adopted after the Offer was launched and is squarely aimed at the Offer. The desire to deter the Offer is evident by the highly abnormal terms of the SRP.

80. The unusual provisions of the SRP dissuade Shareholders from supporting the Offer, including by preventing the entering into of additional lock-up agreements. Moreover the terms attempt to deny a shortened bid window even if exceptions to the 105-day minimum deposit period apply on their face.

81. The overall effect of the SRP, adopted after the launch of the Offer and Aurora's initial correspondence with the Commissions regarding a shortened bid window, would be to dissuade Shareholders from tendering to the Offer, paralyzing their freedom of contract and ability to make an informed decision. Furthermore, the Deposit Period Order would be meaningless by strict application of the terms of the SRP.

82. Following the implementation of the New Regime, the implementation of a rights plan to protect a preferred business combination must be abusive of shareholder rights unless, at a minimum, the plan is entirely consistent with the provisions of NI 62-104.

83. Accordingly, Aurora submits that the Commissions should exercise their discretion to cease trade the SRP because the tactics used by the Board are likely to deny or severely limit the Shareholders' right to respond to the Offer.

An Expedited Hearing is Required

84. Given the dates for the shareholders' meetings of CanniMed and Newstrike, January 23, 2018 and January 17, 2018, respectively, CanniMed may be in a position to close the transactions contemplated by the Arrangement Agreement in late January, 2018. Aurora will seek to adjourn Newstrike's plan of arrangement approval proceedings in the Ontario Superior Court of Justice (Commercial List) until this application has been finally determined.

85. Aurora therefore requests an expedited hearing. In the absence of an expedited hearing, there is a significant risk that the Arrangement Agreement will be approved in January, 2018 and render the Offer moot.

Joint Hearing Between the Commissions

86. Pursuant to section 22 of the *Financial and Consumer Affairs Authority of Saskatchewan Act*, S.S. 2012, c. F-13.5 and Rule 30 of the OSC's Rules of Procedure and Forms, Aurora seeks a hearing of the foregoing issues before the FCAAS in conjunction with the OSC. CanniMed's principal regulator is the FCAAS and by virtue of the OSC not being part of the passport system, it conducts a separate review from the principal regulator.

87. Aurora further submits that the egregious actions described above make it in the public interest for the Commissions to conduct a joint or simultaneous hearing and consider the issues at the same time. This application raises issues that are novel and of significant importance to the parties in this proceeding and participants in the Canadian capital markets and, Aurora believes, will influence the conduct of other market participants in the future.

IV. CONCLUSION

88. For the foregoing reasons, Aurora submits that protection of the public interest requires that a hearing be convened by both Commissions at the earliest opportunity to consider shortening the minimum deposit period to allow the Offer to be considered concurrently with the Arrangement Agreement, and to cease trade the SRP. The Commissions should exercise their broad unfettered power to move quickly to intervene where actions contrary to the public interest are unfolding.

C. EVIDENCE

89. Aurora intends to rely on affidavit evidence, to be sworn, and submissions (memorandum of fact and law) to be delivered in advance of the hearing.

DATED at Toronto, Ontario, this 4th day of December, 2017

McMILLAN LLP

Paul Davis
Geoff Moysa

McMillan LLP
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Counsel for the Applicant,
Aurora Cannabis Inc.

SCHEDULE "A"

mcmillan

Reply to the Attention of Paul Davis
Direct Line 416.307.4137
Email Address Paul.Davis@mcmillan.ca
Our File No. N/A
Date November 22, 2017

VIA E-MAIL AND COURIER

November 22, 2017

REQUEST FOR EXPEDITED REVIEW

TO: Financial and Consumer Affairs Authority of Saskatchewan
Suite 601
1919 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H2

Attention: **Mr. Sonne Udemgba, Deputy Director, Legal Securities Division**

AND TO: Ontario Securities Commission

Re: Application for Exemptive Relief

To Whom it May Concern:

We are counsel to Aurora Cannabis Inc. (the "**Filer**"), which intends on launching an unsolicited formal take-over bid for the issued and outstanding common shares (the "**Common Shares**") of CanniMed Therapeutics Inc. ("**CanniMed**") by no later than November 24, 2017, subject to certain conditions (the "**Offer**").

We have been authorized by the Filer to make this dual application ("**Application**") on its behalf pursuant to NP 11-203 – *Process for Exemptive Relief Applications in Multiple Jurisdictions* ("**NP 11-203**").[1] The head office of CanniMed is in Saskatoon in the Province of Saskatchewan. As a result, and in accordance with the guidance set forth in Section 3.6(5) of NP 11-203,[2] the Filer has selected the Financial and Consumer Affairs Authority of Saskatchewan (the "**FCAAS**") as the principal regulator for this Application.

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[1] *Process for Exemptive Relief Applications in Multiple Jurisdictions*, OSC NP 11-203 (30 April 2016), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category1/csa_20160430_11-203-unofficial-consolidation.pdf >.

[2] *Ibid* at 3.6(5).

Pursuant to paragraph 5.2(1)(a)(v) of NP 11-203,[3] notice is hereby given that section 4.7(1) of Multilateral Instrument 11-102 - *Passport System* ("**MI 11-102**")[4] is intended to be relied upon in British Columbia, Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador.

1. SUMMARY OF REQUESTED RELIEF

On behalf of the Filer, we hereby apply for a decision pursuant to Section 6.1 of National Instrument 62-104 – *Take-Over Bids and Issuer Bids* ("**NI 62-104**") that Section 2.28.1 of NI 62-104 not apply to the Offer, subject to the condition that the Offer allow Common Shares to be deposited for an "initial deposit period" of at least 35 days from the date the Offer is made (the "**Requested Relief**").[5]

2. DEFINED TERMS

Terms defined in National Instrument 14-101 – *Definitions,*[6] MI 11-102[7] and NI 62-104[8] have the same meaning if used in this decision, unless otherwise defined herein.

3. FACTS AND BACKGROUND

1. The Filer is a reporting issuer in each province of Canada and is not currently on any reporting issuer default list. The Filer's common shares are listed on the Toronto Stock Exchange (the "**TSX**").

2. The Filer's wholly-owned subsidiaries, Aurora Cannabis Enterprises Inc., Peloton Pharmaceuticals Inc. (through 10094595 Canada Inc.) and Pedanios GmbH, are the Filer's main operating subsidiaries, Aurora Cannabis Enterprises Inc. has two licenses to produce cannabis pursuant to Health Canada's Access to Cannabis for Medical Purposes Regulations and Pedanios GmbH is a licensed importer of Cannabis pursuant to the German Narcotic Law.

3. CanniMed is a Canadian-based, international plant biopharmaceutical company. CanniMed is a reporting issuer in each province of Canada other than Québec and is not, to the Filer's knowledge, on any reporting issuer default list. The Common Shares are listed on the TSX.

4. On November 14, 2017, the Filer announced by press release that it had submitted a proposal to CanniMed's board of directors (the "**Board**") to purchase all of the issued and outstanding Common Shares for consideration of 4.52586207 shares of the Filer, to a maximum of $24 per Common Share (the "**Proposal**"). Based on closing prices of the relevant securities on the TSX, this represents a premium of 56.9% over the closing price of the Common Shares on

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[3] *Ibid* at 5.2(1)(a)(v).

[4] *Passport System*, BCSC MI 11-102 (31 July 2017), online: <https://bcsc.bc.ca/Securities_Law/Policies/Policy1/PDF/11-102__MI___July_31__2017/>.

[5] *Take-Over Bids and Issuer Bids*, BCSC NI 62-104 (9 May 2016), online: <https://www.bcsc.bc.ca/Securities_Law/Policies/Policy6/PDF/62-104__NI___May_9__2016_(1)/>.

[6] *National Definitions*, OSC NI 14-101 (1 February 2017), online: <http://www.osc.gov.on.ca/documents/en/Securities-Category1/rule_20170201_14-101_unofficial-consolidated.pdf>.

[7] *Passport System*, *supra* note 4.

[8] *Take-Over Bids*, *supra* note 5.

November 14, 2017. Upon completion of the transactions contemplated pursuant to the Proposal, holders of Common Shares would hold approximately 20.4% of the issued and outstanding common shares of the Filer.

5. In its November 14, 2017 press release, the Filer stated that if the Board did not respond to its Proposal prior to 5:00 pm (Vancouver time) on Friday November 17, 2017, the Filer intended to commence the Offer.

6. The largest shareholder of CanniMed, holding approximately 17.51% of the Common Shares, is Golden Opportunities Fund Inc. The Filer understands that the second and third largest shareholders of the Common Shares, holding 8.71% and 8.42% of the Common Shares respectively, are Vantage Asset Management and Saskworks Venture Fund Inc.

7. Holders of Common Shares representing, in aggregate, 38% of the Common Shares (including those referred to in the immediately preceding paragraph) (the "**Locked-up Shareholders**") support the Offer and have entered into lock-up agreements. Such shareholders are precluded from tendering any Common Shares in favour of any other competing acquisition proposal and are required to vote against other acquisition proposals or actions which may prevent, delay or frustrate the proposal of the Filer, including any resolution to approve an issuance of Common Shares or a material acquisition by CanniMed. These agreements terminate if the Filer does not commence the Offer on or before November 27, 2017.

8. The Proposal was delivered to the Board on November 13, 2017. Acknowledgement of receipt of the Proposal was provided by CanniMed to the Filer on November 14, 2017 by letter. Following such acknowledgement, no other communication was received from CanniMed prior to the Proposal deadline of 5:00 p.m. on November 17, 2017.

9. Notwithstanding its failure to respond to the Proposal, at 4:46 pm (Toronto time) on November 17, 2017, CanniMed issued a press release (the "**Announcement**") announcing that it had entered into an arrangement agreement (the "**Arrangement Agreement**"), with approval of the Board, to acquire Newstrike Resources Ltd. ("**Newstrike**"). According to the Announcement, the Arrangement Agreement, which has not yet been filed, provides that each shareholder of Newstrike will receive 0.033 Common Shares in exchange for each share held.

10. According to the Announcement, the Arrangement Agreement further provides that: (i) both parties are subject to non-solicitation provisions; (ii) a $9.5 million termination fee will be payable by CanniMed to Newstrike in the event the arrangement (the "**Arrangement**") is terminated in favour of an unsolicited superior proposal; and (iii) in certain circumstances, expense reimbursement of up to $600,000 from one party to another will be payable in the event the Arrangement Agreement is terminated.

