**In the Matter of the Securities Act, R.S.B.C. 1996, c. 418**
**And**
**In the Matter of Tim Johnston**
**And**
**In the Matter of a Decision of the TSX Venture Exchange Inc. dated May 11, 2020**

**SECTIONS 28 AND 165 OF THE SECURITIES ACT, R.S.B.C. 1996, c. 418 (the "Act")**

**REQUEST FOR HEARING AND REVIEW**

**Name of Applicant: Tim Johnston**

TO: The Executive Director of the British Columbia Securities Commission
(the "Executive Director")
ATTENTION: Peter Brady, Executive Director

AND TO: TSX Venture Exchange Inc. (the "Exchange")
ATTENTION: Mani Sanghera, Director, Compliance & Disclosure

TAKE NOTICE than an application will be made by the applicant to the British Securities Commission (the "Commission") at 701 West Georgia Street, Vancouver, B.C. on a date and time to be determined for the order set out in Part 1 below.

**Part 1: ORDER SOUGHT**

1. An order setting aside the acceptability review decision of the Compliance & Disclosure Department (the "C&D Department") of the Exchange dated May 11, 2020 requiring, among other things, Mr. Johnston to make a written application to and obtain prior written acceptance from the C&D Department of the Exchange for any proposed involvement as a director or officer of any Exchange listed issuer or performing any functions for any Exchange listed issuer which are similar to those normally performed by an individual occupying the position of director or officer.

**Part 2: FACTUAL BACKGROUND**

2. Mr. Johnston was a director and officer of Desert Lion Energy Inc. ("Desert Lion" or the "Company") during the period November 2018 to July 16, 2019. In particular, Mr. Johnston served as Chief Executive Officer and a director of the Company during the period February 23, 2018 to July 16, 2019 and as President during the period February 23, 2018 to May 2019.
3. Mr. Johnston is not currently a director or officer of any Exchange listed issuer.

4. Mr. Johnston is an engineer by profession and does not have any legal training. Consequently, whilst at Desert Lion, Mr. Johnston relied on the advice of others respecting applicable Canadian securities law and Exchange requirements.
5. In or around November 2018, Desert Lion had the opportunity to raise an aggregate principal amount of $4 million by private placement through the issuance of convertible notes to a single subscriber (the "November 2018 Financing"). A subsequent $1 million financing took place in February 2019 through the private placement of non-convertible notes (the "February 2019 Financing" and together with the November 2018 Financing, the "Financings").
6. At the time of the Financings, Desert Lion was in urgent need of capital. Consequently, the Company's management and board determined that the arm's length Financings were in the best interests of the Company. There has been no suggestion to the contrary by the Exchange nor any interested party.
7. In fact, the Financings were priced reasonably in the context of the market having regard to the Company's urgent need to settle its obligations to creditors and raise sufficient working capital for the Company to undertake an orderly sale process. Without the Financings, the Company may have become insolvent and/or sold in distress, to the detriment of shareholders.
8. Desert Lion sought Exchange approval for the Financings. After some discussion, the Exchange's Listed Issuer Services Department approved the Financings in March 2019.
9. The Form 4Bs filed in connection with the Financings were prepared by the Company's internal legal counsel, an experienced capital markets solicitor, with input from one of the Company's directors, a practising lawyer at a national Canadian law firm.
10. Mr. Johnston believed, and had every reason to believe, that the solicitors prepared and reviewed the Form 4Bs and other documents/disclosures having regard to applicable securities law and Exchange requirements.
11. On that basis, Mr. Johnston signed documents associated with the Financings that were presented to him by Company counsel, including one of the Form 4Bs.
12. On October 11, 2019, the Exchange advised Mr. Johnston that it had initiated a review of his future acceptability to serve as a director or officer of any Exchange listed issuer.
13. In a letter dated October 11, 2019, the Exchange advised Mr. Johnston that it had concerns with respect to the Company's filings with the Exchange (including the Form 4Bs) and certain communications to the public concerning the Financings. In particular, the Exchange alleged that the Company did not disclose certain information in relation to the Financings, including fees payable to the financier and that the Financings were subject to a $1 million discount.
14. Mr. Johnston made submissions to the Exchange regarding the matters raised in its letter of October 11, 2019, including that:
    a. Mr. Johnston is not a lawyer and relied on the legal counsel referred to above to complete all filings made with the Exchange regarding the Financings and that he had a reasonable basis for belief that the filings complied with applicable requirements;
    b. while Mr. Johnston was aware that the Company was engaged in ongoing discussions with the Exchange regarding the Financings, he was not personally

involved in those discussions and was told that the necessary information, including the Form 4Bs, was filed and discussed with the Exchange;

c. Mr. Johnston did not sign the Form 4B dated November 7, 2018 in respect of the November 2018 Financing;
d. Mr. Johnston was focused on his operational duties respecting Desert Lion and not on the Company's interactions with the Exchange;
e. while Mr. Johnston has acknowledged that, with the benefit of hindsight, disclosures made regarding the Financings could have contained additional information, he believed and was told that all disclosures were accurate and complete at the time they were made; and
f. at all times, Mr. Johnston acted in good faith in discharging his duties as a director and officer of the Company.

