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Alberta Securities Commission

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Overview of the Alberta Securities Commission

1. The Alberta Securities Commission (ASC) was established in 1955. It is a self-funded regulatory agency operating under the *Securities Act*, RSA 2000, c. S-4 (Act), having the dual mandate of protecting investors and fostering a fair and efficient capital market in Alberta.
2. The ASC oversees the trading of securities in Alberta (both terms broadly defined in the Act). It does so by regulating the conduct of issuers of securities and their officers, directors and significant shareholders, as well as intermediaries, certain service providers, and marketplaces located or carrying on business within Alberta. The ASC regulates such conduct through:
 - (a) the oversight of issuers and market participants and their compliance with Alberta securities laws;
 - (b) the investigation of alleged breaches of Alberta securities laws, the commencement and adjudication of enforcement action against offenders, and the review and resolution of disputes among market participants and investors; and
 - (c) the formulation of new, and the recommendation of amendments to existing, provisions of the Act and other Alberta securities laws through the Alberta Minister of Finance and Enterprise and through work with the Canadian Securities Administrators.
3. The ASC is a corporation with a board of directors consisting of the members of the Commission (**Members** - of whom currently there are 11).

Members are appointed by the Lieutenant Governor in Council and are headed by a full-time Chair and Chief Executive Officer, and one or more Vice-Chairs (currently there are two). Members are chosen from various professions and backgrounds, including lawyers, accountants, brokers, geologists and directors. New Members are provided a briefing book detailing the operations of the ASC and the duties and responsibilities of the Members.

4. The Members set policy, make rules and recommend changes to the Act and accompanying regulations to the provincial government. Members also: have an adjudication function and are empowered to hear matters that affect the public interest in Alberta (e.g., enforcement proceedings and applications for exemptions from the requirements of Alberta securities laws), make orders and rulings, and hear appeals from the decisions of internal administrative staff and from certain other regulatory authorities.
5. The Chair may designate two or more Members to sit as a panel (s. 23(1)). Two Members constitutes a quorum at a sitting of a panel of the ASC (s. 23(2)).
6. The fact that Members have both a policy and adjudicative function does not, of itself, create a reasonable apprehension of bias. Some act going beyond its statutorily authorized duties must be found to disqualify the ASC from hearing a matter (*Brosseau v. Alberta Securities Commission*, 1989 CarswellAlta 19 (S.C.C.)).
7. The ASC has a staff and executive management group (**Staff**) headed by the chief administrative officer, the Executive Director (**ED**), who run the day-to-day operations of the Commission. ASC Staff responsibilities include

registration and oversight of persons and companies operating in Alberta's securities industry, reviewing prospectuses and continuous disclosure, considering applications for exemptions from specified requirements of Alberta securities laws, developing changes to and making recommendations regarding Alberta securities laws, and taking enforcement action against persons who are alleged to have contravened Alberta securities laws.

8. The staff of the ASC is composed of legal, financial, accounting, management, engineering, geology and communication professionals, as well as securities analysts, investigators and administrative support personnel. As at March 12, 2012, the ASC employed 166 staff on a full-time basis, all in Calgary.

Roles and Responsibilities

9. The ASC is organized into the following divisions or branches:
 - (a) Chair's Office – represents the ASC and addresses emerging issues in securities regulation.
 - (b) Office of the ED – oversees Corporate Finance, Enforcement and Market Regulation, among other groups. The ED also has an adjudicative role, and acts in an appellate capacity from decisions made by Market Regulation, Corporate Finance, and Enforcement.
 - (c) Office of the General Counsel – reports to the Chair, and provides legal advisory services to the ASC on a broad range of operational, transactional and policy projects. This branch also provides guidance to market participants on the interpretation of securities laws.

