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August 8, 2008

## **Headnote**

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* - Securities Act s. 114(2) Takeover Bids - Exemption from the formal take over bid requirements in Part 13 of the Securities Act - Identical consideration - Issuer needs relief from the requirement in s. 107(1) of the Act that all holders of the same class of securities must be offered identical consideration - Under the bid, Canadian resident shareholders may receive shares, cash, or a combination of both; US resident shareholders will receive substantially the same value as Canadian shareholders, in the form of cash paid to the US shareholders based on the proceeds from the sale of their shares; the number of shares held by US residents is de minimis; the US does not have an identical consideration requirement

## **Applicable British Columbia Provisions**

Multilateral Instrument 62-104 s.2.23, s.6

In the Matter of  
the Securities Legislation of  
British Columbia and Ontario  
(the Jurisdictions)

and

In the Matter of  
the Process for Exemptive Relief Applications in Multiple Jurisdictions

and

In the Matter of  
Khan Resources Inc.  
(the Filer)

Decision

## **Background**

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (the Decision Maker) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) for an exemption from the requirement in Section 2.23(1) of MI 62-104 and in Section 97(1) of the *Securities Act* (Ontario) to offer identical consideration to all holders of the same

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class of securities subject to a take-over bid in connection with the Filer's take-over bid for all of the outstanding common shares (Western Prospector Shares) of Western Prospector Group Ltd. (Western Prospector) (the Exemption Sought).

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

- (a) the British Columbia Securities Commission is the principal regulator for this application;
- (b) the Filer has provided notice that Section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, Québec, Nova Scotia, New Brunswick, Newfoundland & Labrador, Prince Edward Island, the Northwest Territories, Nunavut and Yukon; 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**

- ¶ 2 Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

- ¶ 3 The decision is based on the following facts represented by the Filer:
1. the Filer is a corporation existing under the *Business Corporations Act* (Ontario); the registered and head office of the Filer is located in Toronto, Ontario;
  2. prior to the filing of its take-over bid circular for the Western Prospector Shares, the Filer was a reporting issuer in each of British Columbia, Alberta, Saskatchewan, Manitoba and Ontario; as a result of the filing of its securities exchange take-over bid circular, the Filer is now also a reporting issuer in Quebec; the Filer is not in default of any of the requirements of the applicable securities legislation of any such jurisdiction in which it is a reporting issuer;
  3. the common shares of the Filer (the Khan Shares) are listed and posted for trading on the Toronto Stock Exchange (the TSX);

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4. the authorized capital of the Filer consists of an unlimited number of common shares; as of May 9, 2008, there were 54,143,279 Khan Shares outstanding;
5. Western Prospector is a corporation existing under the *Business Corporations Act* (British Columbia) and its head office is located in Vancouver, British Columbia;
6. Western Prospector is a reporting issuer in each of British Columbia, Alberta and Ontario; the Western Prospector Shares are listed and posted for trading on the TSX Venture Exchange;
7. the authorized capital of Western Prospector consists of an unlimited number of Common Shares; as of May 28, 2008, there were 54,256,062 Western Prospector Shares issued and outstanding;
8. on May 11, 2008, the Filer issued a press release announcing its intention to make an offer (the Offer) to acquire all of the issued and outstanding Western Prospector Shares on the basis of 0.685 of a Khan Share for each Western Prospector Share;
9. an advertisement announcing and commencing the Offer was published in English in *The Globe and Mail* and the *New York Times* (national edition) and in French in *La Presse* on May 12, 2008 and, upon receipt of the registered shareholder list and NOBO list of Western Prospector, the take-over bid circular, letter of transmittal and notice of guaranteed delivery were mailed to Western Prospector Shareholders;
10. the Offer was originally scheduled to expire on June 20, 2008, but was subsequently extended and is now currently scheduled to expire at 8:00 p.m. (Toronto time) on August 8, 2008;
11. the Khan Shares issuable under the Offer to US Shareholders of Western Prospector (US Shareholders) have not been and will not be registered under the *United States Securities Act of 1933*, as amended (the 1933 Act) or any State securities (or "blue sky") laws in the United States; as discussed below, the Khan Shares issuable under the Offer will be exempt from the registration requirements of the 1933 Act; however, the issuance of Khan Shares to certain classes of US Shareholders (Ineligible US Shareholders) under the Offer will not be exempt from the registration requirements of a substantial number of US State securities laws; because the Khan Shares will not be registered under any US State securities laws, the offer, sale or delivery of Khan Shares under the Offer to Ineligible US Shareholders would violate certain US State securities laws;