11. The Announcement states that upon closing of the Arrangement, Newstrike would become a wholly-owned subsidiary of CanniMed and holders of Common Shares would own, in aggregate, approximately 65 percent of the combined entity and holders of common shares of Newstrike would own, in aggregate, approximately 35 percent of the combined entity. The Announcement further provides that the board of directors of the combined entity would include two persons who would be nominated by Newstrike. In addition, certain shareholders of Newstrike would be entitled to nominate two persons to the board of directors of the combined entity at its 2018 annual shareholders' meeting and would have the right to

nominate one person to the board at each annual meeting for so long as they hold 10% of the outstanding Common Shares.

12. In the Announcement, CanniMed provided that in making its recommendation to holders of Common Shares to vote in favour of the Arrangement, the terms of any offer of the Filer were unknown and the transaction with Newstrike was fully negotiated and contains reasonable terms for closing.

13. On November 20, 2017, at 10:00 a.m. (Toronto time), CanniMed and Newstrike held a joint conference call and webcast to discuss the Arrangement and the President of CanniMed stated that "in our collective judgement, this business combination provides our shareholders of both companies the optimal opportunity to have significant share appreciation in near and future years".

14. It is the Filer's current intention to launch the Offer on or before November 24, 2017. The Filer expects the Offer to be subject to customary conditions including: (i) there being deposited under the Offer, and not withdrawn, at least 66⅔% of the outstanding Common Shares (calculated on a fully diluted basis), excluding any Common Shares held by the Filer; (ii) receipt of all governmental, regulatory and third party approvals that the Filer considers necessary or desirable in connection with the Offer; (iii) no material adverse change having occurred in the business, affairs, prospects or assets of CanniMed; and (iv) the Arrangement is not completed and the Arrangement Agreement is terminated.

4. ANALYSIS AND SUBMISSIONS

15. Amendments to the take-over bid regime came into force on May 9, 2016. As you are aware, the goal of such amendments was to enhance the quality and integrity of the take-over bid regime and rebalance the current dynamics among offerors, offeree issuer boards of directors and offeree issuer security holders by, among other things, providing the offeree board with additional time and discretion when responding to a take-over bid, subject to certain important exceptions.

16. Pursuant to the new regime, Section 2.28.1 of NI 62-104[9] requires an offeror to allow securities to be deposited under a take-over bid for an initial deposit period of at least 105 days from the date of the bid, subject to two exceptions. The minimum deposit period is reflective of the policy objective of the Canadian Securities Administrators ("**CSA**") noted in paragraph 15.

17. Section 2.28.3 of NI 62-104[10] sets out one of the two exceptions to the minimum 105-day deposit period and allows securities to be deposited for at least 35 days from the date of the bid in instances where the issuer has issued a news release that it intends to effect an "alternative transaction".

18. An "alternative transaction" is defined in Section 1.1 of NI 62-104,[11] for an offeree issuer, as including an amalgamation, merger, arrangement, consolidation, or any other transaction of the issuer, or an amendment to the terms of a class of equity securities of the issuer, as a

[9] *Take-Over Bids*, *supra* note 5 at 2.28.1.

[10] *Ibid* at 2.28.3.

[11] *Ibid* at 1.1.

consequence of which the interest of a holder of an equity security of the issuer may be terminated without the holder's consent, regardless of whether the equity security is replaced with another security.

19. The key reason for the "alternative transaction" exception is to "avoid unequal treatment of offerors". In other words, "since the purpose of the [105] day minimum deposit period is to provide offeree boards with a longer period of time to respond to an unsolicited bid, there is no need for the [105] day minimum deposit period to apply where the offeree issuer has determined that an alternative transaction is appropriate".[12]

20. The Board has been aware of the Offer since November 13, 2017 and failed to respond to it. In reasons for recommending the Arrangement, the Announcement provides that the Offer of the Filer was unknown. This is misleading as the Board had full access to the terms of the Offer provided by the Filer to CanniMed on November 13, 2017 (which CanniMed acknowledged receipt of but failed to consider in any meaningful way).

21. Instead of responding to the Proposal, CanniMed announced the entry into the Arrangement Agreement mere hours before it knew that the Offer was expected to be launched. The terms of the Arrangement Agreement, including non-solicit provisions and a significant $9.5 million break-fee that is payable by CanniMed to the extent an unsolicited superior offer is received, are reflective of a transaction meant to provide the shareholders of CanniMed with a competing proposal to the Offer – or, in CanniMed's view, an alternative transaction to maximize shareholder value. It is noteworthy that, on the November 20, 2017 joint conference call and webcast, the President of CanniMed emphasized the optimal opportunity for shareholders of both CanniMed and Newstrike to have significant share appreciation in the combined entity in near and future years.

22. The Arrangement with Newstrike would significantly impact the control for CanniMed, or at the very least would vest negative control in the hands of the current shareholders of Newstrike, dilute the interests of the Locked-up Shareholders, and significantly reduce the economic value of the Proposal to the Filer. It involves the issuance of over 33 percent of the common shares of CanniMed and, according to the Announcement, constitutes "a transformational strategic acquisition".

23. The Filer acknowledges that, as described in the Announcement, the Arrangement Agreement does not strictly constitute an "alternative arrangement" because no holder of equity securities of CanniMed is having their interest in any equity security terminated. However, this ignores substance over form. The policy rationale for an exception to the 105-day deposit period exists on these facts since CanniMed no longer requires an extended time period to allow it an opportunity to consider unsolicited transactions and propose alternative transactions to its shareholders which may provide greater value to them. CanniMed has

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[12] *CSA Notice and Request for Comment; Proposed Amendments to Multilateral Instrument 62-104; Proposed Changes to National Policy 62-203 and Proposed Consequential Amendments*, CSA Notice (31 March 2015) at 3, online: < http://www.osc.gov.on.ca/documents/en/Securities-Category6/csa_20150331_62-104_rfc-proposed-admendments-multilateral-instrument.pdf>.

already exercised this privilege. The President of CanniMed has been quoted as saying the Board determined Newstrike was the "optimal partner". [13]

24. It is our submission that the significant effect of the business combination proposed in the Arrangement Agreement, including the traditional merger provisions therein, should be considered in evaluating the length of time the Filer should be required to keep the Offer open.

25. It is our submission that in situations where an offeree issuer has agreed to an alternative option to an unsolicited bid, the offeror should be permitted to adjust the deposit period to a shorter timeframe than 105 days. Part of the policy rationale for permitting an offeror to accept the deposit of securities in a shorter time period than 105 days is to ensure that no offeror is unduly prejudiced by actions of an issuer and to avoid unequal treatment of offerors.

26. In the absence of an order granting the Requested Relief, the Filer will be required to keep the Offer open for 105 days and CanniMed may be in a position to close the transactions contemplated by the Arrangement Agreement in January, 2018. The holders of Common Shares will be coerced into deciding whether to support the Arrangement a full two months prior to the expected expiry of the Offer. This will result in the holders of Common Shares being stripped of their ability to tender to the Offer prior to the Arrangement being completed, and given the additional risk to the Filer as a result of the Arrangement, there will be no certainty that the Offer will be completed.

27. In the event the Requested Relief is not granted, the Filer will be unduly prejudiced.

5. OTHER MATTERS

In support of this Application, we enclose the following:

1. As Appendix "A", a draft form of decision document sought;
2. As Appendix "B", the required verification and authorization statement from the Filer; and
3. Payment of applicable fees.

We thank you in advance for your attention to this matter. Should you have any questions or comments or require any further information, please contact Paul Davis at Tel: (416) 307-4137 or Cory Kent at Tel: (604) 691-7446.

Yours truly,

Paul Davis

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[13] Armina Ligaya, "Aurora Cannabis's battle for CanniMed turns hostile", *Financial Post* (20 November 2017), online: <http://business.financialpost.com/>.

APPENDIX "A"

Decision document

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
SASKATCHEWAN AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
AURORA CANNABIS INC.
(the Filer)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Makers**) has received an application from the Filer for a decision (the **Exemption Sought**) under securities legislation of the Jurisdictions (the **Legislation**) that the Filer is exempt from Section 2.28.1 of National Instrument 62-104 – *Take-Over Bids and Issuer Bids* (**NI 62-104**) with respect to the proposed acquisition by the Filer of all of the issued and outstanding common shares (the **Common Shares**) of CanniMed Therapeutics Inc. (the **Offer**), subject to the condition that the Offer allow Common Shares to be deposited for an "initial deposit period" of at least 35 days from the date the Offer is made.

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

a) the Securities Division, Financial and Consumer Affairs Authority of Saskatchewan is the principal regulator for this Application;

b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island and Newfoundland and Labrador; and

c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 – *Definitions*, MI 11-102 and NI 62-104 have the same meaning if used in this decision, unless otherwise defined herein.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a reporting issuer in each province of Canada and is not currently on any reporting issuer default list. The Filer's common shares are listed on the Toronto Stock Exchange (the **TSX**).

2. CanniMed is a Canadian-based, international plant biopharmaceutical company. CanniMed is a reporting issuer in each province of Canada other than Québec and is not, to the Filer's knowledge, on any reporting issuer default list. The Common Shares are listed on the TSX.

3. On November 14, 2017, the Filer announced by press release that it had submitted a proposal to CanniMed's board of directors (the **Board**) to purchase all of the issued and outstanding Common Shares for consideration of 4.52586207 shares of the Filer, to a maximum of $24 per Common Share (the **Proposal**). Based on closing prices of the relevant securities on the TSX, this represents a premium of 56.9% over the closing price of the Common Shares on November 14, 2017. Upon completion of the transactions contemplated pursuant to the Proposal, holders of Common Shares would hold approximately 20.4% of the issued and outstanding common shares of the Filer.

4. In its November 14, 2017 press release, the Filer stated that if the Board did not respond to its Proposal prior to 5:00 pm (Vancouver time) on Friday November 17, 2017, the Filer intended to commence the Offer.

5. The largest shareholder of CanniMed, holding approximately 17.51% of the Common Shares, is Golden Opportunities Fund Inc. The Filer understands that the second and third largest shareholders of the Common Shares, holding 8.71% and 8.42% of the Common Shares respectively, are Vantage Asset Management and Saskworks Venture Fund Inc.

6. Holders of Common Shares representing, in aggregate, 38% of the Common Shares (including those referred to in the immediately preceding paragraph) (the **Locked-up Shareholders**) support the Offer and have entered into lock-up agreements. Such shareholders are precluded from tendering any Common Shares in favour of any other competing acquisition proposal and are required to vote against other acquisition proposals or actions which may prevent, delay or frustrate the proposal of the Filer, including any resolution to approve an issuance of Common Shares or material acquisition by CanniMed. These agreements terminate if the Filer does not commence the Offer on or before November 27, 2017.