- (d) Chief Accountant – provides accounting expertise to ASC staff as well as guidance to reporting issuers and their advisers.
- (e) Communications - provides support to all branches in relation to educating internal and external stakeholders in accordance with the ASC's organizational objectives.
- (f) Corporate Finance - reviews offering documents, monitors continuous disclosure filings, and makes recommendations on applications for exemptive relief from securities legislation.
- (g) Enforcement - enforces securities laws by discovering, investigating and prosecuting breaches and conduct contrary to the public interest.
- (h) Market Regulation – regulates and registers, where appropriate, participants in the exempt market, and provides responsive securities regulation to the Alberta capital market through administration of rules and policies with respect to exchanges, alternative trading systems, registrants and self-regulatory organizations (IIROC, MFDA).

Enforcement

10. The ASC enforces Alberta securities laws by examining the conduct of issuers and market participants in the course of compliance or disclosure reviews, or by investigating self-generated leads or the receipt of complaints of misconduct from the public. It investigates instances of perceived misconduct and prosecutes alleged breaches/offences under Alberta securities laws. Members adjudicate allegations of breach in public hearings, issue decisions and, where appropriate, make sanction orders.

11. Contraventions of Alberta securities laws may be dealt with either in administrative proceedings before a panel of Members or, alternatively, in quasi-criminal proceedings in the Provincial Court of Alberta.
12. Orders made by the ASC following administrative proceedings may include: requirements that trading in and/or purchasing of securities cease, prohibitions against acting as a director or officer, suspension of registration, denial of the privilege of using registration or prospectus exemptions, payment of administrative penalties, and payment of costs (sections 198, 199 and 202). Orders providing for payment of penalties or costs may be registered by the ASC as judgments of the Court of Queen's Bench to facilitate collection (s. 200). Quasi-criminal proceedings may result in fines, restitution, imprisonment, and orders such as those discussed above (s. 194).
13. The ASC may enter into agreements of settlement with persons accused of non-compliance or misconduct.
14. The ASC may also make proactive or preventative orders, including: (i) orders to freeze property, (ii) interim orders aimed at protecting Alberta investors from the continuation of *prima facie* wrongful conduct pending the conclusion of proceedings, and (iii) reciprocal orders based on findings, orders, or agreements made in Canada or elsewhere.
15. The ASC's enforcement division has approximately 50 employees, divided into five departments: Office of the Director, Assessment, Market Surveillance and Investigation (**MSI**), Investigations and Litigation.
16. Assessment is responsible for initial complaint or file review and assessment. Historically, this branch concludes 80-90% of all preliminary

stage reviews without further action. Files that pass this first evaluation step are generally transferred to Investigations, but may go directly to Litigation.

17. MSI takes referrals from IIROC and other Self Regulatory Organizations and Commissions and assesses and investigates market related misconduct (illegal insider trading and market manipulation). Where appropriate, MSI refers files to Litigation.
18. Investigations picks up the investigation from Assessment, and develops and completes it. Investigatory steps may include conducting searches, sourcing documents (produced voluntarily, by statutory compulsion, or by search warrant), interviewing witnesses and, in many cases, interviewing the alleged wrongdoers. Upon completion of the investigation, a file may be closed or referred to Litigation for further consideration.
19. Litigation occasionally assists with investigative steps (both at Assessment and Investigations), but most often it receives and reviews completed investigations and assesses them for potential enforcement action. As with any stage in the review process, Litigation may close a file for any number of reasons, including insufficiency of evidence, no reasonable prospect of breach/conviction, lack of jurisdiction, or *de minimus* conduct.

ASC Investigations

20. Investigative powers are contained in Part 2 of the Act, sections 40-57. For any purpose related to the administration of the Act, the Executive Director may by order pursuant to s. 40 require listed parties to produce information, documents and records. More often in an investigation the ED appoints a person under s. 41 to make an investigation. Persons so appointed have the

same power as is vested in the Court of Queen's Bench for the trial of civil actions to summon witnesses, compel witnesses to give evidence under oath, and compel witnesses to produce documents, records, etc. (s. 42).