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12. for purposes of the Offer, the term “Ineligible US Shareholders” includes any US Shareholder, other than a resident of New York State, who does not qualify as an exempt “institutional investor” within the meaning of the securities laws and regulations of such US Shareholder’s US jurisdiction;
13. to the knowledge of the Filer, based solely on the most recent registered shareholder list provided to the Filer on July 15, 2008 and the most recent NOBO list provided to the Filer on June 13, 2008, less than 5% of the Western Prospector Shares are held by Ineligible US Shareholders;
14. Rule 802 under the 1933 Act (Rule 802) provides an exemption from the registration requirements of the 1933 Act for offers and sales in any exchange offer for a class of securities of a foreign private issuer (as defined for purposes of the 1933 Act and the rules and regulations issued by the U.S. Securities and Exchange Commission thereunder) or in any exchange of securities for the securities of a foreign private issuer in any business combination if the holders of the foreign subject company resident in the United States hold no more than 10% of the securities that are the subject of the exchange offer or business combination; Rule 802 provides that for the purposes of this calculation, securities held by persons who hold more than 10% of the subject securities are to be excluded, as are securities held by the offeror; in order for this exemption to apply, holders resident in the United States must participate in the exchange offer or business combination on terms at least as favourable to those offered to the other holders of the subject securities, subject to an exception which allows the offeror to offer cash consideration to securityholders resident in states of the United States that do not have an applicable state “blue sky” exemption from the registration or qualification requirements of state securities laws;
15. to the knowledge of the Filer, based on public disclosure, Western Prospector is a “foreign private issuer” within the meaning of Rule 405 of Regulation C under the 1933 Act; furthermore, to the knowledge of the Filer, based on public disclosure, Anchorage Capital Master Offshore, Ltd. (Anchorage) holds approximately 19% of the Western Prospector Shares; to the knowledge of the Filer, based on the most recent versions of the registered shareholder list and NOBO list of Western Prospector, approximately 8.2% of the issued and outstanding Western Prospector Shares on a non-diluted basis, and (as directed by Rule 802 for purposes of calculating the level of U.S. ownership) excluding the shares held by Anchorage, are beneficially held by US Shareholders;
16. therefore, to the knowledge of the Filer, the 10% ownership condition and the other conditions to Rule 802 have been met and the offer and sale of the Khan

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Shares is exempt from the registration requirements of the 1933 Act by virtue of Rule 802; furthermore, based on publicly available information, Anchorage is not an Ineligible US Shareholder and will, therefore, receive Khan Shares if it tenders its Western Prospector Shares to the Offer;

17. there is no general exemption from state “blue sky” laws that coordinates with Rule 802; as a result, the securities laws of a significant number of states would prohibit delivery of the Khan Shares to US Shareholders without registration of the Khan Shares to be issued to US Shareholders resident in such states unless such holders are otherwise exempt investors under the laws of such states; the Filer is not eligible to rely on the relief provided by the Multi-Jurisdictional Disclosure System and, in any event, such system does not provide relief from the registration or qualification requirements of United States state securities laws;
18. registration under the 1933 Act and applicable state securities laws of the Khan Shares deliverable to US Shareholders, and the resulting ongoing reporting requirements under the US Federal securities laws, would be costly and burdensome to the Filer;
19. for US Shareholders who are Ineligible US Shareholders (and Western Prospector shareholders who appear to the Filer to be Ineligible US Shareholders), the Filer proposes to deliver to a selling agent (the “Agent”) the Khan Shares that those Ineligible US Shareholders would otherwise be entitled to receive under the Offer, and the Agent will then, as expeditiously as commercially reasonable thereafter, sell (or cause to be sold) the Khan Shares on behalf of those Ineligible US Shareholders through the facilities of the TSX; as soon as possible after the completion of such sale, the Agent will deliver to each such Ineligible US Shareholder their respective pro rata share of the cash proceeds of the sale, less commissions, other expenses and withholding taxes; the sale of Khan Shares by the Agent will be effected in a manner intended to maximize the consideration to be received by the Ineligible US Shareholders and minimize any adverse impact of the sale on the market for the Khan Shares; based on the exchange ratio of the Offer and the number of Western Prospector Shares that, to the knowledge of the Filer, are held by Ineligible US Shareholders, and assuming the Filer acquires 100% of the Western Prospector Shares, the Khan Shares to be sold under the vendor placement would represent approximately 2% of the outstanding shares of the combined company;
20. the Offer to the Ineligible US Shareholders and the sale of the Khan Shares for the benefit of Ineligible US Shareholders under the vendor placement

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described in the preceding paragraph will not constitute a violation of U.S. federal and state securities laws;

21. the Filer's financial advisor has advised that in its view there will be a "liquid market" (as such term is defined in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*) in the Khan Shares following successful completion of the Offer and vendor placement mechanism described in paragraph 19 above; and
22. to the knowledge of the Filer, based solely on the most recent shareholder lists provided to the Filer by Western Prospector, there are approximately 6.3 million Western Prospector Shares held by shareholders who are neither in Canada or the United States; the Filer does not intend to use the vendor placement mechanism described in paragraph 19 above in respect of these shareholders; the Offer is not being made to any person in any jurisdiction in which the Offer is unlawful and the Offer is not being made to, nor will deposits be accepted from or on behalf of, shareholders of Western Prospector in any jurisdiction in which the making or acceptance of the Offer would not be in compliance with the laws of such jurisdiction.

### **Decision**

- ¶ 4 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 provided that the Ineligible US Shareholders, who would otherwise receive Khan Shares under the Offer, instead receive cash proceeds from the sale of the Khan Shares in accordance with the procedures set out in paragraph 19 above.

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British Columbia Securities Commission