7. The Proposal was delivered to the Board on November 13, 2017. Acknowledgement of receipt of the Proposal was provided by CanniMed to the Filer on November 14, 2017 by letter. Following such acknowledgement, no other communication was received from CanniMed prior to the Proposal deadline of 5:00 p.m. on November 17, 2017.

8. Notwithstanding its failure to respond to the Proposal, at 4:46 pm (Toronto time) on November 17, 2017, CanniMed issued a press release (the "**Announcement**") announcing that it had entered into an arrangement agreement (the "**Arrangement Agreement**"), with approval of the Board, to acquire Newstrike Resources Ltd. ("**Newstrike**"). According to the

Announcement, the Arrangement Agreement, which has not yet been filed, provides that each shareholder of Newstrike will receive 0.033 Common Shares in exchange for each share held.

9. According to the Announcement, the Arrangement Agreement further provides that: (i) both parties are subject to non-solicitation provisions; (ii) a $9.5 million termination fee will be payable by CanniMed to Newstrike in the event the arrangement (the "**Arrangement**") is terminated in favour of an unsolicited superior proposal; and (iii) in certain circumstances, expense reimbursement of up to $600,000 from one party to another will be payable in the event the Arrangement Agreement is terminated.

10. The Announcement states that upon closing of the Arrangement, Newstrike would become a wholly-owned subsidiary of CanniMed and holders of Common Shares would own, in aggregate, approximately 65 percent of the combined entity and holders of common shares of Newstrike would own, in aggregate, approximately 35 percent of the combined entity.

11. It is the Filer's current intention to launch the Offer on or before November 24, 2017. The Filer expects the bid to be subject to customary conditions including: (i) there being deposited under the Offer, and not withdrawn, at least 66⅔% of the outstanding Common Shares (calculated on a fully diluted basis), excluding any Common Shares held by the Filer; (ii) receipt of all governmental, regulatory and third party approvals that the Filer considers necessary or desirable in connection with the Offer; (iii) no material adverse change having occurred in the business, affairs, prospects or assets of CanniMed; and (iv)) the Arrangement is not completed and the Arrangement Agreement is terminated.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted.

DATED at Saskatoon on this day of , 2017.

Financial and Consumer Affairs Authority of Saskatchewan

STATEMENT OF VERIFICATION

The undersigned hereby authorizes the making and filing of the attached Application by McMillan LLP on behalf of the undersigned and confirms the truth of the facts contained therein.

Dated at Toronto this 22nd day of November, 2017.

AURORA CANNABIS INC.

By: _____

Name: Glen Ibbott
Title: Chief Financial Officer

SCHEDULE "B"

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Borden Ladner Gervais

December 1, 2017

By E-mail and Courier

TO: Financial and Consumer Affairs Authority of Saskatchewan
Suite 601, 191 Saskatchewan Drive
Regina, Saskatchewan
S4P 4H2
Attention: Sonne Udemgba, Deputy Director, Legal Securities Division

AND TO: Ontario Securities Commission
20th Floor, 20 Queen Street West
Toronto, Ontario
M5H 3S8
Attention: Naizam Kanji, Director, Office of Mergers and Acquisitions

Dear Sirs,

Re: Response to Application for Exemptive Relief

We are the lawyers for to CanniMed Therapeutics Inc. ("**CanniMed**") and provide this written response on its behalf to the application dated November 22, 2017 (the "**Application**") made on behalf of Aurora Cannabis Inc. ("**Aurora**" or the "**Filer**") to the Financial and Consumer Affairs Authority of Saskatchewan (the "**FCAAS**") and the Ontario Securities Commission (the "**OSC**" and together with the FCAAS, the "**Regulators**"). For the reasons set out herein, CanniMed requests that the Application be denied or, in the alternative, that a joint hearing be scheduled with an appropriate schedule for evidence and submissions to consider this matter and potentially ancillary or other issues.

I. OVERVIEW OF CANNIMED'S POSITION

1. The Application is a transparent attempt by Aurora to mischaracterize the proposed acquisition by plan of arrangement (the "**Arrangement**") of Newstrike Resources Ltd. ("**Newstrike**") by CanniMed as akin to an alternative transaction in order to attenuate the prescribed deposit period for the hostile bid (the "**Hostile Bid**") made by Aurora for all of outstanding common shares of CanniMed (the "**CanniMed Shares**"), thereby coercing

CanniMed shareholders to make a decision, reducing the opportunity for alternative options to emerge and undermining the legitimate actions of the board of directors of CanniMed (the "**Board**"). The Arrangement is not, as the Filer admits, an alternative transaction within the meaning of section 2.28.3 of National Instrument 62-104 – Take-Over Bids and Issuer Bids ("**NI 62-104**") so as to attract the exception from the minimum bid deposit period available under 2.28.1 of NI 62-104. Moreover, the Arrangement clearly does not in any way engage the animating principles and policy objectives that underlie the exception available in the case of a competing alternative transaction.

2. As will be evident in part herein and would be put into evidence at a full hearing if one was required, the Arrangement had been under consideration for weeks and was in a very advanced stage and indeed almost "fully-baked" when the Aurora conditional proposal (the "**Aurora Proposal**") appeared only one hour before the Board was set to consider and approve the arrangement agreement to be entered into with Newstrike (the "**Arrangement Agreement**"). As would be developed at any hearing, the circumstances and timing of the Aurora Proposal would be important in considering its request for relief in this Application.

3. The disposition of this Application will also be important in settling the approach and attitude of the Regulators towards attempts to alter the important protections of the new take-over bid regime. While it is clear that exemptive relief is not appropriate in the circumstances, if the Regulators are even considering altering the statutorily prescribed period, it will be particularly important for them to receive full information and assistance, especially in the face of potentially troubling facts and opportunistic actions on the part of Aurora. CanniMed is in the process of seeking information as to those circumstances and it is likely that there will be additional issues for consideration, if not a separate application.

II. FACTS AND BACKGROUND

4. For the convenience of the Regulators, rather than restating many of the facts as set out in the Application, for the purposes of this letter CanniMed does not dispute the facts set out in paragraphs 1 to 6 and 8 to 14 of the Application except that CanniMed:

(a) does not accept statements as to the Filer's intentions as set out in the Application,

(b) does not accept statements as to the premium that the Aurora Proposal represents to the trading price of the CanniMed Shares;

(c) disagrees with the statement in paragraph 9 that states "Notwithstanding its failure to respond" as CanniMed did send an acknowledgement letter to Aurora and further was under no obligation to respond to Aurora (in fact, CanniMed was subject to exclusivity obligations precluding a meaningful response, but did request copies and details of the lock-up agreements, which request was denied by Aurora), and

(d) sets out additional facts and background below that it believes is relevant to the Application.

5. Newstrike, through its subsidiaries, is a licensed producer of medical cannabis. Newstrike is a reporting issuer in British Columbia, Alberta and Ontario and is not on the list of reporting issuers in default in any of those provinces. Newstrike's common shares are listed on the TSX Venture Exchange.

6. Approximately five months before the Hostile Bid, in June 2017, CanniMed and Newstrike began informal and confidential discussions regarding, among other things, the possibility of collaborative ventures with respect to the supply and storage of cannabis.

7. On June 29, 2017, these discussions were formalized, and CanniMed and Newstrike entered into a mutual non-disclosure agreement (the "**NDA**"). During the summer and fall, discussions continued, and resulted eventually in mutual exclusivity obligations that were regularly renewed and that ultimately expired on November 17, 2017 (the "**Exclusivity Period**").

8. On September 20, 2017, the Board approved the terms of a $4 million debenture financing for Newstrike with a view to extending the Exclusivity Period beyond September 29, 2017. Also on September 20, 2017 the Board formed a committee (the "**First Committee**") with a mandate to consider potential strategies and opportunities for merger

and acquisition activities by CanniMed and to make recommendations to the Board in relation to such strategies and opportunities. On September 27, 2017, the Board clarified that the mandate of the First Committee did not extend to the initiation by CanniMed of a strategic sales process, including a potential change of control transaction. On October 2, 2017, CanniMed subscribed for a convertible debenture of Newstrike.

9. Three days after the convertible debenture transaction, on October 5, 2017 Vantage Asset Management Inc. ("**Vantage**"), a shareholder of CanniMed, sent a letter to the Board expressing its view that the best path forward for CanniMed was a change of control transaction.

10. The First Committee considered the Vantage letter at a meeting on October 12, 2017. . Prior to a meeting of the Board on October 27, 2017, a second letter, dated October 23, 2017, essentially repeating the first letter was received from Vantage. At the October 27, 2017 Board meeting, the First Committee informed the Board that it could not reach a consensus on whether or not to open discussions with Vantage. The Board received a presentation from its financial advisor, AltaCorp Capital Inc. ("**AltaCorp**") which analyzed the various transactions which Vantage had raised in their letters, together with other potential transactions. The Board meeting was adjourned to 5:30 p.m. on Monday October 30, 2017.

11. At 5:28 p.m. on October 30, 2017 a letter was sent by counsel to Vantage to the Board titled "Serious Concerns re CanniMed's Proposed Strategic Direction" and stating that if the independent directors did not engage with Vantage it "would be compelled to ...hold each director and officer of the Company personally accountable for their actions".

12. At its meeting on October 30, 2017, the Board further discussed the issue of whether CanniMed should consider initiating a change of control transaction process, including inviting Vantage to present to the Board and decided that, at such time, it was not in the best interests of CanniMed to initiate such a process. The Board authorized management to continue discussions with Newstrike. The Board also directed the Chair of the Board and a representative of AltaCorp to meet with representatives of Vantage.

13. In October and early November, 2017, CanniMed and Newstrike expanded the discussions to include a potential business combination and, with the assistance of their respective financial and legal advisors, began work on negotiating and drafting the Arrangement Agreement.

14. On November 2, 2017, just days after the Board had decided to proceed with discussions to acquire Newstrike, Vantage sent a third letter stating its views with respect to a change of control transaction and stated its strong opposition to any potential acquisition.

15. Negotiations with Newstrike continued in earnest through late October and early November 2017. CanniMed's CEO discussed with Doug Banzet, the COO of Westcap Mgt. Ltd. which is the investment manager of CanniMed's largest shareholder, Golden Opportunities Fund Inc. ("**Golden**") its support for the Arrangement. A Board meeting was scheduled for November 13, 2017 with the purpose of presenting the Arrangement Agreement to the Board for approval.