21. The investigator may obtain a warrant to search premises pursuant to s. 42(6) on application to the Court of Queen's Bench.
22. The ED may also:
 - (a) appoint a person (expert) having special technical or other knowledge or skills to assist in the investigation (s. 43);
 - (b) provide information to and receive it from other securities or financial regulatory authorities, exchanges, self-regulatory bodies, law enforcement agencies, and other governmental or regulatory authorities in Canada and elsewhere (s. 46);
 - (c) make an order to freeze property (s. 47); and
 - (d) apply to the Court of Queen's Bench to have appointed a receiver, receiver and manager, trustee or liquidator (s. 48).
23. Persons compelled pursuant to s. 41 to attend an ASC interview must so attend, answer questions, and produce documents and records sought by ASC staff. Failure to do so renders the person liable to be committed for contempt by the Court of Queen's Bench under ss. 42(3) and (4).
24. There is no protection from self-incrimination, except that testimony given pursuant to an examination by an investigator shall not be admitted in evidence against the person in a prosecution of an offence under s. 194 of the Act or any other prosecution of an offence under an enactment of Alberta (s. 215).

25. Anything acquired and all information or evidence obtained pursuant to an investigation is confidential and shall not be divulged except by a person or company to the person or company's counsel, where authorized by the ED, or as otherwise permitted under Alberta securities laws (s. 45).
26. Interviews under the Act are far ranging and thorough, more akin to police interviews than examinations for discovery. Undertakings are sometimes sought, and objections to questions are determined at the time or later by the Court of Queen's Bench. Counsel are often present, but not mandatory.

ASC Hearings

27. Upon completion of an investigation, and where it has been determined there may have been breaches of securities laws or conduct contrary to the public interest, a letter is typically sent to the person or company asking for submissions. The letter is neither statutorily nor common law mandated, and reply, if any, is strictly voluntary. If reply is given, it is expressly stated to be 'with prejudice'.
28. The ASC is, for the purposes of the Act and regulations, an agent for the Crown in right of Alberta (s. 21). Pursuant to section 194, every contravention of Alberta securities laws is an offence and is liable to a fine of not more than \$5,000,000 or to imprisonment for a term of not more than 5 years less a day, or to both. As agents of the Crown, ASC staff are empowered to initiate and conduct prosecutions of offences under the Act in Provincial Court.

29. Proceedings before the ASC are initiated by a Notice of Hearing (in Provincial Court, it is an Information). Section 29 of the Act governs in a general way the conduct of hearings, and in summary the following applies:
- (a) The Notice of Hearing shall be sent to the person or company that is the subject of the hearing;
 - (b) It may also be sent to any person or company that, in the opinion of the ASC or the ED, is substantially affected by the hearing;
 - (c) Members presiding over a hearing have the same powers as vested in the Court of Queen's Bench for the trial of civil actions;
 - (d) Evidence that is relevant to the matter being heard shall be received;
 - (e) The laws of evidence applicable to judicial proceedings do not apply;
 - (f) Oral evidence is recorded;
 - (g) A person or company appearing at a hearing may be represented by counsel; and
 - (h) The hearing is open to the public unless otherwise ordered.
30. Also governing ASC proceedings is ASC Rule 15-501, *Rules of Practice and Procedure for Commission Proceedings (Rules)* (See attached Appendix A). Among other areas, the Rules govern how motions are prepared (Rule 3.5), how non-parties may seek to appear (Rule 6.1), disclosure (Part 7), expert witnesses (Rule 7.3), and the calling of witnesses (Rule 10.1).