15. Ultimately, on May 11, 2020, the Exchange advised Mr. Johnston that it had completed its acceptability review and made the following decision imposing conditions on Mr. Johnston's ability to serve as a director or officer of any Exchange listed issuer in the future (the "Decision"):

> *Effective immediately and until further written notice, the Exchange has determined that you are required to make a written application to and obtain prior written approval from the C&D Department of the Exchange for any proposed involvement as a Director or Officer of any Exchange listed issuer…*
>
> *The Exchange will not consider an application regarding your involvement as a Director or Officer unless the application is also made on your behalf by an Exchange listed issuer. That issuer will be required to provide the Exchange with satisfactory evidence that a copy of this letter has been received and reviewed by the Issuer.*

16. In substance and effect, the Exchange issued an *a priori* decision imposing conditions on Mr. Johnston's acceptability to serve as a director or officer of any Exchange listed issuer. The Exchange disregarded the evidence that Mr. Johnston presented to the Exchange in the context of its review as well as the surrounding circumstances which strongly favoured Mr. Johnston's position. The Exchange never spoke to Mr. Johnston respecting any of its concerns and appears to have based its conclusions regarding his acceptability on the Company's filings alone.
17. The Decision is incorrect in law and fact and runs contrary to the public interest. The impact of the Decision will be highly prejudicial to Mr. Johnston's career prospects.

**Part 3: LEGAL BASIS**

18. Section 7.9 of BC Policy 15-601, confirms that the Commission will apply the factors enunciated in *Canada Malting Co.* (1986), 9 OSCB 3565 in determining whether to intervene in a decision of the Exchange:
    a. the Exchange has proceeded on an incorrect principle;
    b. the Exchange has erred in law;

c. the Exchange has overlooked material evidence;
d. new and compelling evidence is presented to the Commission that was not presented to the Exchange; or
e. the Commission's perception of the public interest conflicts with that of the Exchange.

19. Additionally, where the record before the Exchange does not reflect that the Exchange considered issues relevant to the exercise of its jurisdiction or any discretion, the Commission may consider new evidence and substitute its decision for that of the Exchange.
20. As described below, the Exchange proceeded on incorrect principles and erred in law respecting its jurisdiction and its assessment of Mr. Johnston's actions as an officer and director of the Company.
21. The Exchange also overlooked material evidence regarding, among other things, Mr. Johnston's reasonable reliance on legal advice.
22. To the extent that the Exchange came to an *a priori* determination as to Mr. Johnston's fitness to serve as an officer or director of any Exchange listed issuer on the basis of a thin evidentiary record and without ever meeting or interviewing him, the Exchange's perception of the public interest in these circumstances must be inconsistent with that of the Commission.
23. The Exchange's decision fails to address its lack of jurisdiction to make an *a priori* determination in respect of future applications by an individual who is not currently a director or officer of an Exchange listed issuer.
24. By making such an *a priori* determination, the Exchange impermissibly fettered its discretion to consider any future application by a listed issuer that in any way involves Mr. Johnston as a director or officer on the particular facts and circumstances of that issuer as required by section 2.1 of Policy 3.1 of the *TSXV Corporate Finance Manual* (the "Manual").
25. Additionally, Policy 3.1 of the Manual, by its terms, only gives the Exchange the discretion to make listing decisions based on *actual* applications for listing that have been filed with the Exchange or in respect of a review of an existing officer or director of a listed issuer under section 4 of the policy. Specifically, the Exchange has no authority to exercise this discretion outside the application process or in respect of an individual who is not a current director or officer of a listed issuer.
26. Additionally, the Decision is highly prejudicial to Mr. Johnston because it will adversely impact his relationship with any prospective listed issuer in which he may plan to serve as an officer or director.
27. The Exchange erred in law and in principle by making an *a priori* adverse decision respecting Mr. Johnston's ability to comply with the public interest and maintain the quality of the Exchange's marketplace when the disclosure decisions upon which the Decision was based were not made by Mr. Johnston and were plainly outside his knowledge and expertise.
28. In this regard, the Decision does not reflect any or adequate consideration of Mr. Johnston's submissions that he reasonably relied on counsel or the impact of this essential fact on the public interest or the quality of the Exchange's marketplace. The Decision also failed to take into account the "safe harbour" afforded to Mr. Johnston under subsection 135(4) of the *Business Corporations Act* (Ontario). This provision allowed him, as a director, to rely on the

advice of counsel. The Exchange also failed to consider the limits of Mr. Johnston's authority as an officer to act contrary to the direction of the board as a whole in connection with the Company's filings respecting the Financings.