16. On November 13, 2017, at approximately 11 a.m. (Central Standard Time), one hour prior to the Board meeting, CanniMed received the Aurora Proposal from Aurora. At approximately the same time, the Chair of the Board received an unexpected call from the President and CEO of Westcap on behalf of Golden, in which the Chair was advised that Golden had entered into an irrevocable lock-up agreement with Aurora. In Aurora's letter, it also indicated that it had signed "irrevocable" lock-up agreements in respect of 39% of the issued and outstanding CanniMed Shares (as it would later turn out, this was not an entirely accurate representation). At such time, CanniMed was bound by the exclusivity provisions in the NDA. Accordingly, CanniMed simply responded to Aurora acknowledging receipt of its proposal. On November 15, 2017, CanniMed requested copies of the lockup agreements. That request was deferred by Aurora's counsel until such time as the agreements were required to be filed on SEDAR. The Aurora Proposal was non-binding and conditional, stating that the entry into a definitive agreement was conditional upon, among other things, due diligence and the entry into voting and support agreements in respect of the transaction by each of the directors and officers of CanniMed, yet at the same time set a deadline for response of November 17, 2017.

17. Two of CanniMed's directors who were privy to the confidential discussions and status of negotiations between Newstrike and CanniMed, Robert Duguid and Douglas Banzet, are senior officers of shareholders, or managers of shareholders, who entered into lock-up agreements in support of the Hostile Bid. These two directors had previously voiced their support for a change of control transaction, notwithstanding the Board expressly resolved against doing so and notwithstanding that CanniMed was bound by the terms of an exclusivity agreement with Newstrike.

18. At its meeting on November 13, 2017, the Board dissolved the First Committee and appointed a new Committee (the "**Second Committee**") comprised of three of the independent directors to review and assess the Aurora Proposal and to advise the Board as to what action should be taken concerning the Aurora Proposal or any other proposal made by any third party.

19. Before the time for response in the Aurora Proposal, on November 14, 2017, Aurora issued a press release disclosing its letter to CanniMed and once again claimed that it had entered into "irrevocable" lock-up agreements. On the same day, CanniMed issued a press release in response to Aurora's press release, advising CanniMed shareholders that it would consider the Aurora Proposal and disclosing its exclusive negotiations with Newstrike in respect of the Arrangement Agreement.

20. On November 17, 2017, the Board met to consider the Arrangement Agreement. Prior to the Board deliberating, Mr. Banzet recused himself and Mr. Duguid resigned from the Board. At that meeting, the Second Committee reported to the Board that it was its unanimous view was that CanniMed should not engage in discussions with Aurora at such time in light of a number of factors, including the recent sharp increase of the price of Aurora's common shares, the risk to CanniMed Shareholders of a correction in the Aurora share price, the conditionality of the Aurora Proposal and the uncertainty with respect to Aurora's projected production capacity. The Board then discussed the terms of the Arrangement Agreement, the report from its financial advisor, the report from the financial advisor to the Special Committee, the report of the Special Committee and the advice of legal counsel, and subsequently approved the execution and delivery of the Arrangement Agreement.

21. On November 24, 2017, Aurora formally launched the Hostile Bid. The Hostile Bid is conditional on, among other things, the Arrangement Agreement being terminated prior to closing of the Arrangement.

22. As required by law, Aurora filed the lock-up agreements on the same day as filing the other take-over bid materials on SEDAR. The lock-up agreements are far from "irrevocable", and in fact contain unusual provisions allowing the locked up shareholder to terminate the agreement (i) if the value of the all share consideration offered by Aurora were to be below $16.00, and (ii) if the value of the all share consideration offered by Aurora were to be below $18.00, subject to a top-up right in favour of Aurora. Given the very recent, significant and difficult to explain run-up in Aurora's share price, and the very volatile conditions in the cannabis sector currently, it is entirely possible that these situations may arise before the Aurora bid expires, particularly if there is no abridgement of the bid deposit period.

III. ANALYSIS AND SUBMISSIONS

A. The Arrangement Agreement Is Clearly Not an "Alternative Transaction"

23. Aurora admits that no exception to the 105 day minimum deposit period is applicable on its face in this case. Rather, Aurora asks the Regulators to grant the discretionary relief pursuant to section 6.1 of NI 62-104 despite there being no basis for doing so in the applicable rules and the prejudice doing so would cause to CanniMed and its shareholders. The Regulators should dismiss this Application on this basis alone.

24. NI 62-104, section 2.28.1, provides that "an offeror must allow securities to be deposited under a take-over bid for an initial deposit period of at least 105 days from the date of the bid".[1] This rule is intended to ensure that the board of directors and the shareholders of the target of a take-over bid have an appropriate amount of time to consider the offer and for the board of directors to seek alternatives.

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[1] NI 62-104, s. 2.28.1

25. There are only two exceptions to this fundamental rule, both of which are based on the premise that the target's board of directors has already been engaged in a take-over bid process and therefore do not need the full 105 days to consider the offer or seek alternatives.

26. More specifically:

(a) Section s. 2.28.2 provides an exception – the "deposit period news release" exception that generally applies in a friendly, negotiated take-over bid and permits the target's board to issue a news release in respect of an offer stating that the expiry time can be reduced to a minimum deposit period of 35 days; and

(b) section 2.28.3 provides an exception - the "alternative transaction" exception where the target's board issues a press release indicating that it intends to engage in an "alternative transaction", in which case the offeror can reduce the minimum deposit period to 35 days.

As noted above, in both of these situations, the target's board of directors would have been engaged in a change of control transaction (either with the bidder in the case of (a) or a third party in the case of (b)) and therefore would have already had time to consider alternatives.

27. It is common ground that the "deposit period news release" exception is not available to Aurora in this case. In addition, in this case, as already noted, the Board had expressly determined not to engage in a change of control or takeover process in the period before the Aurora Proposal and so obviously had not done so.

28. Aurora also admits that the Arrangement is not an "alternative transaction". An "alternative transaction" is defined as either a transaction where shareholders will lose their ownership of their equity securities without their consent, or a sale of all or substantially all of the issuer's property. NI 62-104 provides as follows:

"alternative transaction" means, for an issuer:

(a) an amalgamation, merger, arrangement, consolidation, or any other transaction of the issuer, or an amendment to the terms of a class of equity securities of the issuer, as a consequence of which the interest of a holder of an equity security of the issuer may be terminated without the holder's consent, regardless of whether the equity security is replaced with another security, but does not include

(i) a consolidation of securities that does not have the effect of terminating the interests of holders of equity securities of the issuer in those securities without their consent, except to an extent that is nominal in the circumstances,

(ii) a circumstance in which the issuer may terminate a holder's interest in a security, under the terms attached to the security, for the purpose of enforcing an ownership or voting constraint that is necessary to enable the issuer to comply with legislation, lawfully engage in a particular activity or have a specified level of Canadian ownership, or

(iii) a transaction solely between or among the issuer and one or more subsidiaries of the issuer,

(b) a sale, lease or exchange of all or substantially all the property of the issuer if the sale, lease or exchange is not in the ordinary course of business of the issuer, but does not include a sale, lease or exchange solely between or among the issuer and one or more subsidiaries of the issuer;[2]

29. It is absolutely clear that subsection (b) (sale of all or substantially all of the issuer's property) of the definition of "alternative transaction" is not applicable in this case.

30. Moreover, Aurora concedes that subsection (a) of the definition of "alternative transaction" does not apply. In its Application, the Filer "acknowledges that, as described in the Announcement, the Arrangement Agreement does not constitute an "alternative arrangement" [*sic*] because no holder of equity securities of CanniMed is having their interest in any equity security terminated."[3]

31. Aurora could not maintain otherwise – the Arrangement is clearly not an "alternative transaction". The Arrangement involves the purchase by CanniMed of all the issued and

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[2] NI 62-104, s. 1.1
[3] Application for Exemptive Relief, dated November 24, 2014 (the "Application"), para. 23.

outstanding shares of Newstrike. As consideration for each Newstrike share, CanniMed has offered 0.033 CanniMed Shares. The Arrangement is simply an asset purchase by CanniMed (the asset being Newstrike) for which the consideration is CanniMed Shares. Pursuant to Section 611 of the TSX Company Manual, CanniMed shareholders must approve the issuance of the CanniMed Shares under the Arrangement since it involves the issuance of greater than 25% of the currently-issued CanniMed Shares. However, in no way will CanniMed shareholders lose their equity ownership as a result of the Arrangement and therefore the Arrangement is not an "alternative transaction." Save for the fact that Aurora seems to wish for the termination of the Arrangement Agreement, both the Arrangement and the Hostile Bid could proceed; the Arrangement is not preclusive of the Hostile Bid.

B. The Definition of "Alternative Transaction" Should Not Be Expanded

32. The Filer suggests that, even though the Arrangement is not an "alternative transaction" as defined in NI 62-104, the exception should nonetheless apply. Not only would this be contrary to the plain meaning of section 2.28.3 of NI 62-104, but it would also be contrary to the policy basis for the exception and the OSC jurisprudence in respect of applications to reduce the minimum deposit period.

33. When the Canadian Securities Administrators (the "**CSA**") adopted amendments to NI 62-104 on February 26, 2016, which resulted in the minimum deposit period regime at issue in this Application, the CSA was clear that "alternative transactions" were limited to transactions involving a change in control of the target. In its "Notice of Amendments to the Take-Over Bid Regime", the CSA summarized the "alternative transaction" exception to the 105 day minimum deposit period as follows:

> The Bid Regime includes a definition for an "alternative transaction" that is based, with certain modifications, principally on the definition of "business combination" in Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions. This definition is intended to encompass transactions agreed to or initiated by the issuer **that could**

> **result in the acquisition of the issuer or the business of the issuer as an alternative to doing so by means of a take-over bid.**[4] [emphasis added]

34. Similarly, when the CSA proposed the amendments to NI 62-104 in 2015, it indicated that the "alternative transaction" exception to the minimum deposit period only applied to transactions where control of the target would be at stake. The CSA stated:

> The second exception we are proposing is if an issuer issues a news release announcing that it has agreed to enter into, or determined to effect, an "alternative transaction" (being, generally, a plan of arrangement **or similar change of control transaction** to be approved by security holders of the issuer). In such case, the minimum deposit period for any then-outstanding take-over bid or subsequent take-over bid commenced before the completion of the alternative transaction must be at least 35 days, rather than 120 days, from the date of the bid. The purpose of this exception is to avoid unequal treatment of offerors when **a board-supported change of control transaction** is proposed to be effected through an "alternative transaction" rather than by way of a "friendly" take-over bid. As well, since the purpose of the 120 day minimum deposit period is to provide offeree boards with a longer period of time to respond to an unsolicited bid, there is no need for the 120 day minimum deposit period to apply where the offeree issuer has determined that an alternative transaction is appropriate.[5] [emphasis added]

35. The Arrangement does not involve a change of control of CanniMed and therefore would not be even analogous to the type of transaction to which the exception is intended to apply. The Filer's proposed expansion of the definition of "alternative transaction" to include the Arrangement is inappropriate and no different than extending the exception to any major business transaction an issuer might undertake that a potential offeror does not like. In this respect, and to show the absurdity of the request, should an offeror be permitted to rely on the exception in 2.28.3 because an issuer proposes to enter into a credit facility, a significant lease for business premises or any other material contract that the offeror does not like and chooses to make a condition of its take-over bid?

