

# 2009 BCSECCOM 760

December 10, 2009

## **Headnote**

Multilateral Instrument 11-102 *Passport System* and National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* – National Instrument 51-102 *Continuous Disclosure Obligations* – Information circular - An issuer wants relief from the requirement to include prospectus-level disclosure in an information circular to be circulated in connection with an arrangement, reorganization, acquisition or amalgamation - The issuer is required to include historical financial statements for a business it is acquiring; it would be extremely difficult, if not impossible, to prepare certain of the historical financial statements because information to support an audit cannot be obtained and personnel with the historical information are not available; alternate financial information that is available will be provided about the business; information will be provided about the parties to the transaction sufficient for shareholders to assess the transaction as a whole

## **Applicable Legislative Provisions**

National Instrument 51-102 *Continuous Disclosure Obligations*, s. 9.1 and Item 14.2 of Form 51-102F5

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  
CanWel Building Materials Income Fund  
(the Filer)

Decision

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### Background

- ¶ 1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application (the Application) from the Filer foray decision under the securities legislation of the Jurisdictions (the Legislation) that the Filer be exempt, subject to certain conditions, from the requirement to include, under National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102), and more specifically under Item 14.2 of Form 51-102F5 *Information Circular* (Form 51-102F5), in the information circular (the Information Circular) to be sent to unitholders of the Filer (Unitholders) in connection with the Filer's proposed acquisition (Proposed Acquisition) of Broadleaf Logistics Company (BLC), the Prospectus Annual Financial Statements (as defined below) in respect of BLC, in accordance with Item 32 of Form 41-101F1 *Information Required in a Prospectus* (Form 41-101F1) (the Requested Relief).

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 the 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, 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

- ¶ 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.

In this decision, references to the Filer include, where appropriate, CanWel Newco (as defined below) as successor to CanWel Building Materials Income Fund pursuant to the Conversion (as defined below).

### Representations

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

#### *CanWel Building Materials Income Fund*

1. the Filer is an unincorporated, open-ended, limited purpose trust governed by the laws of the Province of Ontario; the Filer was established under a

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declaration of trust dated April 5, 2005, as amended and restated on May 8, 2008;

2. the Filer's head office is located at 302 – 369 Terminal Avenue, Vancouver, British Columbia V6A 4C4;
3. the Filer is a reporting issuer or the equivalent in each province of Canada and, to its knowledge, is currently not in default of any applicable requirements under the securities legislation of any province;
4. the Filer is authorized to issue an unlimited number of trust units (Units) and an unlimited number of special voting units (Special Voting Units); as at November 30, 2009, the Filer had 24,031,538 Units and 11,144,279 Special Voting Units issued and outstanding;
5. the Units are listed and posted for trading on the Toronto Stock Exchange (the TSX) under the trading symbol "CWX.UN";

### ***Broadleaf Logistics Company***

6. BLC was formed as 3208152 Nova Scotia Company ULC, an unlimited liability company incorporated on February 13, 2007, under the laws of the Province of Nova Scotia; on May 17, 2007, the name was changed to Broadleaf Logistics Company; the head office of BLC is located at 1130 West Pender Street, 7<sup>th</sup> Floor, Vancouver, British Columbia V6E 4A4;
7. BLC is primarily engaged in the sale and distribution of building materials and related products across Canada; BLC was established for the exclusive purpose of acquiring the Canadian wholesale building materials distribution assets (the BLC Assets) of Weyerhaeuser Company Limited (WCL), a wholly-owned subsidiary of Weyerhaeuser Company (Weyerhaeuser);
8. on April 12, 2007, BLC entered into an asset purchase and sale agreement with WCL to acquire the BLC Assets; on June 4, 2007, BLC completed its acquisition of the BLC Assets from WCL; prior to June 4, 2007, BLC did not have any assets and had not conducted any active business operations;
9. no financial statements exist in respect of BLC or the BLC Assets for the fiscal year ended December 31, 2006, or the period from January 1, 2007 to June 3, 2007; BLC has audited financial statements for the period beginning on the date it commenced operations, June 4, 2007, and ending on December 31, 2007, and for the fiscal year ended December 31, 2008;

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10. BLC is not a reporting issuer or the equivalent in any jurisdiction and none of its securities are listed for trading on any stock exchange or other market;
11. BLC is authorized to issue 100,000 common shares with no par value (BLC Shares); BLC currently has 1,000 BLC Shares issued and outstanding, all of which are held by Rudy Holdings II SARL (Rudy Holdings);
12. BLC's fiscal year-end is December 31;