31. The first return date for the Notice of Hearing is generally six weeks from its issuance. Parties may appear before a panel of Members at that time and set a hearing date or deal with preliminary matters. If a hearing date can be agreed upon beforehand, an attendance is usually not required.
32. ASC staff use the six week period to prepare and provide disclosure. The disclosure obligation is similar to that of *R. v. Stinchcombe*, [1991] 3 S.C.R. 326 – namely, all information in the possession or control of staff that may be relevant to the allegations. There is a reciprocal disclosure obligation on respondents, requiring will says and documents they intend to rely on before the hearing commences.
33. Pre-hearing conferences are typically scheduled in the months between the set date and the hearing. Their purpose is to deal with any preliminary matters and to keep the matter on track to proceed. Where nothing is needed by the parties or the ASC panel scheduled to hear the conference, it may be cancelled.
34. At least 30 days prior to the hearing, ASC staff shall provide to all respondents a witness list, a summary of anticipated evidence from such witnesses (or a transcript of a witness interview, if available), and copies of all documents staff expects to enter into evidence. There is a reciprocal ‘hearing disclosure’ obligation on the respondents. At least 15 days prior to the hearing, each respondent must provide to all other parties those same items.
35. Hearings are conducted much as they are in Court, albeit with more relaxed evidential rules. Panel Members are addressed by their names (on plates in front of them), as Sir or Madam, or as Mister or Madam Chair, as

appropriate. Staff proceed first, followed by the respondents (usually in the order determined at a pre-hearing conference). Opening statements are permitted, but not mandatory (and the respondents may wish to give an opening statement after ASC staff have closed their case).

36. Documents are either agreed upon as exhibits beforehand, or proven in the usual way. However done, a request is always made of the panel that an exhibit be marked, along with the purpose for doing so (as a true exhibit or an exhibit for identification). The panel does have discretion to refuse to mark a document.
37. Witnesses may attend voluntarily, or be summoned to attend a hearing by an ASC order. Any party may apply to an ASC panel for a summons to be issued to a witness with relevant information or documents (s. 29(c)). Witnesses (parties excepted) are typically excluded from the hearing room until their testimony is completed. Witnesses are sworn/affirmed, and generally participate in direct examination, cross examination, and reply (where appropriate). Witnesses are permitted to sit while they testify.
38. Expert witnesses are dealt with much as they would in Court of Queen's Bench, both procedurally and from an evidential perspective (*ie.* they are relevant and necessary). They are qualified (or not) according to their experience and education, and if qualified they are permitted to provide opinion testimony.
39. The panel of members has the jurisdiction pursuant to section 31 of the Act to determine all questions of fact or law that arise in any matter before it. This includes constitutional questions.

40. Proceedings often conclude with closing arguments, either oral, in writing, or sometimes both. Hearings are most often bifurcated, with liability being determined in the first instance and then sanction at a later date if breaches of Alberta securities laws or conduct contrary to the public interest is found. Parties may seek to adduce *viva voce* or documentary evidence with respect to sanction, but typically the sanction phase involves the filing of written briefs and/or oral argument. Proof in both phases of an administrative hearing before the ASC is on a balance of probabilities, based on clear and cogent evidence.

Orders

41. For an administrative hearing, ASC panel orders are predominantly sourced from sections 198, 199 and 202 of the Act.
42. Pursuant to s. 198(1), the ASC may make orders, following a hearing and where it considers it to be in the public interest to do so, that generally restrict access to the market or remediate incomplete or inaccurate market information. Common orders are as follows:
- (a) Cease trading in or purchasing securities – 198(1)(a);
 - (b) Suspension of registration – 198(1)(b.1);
 - (c) Denial of use of exemptions in Alberta securities laws – 198(1)(c);
 - (d) Prohibition against remaining as or becoming a director or officer of any issuer – 198(1)(d) and (e);
 - (e) Disseminate to the public certain information, or amend information previously disseminated to the public – 198(1)(g) and (h); and