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[4] Amendments to Take-Over Bid Regime, Supplement to OSC Bulletin, February 25, 2016: http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20160225_62-104_amd-take-over-bids.htm ("Bulletin Supplement").

[5] CSA Notice and Request for Comment: Proposed amendments to Multilateral Instrument 62-102 Take-Over Bids and Issuer Bids, Proposed changes to National Policy 62-203 Take-Over Bids and Issuer Bids and Proposed Consequential Amendments, March 31, 2013: http://www.osc.gov.on.ca/en/SecuritiesLaw_csa_20150331_62-104_rfc-proposed-admendments-multilateral-instrument.htm

36. The Arrangement does not involve a change of control of CanniMed, CanniMed's assets are not being purchased and CanniMed shareholders are not losing any interest in their CanniMed Shares, let alone without their consent. The TSX requirement that the CanniMed shareholders vote to approve the issuance of the CanniMed Shares issuable on the closing of the Arrangement does not turn the Arrangement into one that is analogous to a change of control transaction any more than any private placement or other transaction to which TSX rules may apply.

37. Aurora's proposed expansion of the definition of "alternative transaction" could inappropriately provide hostile bidders influence over business decisions of a board of a target that the CSA cannot have intended to give them. The CSA stated that the 2016 amendments to NI 62-104 were meant to give target boards more power in relation to hostile bids.[6] The Filer's proposal could have the perverse effect of allowing hostile bidders to make a take-over bid as an either/or alternative to a major business transaction that a target board deemed appropriate by making termination of such transaction as a condition of the take-over bid and then seeking relief such that the expiry of the bid coincide with closing of, (or the shareholder approval of, if applicable,) the major transaction. To the extent that shareholder approval is required for a significant transaction or a share issuance that a shareholder does not agree with, they are free to solicit proxies against such transaction, but that does not mean that the deposit period for a hostile take-over bid should be drastically shortened.

38. Furthermore, this proposed expansion of the exception would make the exceptions to the minimum deposit period far broader than the OSC had previously considered appropriate. Prior to the 2016 amendments to NI 62-104, there were no exceptions to the 35-day, and earlier 21-day minimum deposit periods. The narrow exceptions that the CSA introduced in 2016 had a specific purpose, as discussed above. Previously, the OSC did not consider it appropriate to allow any exceptions to the minimum deposit period.

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[6] Bulletin Supplement, *supra*, "Substance and Purpose".

39. CanniMed has identified only two instances where the OSC considered an application to abridge the minimum deposit period, albeit both pre-date the recent amendments to the take-over bid regime. Both decisions considered situations in which the bidder sought the OSC's assistance in tailoring a bid to its strategic purposes, and in both decisions, the OSC declined to do so. In *Re Standard Broadcasting Corp. Ltd.*, Selkirk Communications Ltd. ("**Selkirk**") applied to reduce the minimum deposit period so it would end immediately before the deposit period for a competing bid by Slaight Communications Inc. ("**Slaight**"). Both bidders had been in negotiations with Hollinger International ("**Hollinger**"), the 49% shareholder of Standard Broadcasting Corp. Ltd. Selkirk's negotiations with Hollinger failed, and Slaight launched a bid and entered into an agreement with Hollinger. There was a term in the agreement between Slaight and Hollinger that the Hollinger offer would be withdrawn if there was another offer that expired prior to the Slaight offer. Selkirk's application to the OSC therefore was intended to make its offer fit within this condition and expire before Slaight's. The OSC dismissed Selkirk's application, holding:

> ... [the minimum deposit period provisions] are primarily for the benefit of the shareholders of the offeree company in that they ensure adequate time to consider the terms of the offer and provide rules that ensure fair treatment. But the rules are also for all those who are involved in a take-over bid, not just the offeree shareholders. They are rules by which all parties must be guided and upon which they are entitled to rely. This Commission will not interfere to change those rules mid-way through a bid, unless it is convinced that it is necessary for the protection of the shareholders of the offeree company to do so.
>
> We were not convinced that it was so necessary in this case as there were other avenues open to Selkirk to pursue its bid if it was so minded. Moreover, the Commission ought not to interfere in a take-over bid when one side's strategy has not proved successful and it comes to the Commission for relief.[7]

40. The OSC's decision in *Standard Broadcasting* in this aspect has since been considered once, in *Re IPL Energy Inc.*,[8] when the OSC again declined to abridge the minimum

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[7] *Re Standard Broadcasting Corp. Ltd.* (1985), 8 O.S.C.B. 3672 at 3675 – 76 (attached as **Tab 1**).
[8] *Re IPL Energy Inc.* (1995), 18 O.S.C.B. 1251, 1995 CarswellOnt 475 at p. 7 – 9 (attached as **Tab 2**).

deposit period. In that case, the OSC considered a hostile bid by IPL Energy Inc. ("**IPL**") for Producers Pipelines Inc. ("**Producers**"). Producers' shareholders were concerned about proposed changes in the federal budget that could have negative tax implications on a disposition of Producers' shares in respect of a bid. IPL therefore sought to reduce the minimum deposit period to end before the date the proposed amendments would come into force. As it happened, the proposed amendments did not come into force. In any case, relying on the above-quoted paragraph in *Standard Broadcasting*, the OSC held that it would not abridge the minimum deposit period just to aid a bidder's strategy.

C. The Arrangement Does Not Put CanniMed "In Play" and the Arrangement Does Not Preclude the Consummation of the Hostile Bid

41. The Filer seems to suggest that by entering into the Arrangement Agreement, CanniMed has put itself in play and that the timing of the vote relating to the Arrangement and the tender period for the Hostile Bid should coincide because the two transactions are mutually exclusive and of the same nature.

42. This argument is simply untenable and incorrect on the facts. Entering into the Arrangement Agreement did not put CanniMed "in play" as CanniMed is not being acquired as part of the Arrangement. In addition, consummation of the Arrangement Agreement after a positive vote would not prohibit CanniMed's shareholders from considering the Hostile Bid or any other take-over bid.

43. The only reason the Arrangement and the Hostile Bid appear as mutually exclusive transactions is that Aurora made it a condition of the Hostile Bid that the Arrangement Agreement must be terminated.[9]

44. The only "pressure to tender" or coercion in relation to the Hostile Bid comes from the terms of the Hostile Bid itself – not from anything CanniMed or the Board have done. CanniMed has done nothing to force this choice on its shareholders

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[9] See Condition 4(b) of the take-over bid circular of Aurora relating to the Hostile Bid.

D. The Hostile Bid has Put CanniMed In Play and It Would Severely Prejudice CanniMed and Its Shareholders If the Board Did Not Have the Appropriate Time to React and to Respond to the Hostile Bid

45. The CSA, after careful thought, determined that any change of control transaction must have a minimum deposit period of 105 days. This was decided after years of rights plan hearings and extensive jurisprudence and a lengthy comment period. It is premised on the idea that a board of directors must have a reasonable period of time to respond, and seek out and consider alternatives, to a take-over bid. The Hostile Bid has now been made for CanniMed and the Board needs the appropriate period to consider the Hostile Bid, and to consider such alternatives as it determines appropriate. Contrary to the Filer's suggestions, CanniMed was not "in play" prior to the Hostile Bid.

46. The Board has struck a Special Committee that has engaged independent legal counsel and its own financial advisor and is considering the Hostile Bid and alternatives. The Special Committee and the Board require the statutory timeframe to ensure that is able to achieve the best result for CanniMed and its stakeholders. To limit the time that the Special Committee has to complete its mandate would severely prejudice CanniMed and its shareholders, and would be wholly inappropriate simply because the Board has recommended the Arrangement and shareholders are to vote on the Arrangement prior to the end of the expiry of the Hostile Bid.

47. The CSA has indicated that the exception is only available if the Board finds an alternative change of control transaction. The Filer is asking the Regulators to violate the policy basis of the rule to give it a special exemption, one that the Filer admits is not available under NI 62-104.

48. Aurora only asks for this exemption because it says it does not want to purchase CanniMed if CanniMed acquires Newstrike. It has made its views known to the Board and to the CanniMed shareholders through the terms of the Hostile Bid. If the CanniMed shareholders nevertheless vote to approve the Arrangement, that is their choice. If the Requested Relief is not granted, the Filer will not suffer any prejudice.

E. Other Factors to Consider if the Application is Given Serious Consideration or a Hearing is Granted

49. There are troubling aspects with respect to the timing of Aurora's approach to CanniMed and its public release of its proposal to acquire CanniMed which arguably support an inference that Aurora was receiving information it shouldn't have from sources that ought not to have provided it (and that Aurora would or should have known the latter).

50. As noted above, certain of the directors of CanniMed had voiced their preference to effect or solicit a change of control transaction and their lack of support for the Arrangement. Shortly after such preference was made known, and while negotiations and discussions were ongoing with Newstrike, various letters were received from Vantage. In the final letter, dated November 2, 2017, Vantage even states that it would oppose any potential acquisition by CanniMed. Further, as noted in the take-over bid circular filed by Aurora, in early November, Aurora was approached by certain CanniMed shareholders suggesting Aurora consider making a proposal for CanniMed. While such a proposal often takes significant time to consider and prepare, within only few days the Aurora Proposal was prepared and sent to CanniMed.

51. As also discussed above, Golden was aware of the discussions with Newstrike as it had been approached to sign a support agreement in favour of such transaction and yet days later it entered into the lock-up agreement with Aurora. Further, Aurora has substantially misrepresented the nature of these lock-up agreements to both CanniMed and the market.

52. At this time, CanniMed is attempting to ascertain whether Aurora may have had inappropriate access to confidential information. This investigation may take some time and may lead to other proceedings. If the conduct of Aurora or others was in violation of any requirements of any relevant securities laws or otherwise contrary to the public interest, this may not only raise the potential for other proceedings, but will also clearly be important for the Regulators to be aware of should they be giving serious consideration to granting the requested relief in this Application.