### ***The Proposed Acquisition***

13. on December 7, 2009, the Filer entered into a share purchase agreement with BLC and Rudy Holdings with respect to the Proposed Acquisition;
14. as a condition of the Proposed Acquisition, the Filer would convert from an income trust to a corporation (the Conversion) pursuant to which Unitholders would receive, in exchange for their Units, common shares (Newco Shares) of a newly formed corporation (CanWel Newco); CanWel Newco will continue the business of the Filer and it is intended that CanWel Newco will be a reporting issuer or the equivalent in all of the provinces of Canada and that the Newco Shares will be listed and posted for trading on the TSX;
15. following completion of the Conversion, CanWel Newco will complete the Proposed Acquisition pursuant to which, among other things, Rudy Holdings will receive Newco Shares in exchange for its BLC Shares;
16. the Filer and BLC are working toward completing the Conversion and Proposed Acquisition as quickly as possible with a view to closing both transactions on or before January 29, 2010;

### ***The Information Circular***

17. TSX rules require security holder approval before the issuance of securities if the securities to be issued in payment of the purchase price for an acquisition exceed 25% of the number of securities of a listed issuer which are outstanding, on a non-diluted basis; the Newco Shares to be issued as consideration for the purchase of the BLC Shares will exceed the thresholds under the TSX rules and, accordingly, the issuance of Newco Shares in connection with the Proposed Acquisition will require Unitholder approval and the preparation of the Information Circular;
18. in order to obtain Unitholder approval of the Proposed Acquisition, the Filer will be required to prepare, file and send to all Unitholders the Information Circular following its receipt of the applicable interim court order and to hold a meeting of Unitholders; the Filer anticipates holding a special meeting of

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Unitholders in mid-January, 2010 and mailing the Information Circular to Unitholders in mid-December, 2009;

19. under the Legislation, the Information Circular must be prepared in accordance with Form 51-102F5;
20. the Proposed Acquisition will constitute a “significant acquisition” of the Filer for the purposes of NI 51-102, as determined in accordance with the tests prescribed by Part 8 of NI 51-102;
21. under Item 14.2 of Form 51-102F5 mandated by Part 9 of NI 51-102, because the Proposed Acquisition will constitute a significant acquisition under which securities of BLC will be exchanged for Newco Shares, the Filer will be required to include in the Information Circular, among other things, information sufficient to enable a reasonable Unitholder to form a reasoned judgment concerning the nature and effect of the Proposed Acquisition and the expected resulting entity or entities and the disclosure (including financial statement disclosure) for BLC prescribed by the appropriate form of prospectus for BLC;
22. the appropriate prospectus form for BLC is Form 41-101F1, which under Item 32 of Form 41-101F1 would require the inclusion, among other things, of 3 years of historical audited financial statements for BLC and any predecessor entity that formed the basis of the business of BLC, if BLC has not existed for 3 years (the Prospectus Annual Financial Statements);
23. the Filer anticipates that the date of the Information Circular will be a date in December 2009; accordingly, the Prospectus Annual Financial Statements of BLC and any predecessor entity that formed the basis of the business of BLC required to be included in the Information Circular will be audited statements of income, retained earnings and cash flows for the years ended December 31, 2006, 2007 and 2008, audited balance sheets as at December 31, 2007 and 2008, and notes to the financial statements;
24. BLC has advised the Filer that it would be impossible to produce audited financial statements of the BLC Assets for the year ended December 31, 2006, and for the period from January 1, 2007 to June 3, 2007. for the following reasons:
  - (a) for the period from January 1, 2006 to June 3, 2007, the BLC Assets were owned and operated by WCL, a wholly-owned subsidiary of Weyerhaeuser and the BLC Assets were not organized or operated as a separate business, unit or division;

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- (b) there is no separate financial information available in respect of the BLC Assets for the year ended December 31, 2006, or the period from January 1, 2007 to June 3, 2007;
  - (c) for the period from January 1, 2006 to June 3, 2007, while basic source documents relating to the BLC Assets may exist, it would be extremely difficult, if not impossible, to locate adequate documentation or information to prepare stand-alone financial statements, and it is not possible to obtain detailed supporting analysis; and
  - (d) it is BLC's understanding that many of the management and staff of Weyerhaeuser sufficiently familiar with the BLC Assets are not available to reconstruct supporting information.
25. given that annual financial statements of the BLC Assets for the year ended December 31, 2006, and the period from January 1, 2007 to June 3, 2007, do not exist and BLC did not acquire the BLC assets until June 4, 2007, the Filer proposes that in place of the Prospectus Annual Financial Statements, the Information Circular contain annual audited financial statements of BLC consisting of:
- (a) an income statement, statement of retained earnings, and a cash flow statement for the period from June 4, 2007 to December 31, 2007, and the fiscal year ended December 31, 2008;
  - (b) balance sheets as at December 31, 2007 and 2008; and
  - (c) notes to the financial statements;
- (together, the Alternative BLC Annual Financial Statements);
- and the Information Circular will otherwise comply with the requirements of Form 51-102F5.

### **Decision**

- ¶ 4 Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted, provided that:

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- (a) the Filer includes in the Information Circular the Alternative BLC Annual Financial Statements; and
- (b) the Information Circular otherwise complies with the requirements of Form 51-102F5.

¶ 5 Martin Eady, CA  
Director, Corporate Finance  
British Columbia Securities Commission