- (f) Disgorge amounts obtained or payments or losses avoided as a result of non-compliance with Alberta securities laws – 198(1)(i).
43. Under section 199, the ASC may order a person or company to pay an administrative penalty of not more than \$1,000,000 for each contravention of or failure to comply with Alberta securities laws. Before making such an order, the ASC must both determine that the person or company has contravened or failed to comply with a provision, and that it is in the public interest to do so.
44. Following a hearing, section 202 of the Act permits the ASC to order, upon being satisfied that a person or company has not complied with Alberta securities laws or has not acted in the public interest, payment of costs of the investigation or hearing.
45. Occasionally, the ASC is asked to make orders and intervene in matters before an investigation is completed, or where securities related findings have been made in another jurisdiction. Under section 33 of the Act, the ASC may make an interim order at any time without conducting a hearing where ASC staff have established a *prima facie* case of breach of the Act, and where the length of time to conduct a hearing and render a decision could be prejudicial to the public interest. An interim order takes effect immediately on being made, and expires 15 days later (s. 33(2)). An ASC panel may extend the period of the interim order beyond the 15 days under s. 33(3).
46. In section 198(1.1) of the Act, the ASC may, after providing an opportunity to be heard, make an order under s. 198(1)(a) to (h) (see above) in respect of a person or company if the person or company has been: convicted in

Canada or elsewhere of an offence relating to securities, found by a court in Canada or elsewhere to have contravened laws respecting trading in securities, is subject to an order made by a securities regulatory authority imposing sanctions, or has agreed with a securities regulatory authority to be subject to sanction.

Appeals

47. A person or company directly affected by a decision of the ED may appeal that decision to an ASC panel of Members (s. 35). The appeal must be served on the Secretary of the ASC within 30 days of the ED's decision (s. 36).
48. An ASC panel may also review a decision of the ED, on its own motion, within 30 days from the date it was made (s. 35(2)). Prior to conducting such a review, however, the ASC panel shall notify the ED and any person that is directly affected by the decision (s. 37).
49. A person or company directly affected by a decision of the ASC may appeal the decision to the Court of Appeal (s. 38(1)). An appeal under this section shall be commenced by a notice of appeal filed with the Court of Appeal within 30 days from the day the ASC sends the notice of its decision to the person or company appealing it (s. 38(2)). A copy of the notice of appeal and supporting documents shall be served on the Secretary of the ASC within that same 30 day period (s. 38(3)).

Miscellaneous

50. The ASC's hearing room in Calgary is located on the 5th floor of Centennial Place, 250 – 5th Street SW. The hearing room is set up similar to a

courtroom, with the panel of ASC Members at the front, court reporter and hearing clerk, and a witness box in the middle, and then tables for parties or counsel.

51. ASC hearings are also held in other cities (*ie* – Lethbridge, Edmonton, etc.). In such cases, the hearing location will be posted on the ASC website.
52. The ASC holds an average of 8-10 hearings a year, varying in length from several days to many weeks.
53. All ASC decisions are published, both on the ASC website and elsewhere, and referenced in press releases. In the last year, ASC panels issued 16 decisions, 12 reciprocal orders, and 12 orders and three rulings with respect to proceedings within the Commission.
54. The number of exhibits tendered at a hearing will vary depending on the issues and the number of witnesses. Shorter hearings may have a binder of exhibits, while others have seen upwards of 50 binders of exhibits and more than 20,000 pages of transcript.
55. The ASC issues investor alerts in the media where there exists a need to protect investors from specific misconduct, or alert groups to affinity or regional misconduct. The ASC spends thousands of dollars each year on investor education, pro-actively trying to prevent harm to Alberta residents from securities related misconduct. Administrative penalties collected as a result of s. 199 orders are statutorily allocated to the investor education fund.

56. The ASC website is a great source of information. On it you can find:
- (a) Information for investors, including educational materials, tips for investing, descriptions of common scams, and Investor Alerts and Investor Notices;
 - (b) The Canadian Securities Administrator's (CSA) Disciplined Persons List, identifying persons who have been subject to sanctions in various Canadian jurisdictions;
 - (c) The CSA's National Cease Trade Order database, containing current company cease trade orders;
 - (d) Frequently asked investing questions;
 - (e) Disclosure reports for insiders;
 - (f) Copies of filed public documents on SEDAR (System for Electronic Document Analysis and Retrieval);
 - (g) Enforcement proceedings, decisions and orders;
 - (h) Instruments, Policies and Rules, with a link to the Act; and
 - (i) Historical news releases and publications.