53. Other factors that militate in favour a full hearing should the Regulators be considering granting this Application include that some or all of the locked up shareholders and/or Aurora may have violated applicable early warning requirements under securities laws.

54. For the foregoing reasons, CanniMed respectfully requests the Regulators decline to grant the Requested Relief or, in the alternative, have their Staff work with the parties to set up a schedule for joint hearings.

We thank you for your consideration of CanniMed's submissions. Should you have any questions or comments, or should you require further information, please do not hesitate to contact either Philippe Tardif at 416.367.6060 or at ptardif@blg.com or James Douglas at 416.367.6029 or at jdouglas@blg.com.

Yours truly,
BORDEN LADNER GERVAIS LLP

Borden Ladner Gervais LLP

Encl.

cc. Peter Howard and Donald Belovich, Stikeman Elliott LLP
Jason Koskela, Ontario Securities Commission

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Pages 3675 - 3676

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IN THE MATTER OF THE SECURITIES ACT,
R.S.O. 1980, CHAPTER 466, AS AMENDED

AND

IN THE MATTER OF STANDARD BROADCASTING CORPORATION LIMITED AND SLAIGHT BROADCASTING INC. AND SELKIRK COMMUNICATIONS LIMITED

Hearing: June 20, 1985

Present:

Stanley M. Beck, Q.C.	- Chairman
Charles R. Salter, Q.C.	- Vice-Chairman
R. James Kane, F.C.A.	- Commissioner
Victor P. Alboini	- Counsel for Selkirk
J. Gordon Coleman, Q.C. Michael G. Thorley	- Counsel for Slaight
J.J.A. Douglas H. Stewart Ash	- Staff Counsel

REASONS

This application was brought by Selkirk Communications Limited ("Selkirk") pursuant to section 99(e) of the Ontario Securities Act, R.S.O. 1980, chapter 466, as amended, (the "Act") in connection with a proposed take-over bid for all of the shares of Standard Broadcasting Corporation Limited ("Standard") at a price of $24.00 per share. The application is made under section 99(e) to permit Selkirk to include in its offer two conditions that would otherwise be prohibited by section 89(1)12 of the Act and to permit Selkirk's offer to expire at 11:50 p.m. on July 2, 1985, which would have the effect of leaving the Selkirk bid open for nine days (inclusive of the July 1st holiday weekend), rather than 21 days required by section 89(1)2 of the Act.

The background to the Selkirk application is a prior take-over bid made by Slaight Broadcasting Inc. ("Slaight") on June 11, 1985 to purchase all of the outstanding common shares of Standard for a price of $21.50 per share. The Slaight offer would expire at midnight on July 2, 1985. By an agreement dated May 8, 1985, Hollinger Argus Limited ("Hollinger") agreed to deposit its Standard shares, representing approximately 49% of the issued Standard shares, under the Slaight offer. A term of the agreement between Slaight and Hollinger provided that if an offer were made by another party to purchase the common shares of Standard "...which offer by its terms may expire prior to the expiry date of the [Standard] Offer...", Hollinger would be entitled to withdraw its shares in sufficient time to enable it to deposit its shares under the other offer. The Slaight offer was for all of the Standard shares and was to be open for 21 days, as required by the Act. The agreement with Hollinger, including the withdrawal right, was described on page 9 of the Slaight offering circular.

The Slaight offer was subject to two conditions:

1. approval being obtained by the Canadian Radio-Television Telecommunications Commission ("CRTC") within 120 days of the date of the offer, such approval not being subject to any condition which, in the reasonable opinion of Slaight, would adversely affect Standard in any material respect;

2. the usual condition as to any undisclosed action prior to the date of the offer or any action subsequent to the date of the offer by Standard and its directors and senior officers that would result in a material change in the affairs of Standard.

An important term of the private agreement between Slaight and Hollinger was that Slaight could require Hollinger to purchase Standard's interest in Valley Cable T.V. ("Valley Cable"), a California cable T.V. company wholly-owned by Standard, for a price of approximately $2 million.

The CRTC condition in the Slaight offer, the Valley Cable agreement and the right of withdrawal given to Hollinger in the Slaight-Hollinger agreement were the essential reasons behind the Selkirk section 99 application to the Commission. Selkirk asked for permission to put the following two conditions in its offer:

1. that Selkirk's offer be conditional upon approval being obtained by the CRTC not more than 120 days after the date of the Selkirk offer, provided that the approval is subject to no condition which, in the reasonable opinion of Selkirk, would adversely affect Standard or Selkirk in any material respect. (This condition is different than the condition in the Standard offer in that it refers to adverse affect on Selkirk as well as on Standard, while the Slaight offer refers only to an adverse affect on Standard).

2. Selkirk's offer would be conditional upon Hollinger entering into an agreement with Selkirk with respect to Valley Cable on substantially the same terms as the agreement between Slaight and Hollinger.

We had little difficulty with the request by Selkirk to be allowed to insert the above two conditions in its offer. The condition with respect to CRTC approval is almost identical to the condition contained in the Slaight bid and the addition of a term relating to adverse affect on Selkirk did not strike us as unreasonable.

The condition with respect to Valley Cable relates to the agreement that Hollinger, the majority shareholder in Standard, was willing to enter into with Slaight and it did not seem unreasonable to us that a subsequent offer be conditioned on the offer or being able to enter into the same agreement with the majority shareholder when it is proposing to offer an increased price to all the Standard shareholders, including Hollinger.

The major point in issue at the hearing was Selkirk's request to leave its offer open for only nine days, rather than the 21 days required under the Act. The stated reason for the request that the Selkirk offer be allowed to expire at 11:50 p.m. on July 2, 1985 (that is, ten minutes prior to the expiration of the Slaight offer) was the withdrawal term in the private agreement between Hollinger and Slaight. In the agreement, Hollinger was given a right to withdraw if:

> "...an offer (or offers) is made by a party other than us to purchase common shares of Standard which offer, by its terms may expire prior to the expiry date of the Offer..."

Counsel for Selkirk argued that if Selkirk had to keep its offer open for 21 days, it would not be an offer that would expire prior to the Slaight offer and trigger Hollinger's withdrawal right. In short, Selkirk was blocked by the lock-up agreement which Slaight negotiated with Hollinger from making an offer which could have the effect of breaking the Hollinger majority block loose from Slaight.

While this argument had some appeal to us in the sense that we would always wish to facilitate an open market for the shares of a company that would see all the shareholders paid the highest offered price, we had some difficulty in granting the order requested. In the first place, we were informed by counsel for Selkirk that Selkirk began negotiations with Hollinger on May 6, 1985, that is, some two days prior to the announcement of the Slaight offer. Selkirk was not able to reach an agreement with Hollinger and, for reasons known only to itself, it did not proceed to make an offer for all of the shares at a higher price after the Slaight offer was announced.

Counsel for Selkirk did know that the May 8 announcement by Slaight indicated that the take-over bid would be conditioned on acceptance by 90% of the Standard shareholders and would be open for thirty-five days. In the event, the Slaight offer was not so conditioned and was open for twenty-one days. Counsel for Selkirk argued that this was misleading to the Standard shareholders. Moreover, the switch to the twenty-one day bid for all of the Standard shares left Selkirk in an impossible position, given the Hollinger withdrawal rights in the private agreement noted above. We have difficulty seeing how the shareholders of Standard were in any way misled by the fact that when the take-over bid was actually mailed to them, it did not contain a 90% condition and was open for twenty-one days. The only person caught off base was Selkirk, by reason of the tactics it chose to employ. That is no reason for the OSC to interfere with the Slaight bid.

As we noted in our oral reasons at the end of the hearing, the provisions of section 89 of the Act are primarily for the benefit of the shareholders of the offeree company in that they ensure adequate time to consider the terms of the offer and provide rules that ensure fair treatment. But the rules are also for all those who are involved in a take-over bid, not just the offeree shareholders. They are rules by which all parties must be guided and upon which they are entitled to rely. This Commission will not iterfere to change those rules mid-way through a bid, unless it is convinced that it is necessary for the

protection of the shareholders of the offeree company to do so.

We were not convinced that it was so necessary in this case as there were other avenues open to Selkirk to pursue its bid if it was so minded. Moreover, the Commission ought not to interfere in a take-over bid when one side's strategy has not proved successful and it comes to the Commission for relief. (We would note that after we issued our oral reasons denying a shortening of the twenty-one day deposit period, Selkirk made a bid to Hollinger which would have expired prior to the Slaight bid. This was to be followed by a bid to all of the Standard shareholders at an identical price, which price was higher than that which Slaight was offering. Hollinger did not accept the offer and the bid did not proceed. In short, the decision of this Commission not to shorten the twenty-one day period did not foreclose Selkirk from making a bid to Hollinger, to be followed by a bid to the remaining Standard shareholders at an increased price.)

During the course of the hearing, and by letter to the Commission prior to the hearing, counsel for Selkirk alleged a number of matters of material non-disclosure in the Slaight circular. We declined to hear arguments on the non-disclosure points, as the application related solely to the three conditions noted above. An application for a specific order under section 99 of the Act during the course of a take-over bid ought not to be turned into a rummage through a take-over bid circular looking for points of inadequate disclosure. If there is a serious case of material non-disclosure it should be brought to the attention of the Commission in the proper way and it will be dealt with in the proper way.

As to the allegations of inadequate disclosure that were made and did surface at several points during the course of the hearing, none were, in our respectful opinion, material in the sense that the disclosure asked for would have been necessary to allow an investor to make an informed investment decision. We stress this last point, as it is often the case that allegations of non-disclosure or inadequate disclosure, are made during the course of a take-over bid. There is a difference between perfect disclosure (which no two opposing counsel likely would ever agree upon), acceptable disclosure and material non-disclosure or material misleading disclosure. In a case

between these parties that was argued in the Supreme Court of Ontario before Madame Justice McKinlay after this Commission had denied relief, Madame Justice McKinlay noted that the appropriate standard of materiality is that set out in the judgment of the United States Supreme Court in TSC Industries Inc. et al v. Northway Inc., 426 U.S. 438, 96 S. Ct. 2126 (1976), which standard was approved by Montgomery, J. in Royal Trustco Ltd. et al. v. Campeau Corp. et al. (1980), 31 O.R. (2d) 75 at 101 and by the Ontario Court of Appeal in Sparling et al v. Royal Trustco Ltd. et al, (1984), 45 O.R. (2d) 484 at 490. That standard is:

> "...an omitted fact is material if there is substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote..." [or in deciding whether to tender his shares in the case of a take-over bid]

No one of the allegations of non-disclosure or inadequate disclosure met that standard of materiality. Although the TSC Industries standard of materiality often has been quoted and is well understood, it is frequently lost sight of when an allegation of non-disclosure is made before the Commission. The fact that counsel for an applicant would have worded a matter differently, or would have made fuller disclosure, or would have placed emphasis on a different aspect of a matter, does not amount to non-disclosure unless there is a showing of materiality.

Accordingly, the application is granted as to the two conditions that Selkirk wishes to include in its offer and is denied as to the requst to shorten the twenty-one day period to nine days.

DATED at Toronto this 4th day of September, 1985.

TAB

2

Pages 7 - 9

1995 CarswellOnt 475
Ontario Securities Commission

IPL Energy Inc., Re

1995 CarswellOnt 475, 18 OSCB 1251, 7 CCLS 299

Re SECURITIES ACT, R.S.O. 1990, CHAPTER S.5, AS AMENDED (THE "ACT")

AND Re IPL ENERGY INC. and FORTIS INC. and PRODUCERS PIPELINES INC.

Smart and Geller Vice-chairs, Carscallen Commissioner

Heard: February 15, 1995
Judgment: March 7, 1995

Counsel: David Spencer, F.R. Allen, T.S. Dobbin, Michael Milani and Allan Belstedt, for IPL Energy Inc.
D.S. McReynolds and Arthur Shiff, for Fortis Inc.
J.E.A. Turner, Philip Mohtadi, Carl Wagner, Mel Bellish and Michael Milani, for Producers Pipelines Inc.
Simon Romano, Ava Yaskiel and Sara Blake, for Ontario Securities Commission Staff.
Dean Murrison and Patti Pacholek, for Saskatchewan Securities Commission Staff.
Glen Roy and Mark Brown, for Alberta Securities Commission Staff.

Subject: Securities; Corporate and Commercial
Related Abridgment Classifications
Securities
V Takeover bids
V.2 Exemption from statutory requirements
Securities
V Takeover bids
V.4 Miscellaneous
Headnote
Securities and Commodities — Regulation of takeover bids — Exemption from statutory requirements
Securities and Commodities — Regulation of takeover bids
Regulation of takeover bids — Exemptions from statutory requirements — Company applying for exemptions from Securities Act to make over-the-counter purchases of shares and for early take-up of shares after previous bid by other company — Application dismissed

— No anomaly in legislation regarding over-the-counter purchases — Early take-up of shares not justified by possibility of changes to capital gains exemption in federal budget — Securities Act, R.S.O. 1990, c. S.5.

Regulation of takeover bids — Offeror's bid being contrary to Securities Act where offeror entering into lock-up agreements on 44.4 per cent of shares on day bid announced — Offeror possessing more than 20 per cent of shares in contravention of Act — Securities Act, R.S.O. 1990, c. S.5.

P Inc. was a publicly held Saskatchewan corporation involved in the operation of three crude oil gathering systems. P Inc. was not a reporting issuer in any jurisdiction, its shares were not listed on any stock exchange and there was no published market for its shares. F Inc. made a takeover bid for P Inc.'s shares and P Inc.'s directors recommended that shareholders accept the bid. However, IPL Inc. subsequently announced its intentions to make a bid for P Inc.'s shares. Prior to making the bid, IPL Inc. entered into lock-up agreements with three P Inc. shareholders for 44.4 per cent of P Inc.'s outstanding shares. IPL Inc.'s bid was conditional on at least 50.1 per cent of P Inc. shares being deposited.

IPL Inc. applied for an order under s. 104 (2) (c) of the Securities Act (Ont.) exempting it from the provisions of ss. 94 (2), 95 (3) and 95 (4) to permit it to make over-the-counter purchases of P Inc.'s shares commencing no later than the third day of its bid provided that the aggregate number of shares did not exceed five per cent, and take up and pay for P Inc.'s shares tendered under its bid commencing on the third day after making the bid. F Inc. applied for an order under s. 127 (1)2 of the Act to cease trading the settlement of any purchases of P Inc.'s shares made by IPL Inc., and cease trading any subsequent purchases of the shares by IPL Inc. otherwise than pursuant to its bid. In support of its application, IPL Inc. submitted that the Commission had exempted similar quasi-private issuers in the past from the formal take-over bid requirements under the Act. IPL Inc. also submitted that the purchase of five per cent of P Inc.'s shares in over-the-counter transactions would not be inconsistent with the underlying policy considerations of the Act and that by permitting the application, the Commission would be doing nothing more than addressing an anomaly in the legislation. IPL Inc. submitted that some holders of P Inc.'s shares considered P Inc. to be a Canadian-controlled private corporation and wished to complete the sale of their shares before the release of the federal budget, fearing that the special capital gains exemption for such corporations might be adversely affected. In opposition to IPL Inc.'s application, F Inc. submitted that the relief sought by IPL Inc. was unprecedented and that the principle of affording shareholders 21 days to consider a bid was fundamental.

Held:

IPL Inc.'s application was dismissed and F Inc.'s application was granted.

The Commission should not interfere to change the rules mid-way through a bid unless it is convinced that it is necessary for the protection of the shareholders of the offeree company to do so. The underlying policy provisions of the Act prohibit any purchases of the relevant securities by an offeror except pursuant to the bid. Subsection 94 (3) provides an exemption

to this rule. There is no anomaly in the legislation and there is no reason to extend the statutory exemption. Purchases of five per cent of P Inc.'s shares by private contracts with some shareholders would have a very substantial, possibly decisive effect on the take-over bid contest and issuing such an order would not be appropriate. The request to grant an order allowing for early take up by IPL Inc. was also refused. The shareholders' fears concerning the federal budget were only speculative and insufficient reason to grant the order. IPL Inc.'s bid was contrary to s. 94(2) of the Act since on the day of its offer, it also entered into the lock-up agreements involving 44.4 per cent of P Inc.'s outstanding shares. Consequently, IPL Inc. might have been deemed by s. 90(1) of the Act to have beneficially owned more than 20 per cent of P Inc.'s shares at the time of the offer.

Table of Authorities

Cases considered:

Nuinsco Resources Ltd., Re (1985), 8 OSCB 3305 — referred to

Standard Broadcasting Corp. Ltd., Re (1985), 8 OSCB 3672 — applied

Waldec Holdings Inc., Re (1986), 9 OSCB 215 — referred to

949211 Ontario Ltd., Re (1991), 14 OSCB 5707 — referred to

Statutes considered:

Income Tax Act, S.C. 1970-71-72, c. 63.

Securities Act, R.S.O. 1990, c. S.5 —

s. 2(5)

s. 90(1)

s. 93(1)(a)

s. 93(1)(d)

s. 94(2)

s. 94(3)

s. 95(3)

s. 95(4)(i)

s. 104(2)(c)

s. 127(1)2

Application for orders for exemptions under Securities Act (Ont.) permitting over-the-counter purchases of company and to take up shares tendered on bid after three days; Application for cease trade orders against purchases of target shares.

The Commission:

Background of Proceedings

These proceedings arose out of two take-over bids made for the outstanding shares (the "Producers shares") of Producers Pipelines Inc. ("Producers"). Producers is a publicly held Saskatchewan corporation. Its principal business is the operation of three crude oil gathering systems. Producers is not a reporting issuer in Ontario or elsewhere, the Producers shares are not listed on any stock exchange, and there is no published market for the Producers shares.

On January 25, 1995, Fortis Inc. ("Fortis") made a take-over bid for all the Producers shares, offering either $41 cash, or, at the option of the tendering shareholder, 1.61 common shares of Fortis, for each Producers share. Fortis' bid was scheduled to expire at 5 p.m. (Regina time) on February 16, 1995, and was conditional, inter alia, on at least 50.1% of the outstanding Producers shares being validly deposited under the bid. Prior to announcing its bid, Fortis had entered into lock-up agreements with 46 shareholders of Producers (including the six directors of Producers who beneficially owned or controlled Producers shares) with respect to approximately 41.9% of the outstanding Producers shares. Fortis did not itself own any Producers shares.

On January 25, 1995, the directors of Producers issued a directors' circular in which the board of Producers recommended that Producers' shareholders accept the Fortis bid.

On February 14, 1995, IPL Energy Inc. ("IPL") announced its intention of making a bid for the Producers shares. On the same day, RBC Dominion Securities Inc., on behalf of IPL, circulated to other Canadian investment dealers a document purporting to contain a press release of IPL in which IPL advised of its willingness to acquire Producers shares at $45 per share plus brokerage, with settlement in five business days. On that date IPL purchased approximately 2.6% of the outstanding Producers shares from shareholders of Producers. We were informed that none of the selling shareholders were Ontario residents. The settlement of these purchases had not yet taken place at the date of the hearing in this matter.

On February 15, 1995, IPL made a take-over bid for all of the outstanding Producers shares, also conditional, inter alia, on at least 50.1% of the outstanding Producers shares being validly deposited under the bid. IPL offered $45 cash, or, at the option of the tendering shareholder, 1.614 of a common share of IPL, for each Producers share. Its bid expires at 5 p.m. (Regina time) on March 9, 1995. Prior to the bid, IPL had entered into lock-up

agreements with three shareholders of Producers with respect to approximately 44.4% of the outstanding Producers shares.

According to a shareholders' list prepared as at February 13, 1995, the outstanding Producers shares were held in 103 accounts by fewer than 100 shareholders. Of these, 46 had entered into lock-up agreements with Fortis, and three with IPL.

Applications to the Commission

On February 15, 1995, IPL applied to the Commission for an order under clause 104(2)(c) of the Act exempting it from the provisions of subsection 94(2) and paragraphs 3 and 4(i) of section 95 of the Act so as to permit it to (i) make over-the-counter purchases of Producers shares commencing no later than the third business day following the date of its bid, provided that the aggregate number of Producers shares so acquired did not exceed 5% of the outstanding Producers shares, and (ii) take up and pay for Producers shares tendered under its bid commencing on the third business day (later changed to the seventh business day) following the date of the bid. Similar applications were made by IPL to the British Columbia Securities Commission (the "BCSC"), the Alberta Securities Commission (the "ASC") and the Saskatchewan Securities Commission (the "SSC").

Fortis applied to the Commission for an order under paragraph 127(1)2 of the Act (i) cease trading the settlement of any purchases of Producers shares made by IPL on February 14, 1995 and (ii) cease trading any subsequent purchases of Producers shares by IPL otherwise than pursuant to its bid. Similar applications were made by Fortis to the BCSC, the ASC, the SSC and the Manitoba Securities Commission.

A Notice of Hearing was issued by the Commission convening a hearing to consider the two applications, to be held on February 15, 1995. Pursuant to subsection 2(5) of the Act, the hearing was held by the Commission in conjunction with the ASC and the SSC.

IPL Application

IPL argued that Producers was essentially a private company, and that, in the past, the Commission had exempted similar quasi-private issuers from the formal take-over bid requirements of the Act, including in circumstances where the 50 securityholder test of the exemption provided for in clause 93(1)(d) of the Act was not met. It referred us to the Commission's orders in Re Nuinsco Resources Ltd. (1985), 8 OSCB 3305, Re Waldec Holdings Inc. (1986), 9 OSCB 215 and Re 949211 Ontario Ltd. (1991), 14 OSCB 5707. However, IPL did not seek full exemption from the take-over bid requirements of the Act, but only the two specific requirements referred to in its application. We would not, in any event, have been prepared to grant a full exemption in the context of this contested take-

over bid. None of the orders cited were made in such a context, and, in our view, the offeree issuers in those matters were much more like private companies than is Producers.

(a) Market Purchases

Subsections 94 (2) and (3) of the Act provide as follows:

> (2) An offeror shall not offer to acquire or make, or enter into any agreement, commitment or understanding to acquire beneficial ownership of any securities of the class that are subject to a take-over bid otherwise than pursuant to the bid on and from the day of the announcement of the offeror's intention to make the bid until its expiry.
>
> (3) Despite subsection (2), an offeror making a take-over bid may purchase, through the facilities of a stock exchange recognized by the Commission for the purpose of clause 93 (1) (a), securities of the class that are subject to the bid and securities convertible into securities of that class commencing on the third business day following the date of the bid until the expiry of the bid, if,
>
> (a) the intention to make such purchases is stated in the take-over bid circular;
>
> (b) the aggregate number of securities acquired under this subsection does not constitute in excess of 5 per cent of the outstanding securities of that class as at the date of the bid; and
>
> (c) the offeror issues and files a press release forthwith after the close of business of the exchange on each day on which securities have been purchased under this subsection disclosing the information prescribed by the regulations.

Since the Producers shares are not listed on a stock exchange recognized by the Commission for the purposes of clause 93 (1) (a) of the Act, IPL can not take advantage of the permitted market purchases allowed by subsection 94 (3). However, IPL argued that the purchase of 5% of the Producers shares in over-the-counter transactions "would not be inconsistent with the underlying policy considerations of the Act", and that, by permitting this, the Commission would be doing nothing more than addressing "an anomaly in the Legislation".

In our view, the relevant underlying policy consideration is that set out in subsection 94 (2) of the Act — that during a formal bid there not be any purchases of the relevant security by the offeror except pursuant to the bid. Subsection 94 (3) of the Act provides an exception to this rule in the circumstances described therein. We do not consider this to be an anomaly. We can see no reason to extend this exception in the circumstances of this case. Purchases of 5% of the Producers shares by private contracts with some shareholders could have a very

substantial, possibly a decisive, effect on the take-over bid contest, and we considered that an order permitting this to happen would not be appropriate.

(b) Early Take-Up

Paragraph 95(3) of the Act provides as follows:

> No securities deposited pursuant to the bid shall be taken up by the offeror until the expiration of twenty-one days from the date of the bid.

We were advised by IPL that discussions it had with some of the holders of Producers shares indicated that such holders considered Producers to qualify as a Canadian-controlled private corporation for purposes of the Income Tax Act (Canada) and intended to benefit from the $500,000 capital gains exemption available in certain circumstances to holders of shares of such a corporation. We were further informed by IPL that such holders had expressed a concern that the federal budget (which we were advised might be brought down on February 27) may adversely affect the exemption, and that, accordingly, those holders had indicated that they would strongly prefer to complete their disposition of their Producers shares prior to the release of the budget. IPL argued that the purpose of the rule in paragraph 95(3) of the Act is to protect the shareholders of the offeree issuer and that it would be a perverse result if the application of this protection were to deny holders the ability to voluntarily tender to a higher offer in a shorter time frame where the reason for the shorter period is the request of the shareholder. Commission staff supported the granting of this relief to IPL.

Fortis, on the other hand, argued that the relief being sought by IPL was unprecedented, and that the principle of affording shareholders a minimum of 21 days to consider a bid and, where thought advisable, to change their minds with respect to the bid, was so fundamental, and the relief sought so extraordinary, that they were able to find only one instance where an application for similar relief in a contested take-over bid situation has been brought. In Re Standard Broadcasting Corp. Ltd. (1985), 8 OSCB 3672, an application was brought by Selkirk Communications Limited in connection with a proposed take-over bid for all the shares of Standard Broadcasting Corporation Limited at a price of $24 per share. The application was made, inter alia, to permit Selkirk's offer to be open for only nine days, rather than the 21 days required by the Act. There was a prior outstanding bid by Slaight Broadcasting Inc. at $21.50 per share, and the holder of approximately 49% of the Standard shares had agreed to deposit those shares to the Slaight offer on terms which permitted their withdrawal only where another party made a bid which by its terms might expire prior to the expiry date of the Slaight bid. If the Selkirk application was granted, and the bid made by Selkirk, the withdrawal right would arise. The Commission stated, commencing at page 3675:

> As we noted in our oral reasons at the end of the hearing, the provisions of section 89 of the Act are primarily for the benefit of the shareholders of the offeree company in

> that they ensure adequate time to consider the terms of the offer and provide rules that ensure fair treatment. But the rules are also for all those who are involved in a take-over bid, not just the offeree shareholders. They are rules by which all parties must be guided and upon which they are entitled to rely. This Commission will not interfere to change those rules mid-way through a bid, unless it is convinced that it is necessary for the protection of the shareholders of the offeree company to do so.
>
> We were not convinced that it was so necessary in this case as there were other avenues open to Selkirk to pursue its bid if it was so minded. Moreover, the Commission ought not to interfere in a take-over bid when one side's strategy has not proved successful and it comes to the Commission for relief. (We would note that after we issued our oral reasons denying a shortening of the twenty-one day deposit period, Selkirk made a bid to Hollinger which would have expired prior to the Slaight bid. This was to be followed by a bid to all of the Standard shareholders at an identical price, which price was higher than that which Slaight was offering. Hollinger did not accept the offer and the bid did not proceed. In short, the decision of this Commission not to shorten the twenty-one day period did not foreclose Selkirk from making a bid to Hollinger, to be followed by a bid to the remaining Standard shareholders at an increased price.)

IPL argued that Standard should not be applied in this case, because, unlike Selkirk, IPL did not start on a level time playing field and had acted expeditiously once it learned of the Fortis bid and that Producers was in play. However, we do not read Standard so narrowly. In our view, the essential holding of Standard was that the Commission should not interfere to change the rules mid-way through a bid unless it is convinced that it is necessary for the protection of the shareholders of the offeree company to do so.

The only substantive reason argued by IPL for our truncating the take-up, and, accordingly, the withdrawal, period required by the Act is that some holders of Producers shares (we do not know how many or whether most or all of them were already bound by one of the lock-up agreements) were concerned that the forthcoming federal budget might take away a tax benefit which they might have if they sold their Producers shares, and that this might cause them to tender to the Fortis bid to beat the budget, thus depriving them and other holders of Producers shares of the benefit of the higher IPL bid.

As was pointed out by Fortis, all of this is highly speculative. Whether the budget would remove this particular tax benefit was a question. (In fact, it did not.) Similarly, it was questionable whether, if the exemption was removed, it would be done at once, or in stages as had been the case with the removal of a similar exemption in the past. Whether any of the holders of the Producers shares would be able to take advantage of this benefit in any event did not appear to be entirely free from doubt. Those holders of Producers shares who might be able to take advantage of the benefit and were sufficiently concerned about the budget

danger might have decided to tender to the lower Fortis bid (if Fortis did not raise it so that it became the higher bid). Others might have decided to wait and try to take advantage of the higher IPL bid.

We, accordingly, refused IPL's application for an order permitting early take-up for two reasons. Firstly, we agreed with Fortis' submission that the 21 day period provided for in the Act constitutes an important protection for shareholders. It gives them time to consider whether to tender to a bid and, if they tender, to change their minds if, but not only if, a competing bid comes along. We were not satisfied that it was in the interests of the shareholders of Producers to truncate this time. Secondly, IPL failed to demonstrate to us that it was necessary for us to interfere to change the rules for the protection of the holders of Producers shares. Absent such a demonstration, as stated in Standard, the parties should be able to rely on the rules set out in the Act. We were not prepared to change the rules in order to "level the playing field" merely for the benefit of one of the bidders.

Accordingly, the IPL application fails.

Fortis Application

On February 14, 1995, IPL entered into lock-up agreements with respect to approximately 44.4% of the outstanding Producers shares and announced its intention to make its bid. On the same day it offered, through RBC Dominion Securities Inc., to acquire Producers shares for $45 a share, with settlement in five business days, and pursuant to that offer approximately 2.6% of the outstanding Producers' shares were tendered.

The issue of whether or not the February 14 offer was contrary to the Act was not fully argued before us. Nevertheless, it would appear to us that this offer was an unlawful take-over bid either because it was an offer to purchase all of the outstanding Producers shares or, if an offer for less than all, it may still have been an offer to acquire more than 20% of the Producers shares because, depending on the terms of its lock-up agreements, IPL may have been deemed by subsection 90(1) of the Act to have beneficially owned more than 20% of the Producers shares at the time of the offer.

In any event, except as permitted by subsection 94(3) of the Act, subsection 94(2) of the Act prohibits an offeror from offering to acquire beneficial ownership of any securities of the class that are subject to a take-over bid otherwise than pursuant to the bid on and from the day of the announcement of the offeror's intention to make the bid until its expiry. The February 14 offer was made on the day of IPL's announcement of its intention to make its bid, and was, accordingly, prohibited by subsection 94(2).

We can only assume that IPL and its advisors either chose to ignore these provisions of the Act or did not recognize that they applied to the February 14 offer. In either case, we are surprised.

As above stated, we were advised that none of the persons and companies that accepted the February 14 offer were resident in Ontario. At the conclusion of the hearing, the SSC announced that it was cease trading the completion of purchases under the February 14 offer. Accordingly, we found it unnecessary to make a similar order.

In view of our refusal of the market purchase relief requested by IPL, it was unnecessary for us to deal with the balance of the Fortis application.

Order accordingly.