

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, as amended**

- and -

**IN THE MATTER OF
ROYSTER-CLARK LTD. AND ROYSTER-CLARK ULC**

- and -

**IN THE MATTER OF
AGRIUM INC. AND AGRIUM ACQUISITIONS INC.**

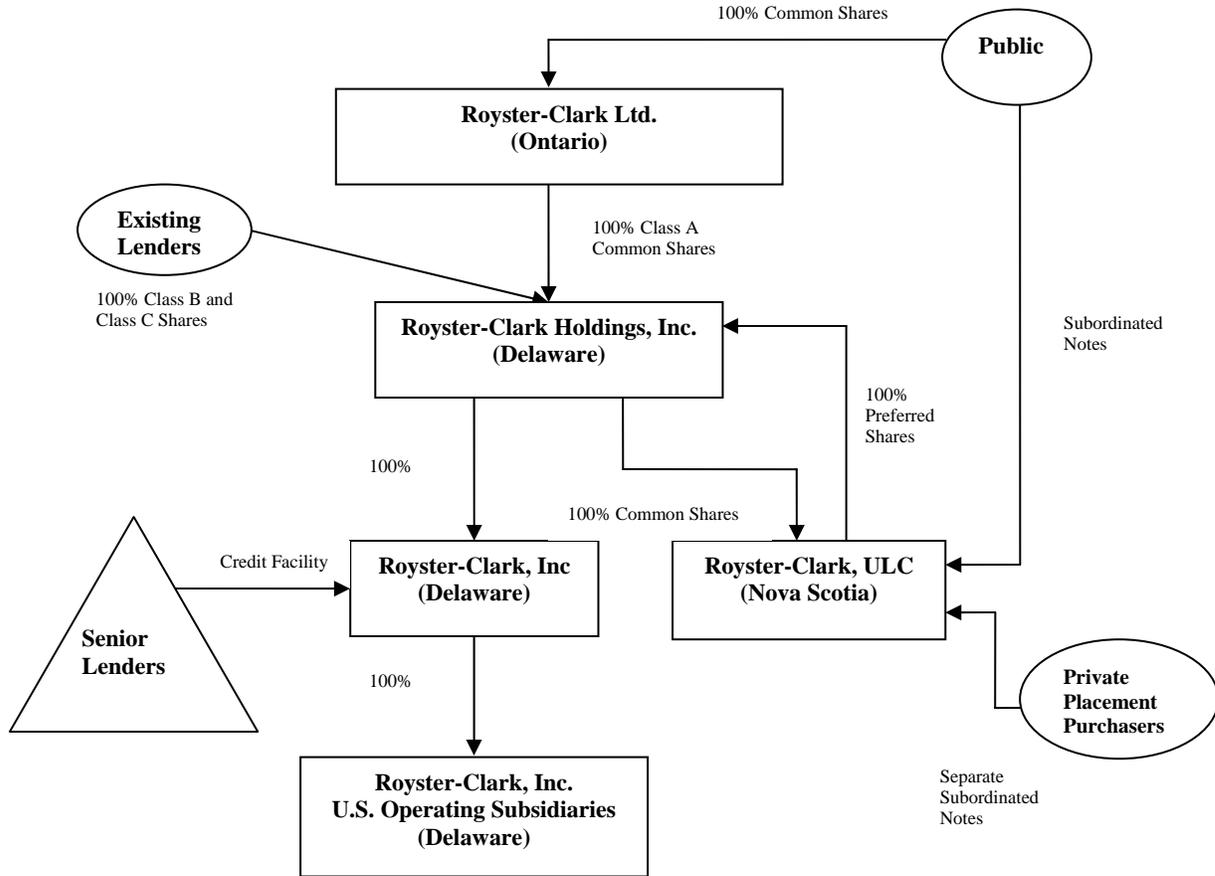
ROYSTER-CLARK SUBMISSIONS
(Illegal Take-Over Bid/Disclosure Hearing)

PART I –OVERVIEW

1. Royster-Clark Ltd. (“RC”) and Royster-Clark ULC (“RC ULC”) (collectively, “Royster-Clark”) submit that the Commission should direct Agrium Acquisitions Inc. (“Agrium”) to comply with Part XX of the *Securities Act* by:
 - (a) reformulating its take-over bid dated November 8, 2005 (the “Agrium Offer”) as an offer to all of the holders of the securities that are the subject of the offer, which securities include the common shares of RC; and
 - (b) providing disclosure in its take-over bid circular of all material facts relative to its offer.
2. The Agrium Offer is improperly structured in that it fails to comply with the requirement under Part XX of the *Securities Act* that a take-over bid be to all holders of the securities that are the subject of the bid.
3. Further and in any event, Agrium’s disclosure in its take-over bid circular is materially deficient and should be rectified to permit Royster-Clark securityholders to make an informed decision on the Agrium Offer.

PART II – FACTS

4. This Part II is organized under the following headings:
 - A. *Royster-Clark*: we describe by way of background the business of the Royster-Clark group of companies and the corporate structure of the group.
 - B. *The Income Deposit Securities*: we explain the income deposit security structure generally and the key features of such securities; and we describe the income deposit securities (the “IDSs”) that have been issued by Royster-Clark and that are the subject of the Agrium Offer.
 - C. *The Agrium Offer*: we describe the Agrium Offer.
 - D. *Unfair and Coercive Effect*: we explain the unfair and coercive effect of the Agrium Offer.
- A. **Royster-Clark**
5. **RC**. RC is an OBCA corporation with its head office in Toronto, Ontario.
6. **RC ULC**. RC ULC is an unlimited liability company under the laws of Nova Scotia with its head office in Toronto, Ontario
7. **The business**. Royster-Clark, through various direct and indirect subsidiaries, is a retail distributor of agricultural fertilizer, seed and crop protection products; it provides agronomic services such as product application and technical consulting services to farmers in the United States; and it distributes crop production inputs, principally fertilizer, on a wholesale level.
8. **Ownership structure**. The ownership structure of Royster-Clark and related corporations is highly complex. The corporate chart that was included in the prospectus for the Royster-Clark initial public offering is set out below.



B. The Income Deposit Securities

9. In their July 2005 IPO, RC and RC ULC jointly issued 32,500,000 IDSs at a price of \$10.00 per IDS. Each IDS represents ownership of one Common Share of RC (“Common Share”) and \$6.08 principal amount of subordinated notes of RC ULC (the “Notes”).¹

10. *Nature of an income deposit security.* The income deposit security structure evolved from the cross-border income trust structure during 2003. It was developed initially for the U.S. market and in significant part was intended to address certain accounting and U.S. tax challenges that had arisen with respect to cross-border income trusts. At the heart of the accounting and U.S. tax concerns was the requirement to ensure that the subordinated debt in the structure constitutes “debt” for U.S. tax purposes so that the interest payments on the subordinated debt

would be tax deductible. One of the keys to achieving this in the income deposit security structure is to have the common shares and subordinated debt held directly as separate instruments by public investors with the IDS receipt used as a mechanism to facilitate trading.

11. Key elements which reflect the separate nature of the underlying common shares and subordinated debt in the income deposit security structure include:

- (a) income deposit security holders have the ability to separate their income deposit security and hold directly the common shares and subordinated debt any time shortly following the initial public offering;
- (b) income deposit security holders receive dividends on their common shares and interest on their subordinated debt, which distributions are taxed according to their character;
- (c) a significant principal amount of separate subordinated debt identical to the debt forming a component of the income deposit securities must be issued to persons who do not intend also to hold common shares;
- (d) the common shares are separately listed for trading on an exchange and the underwriters typically undertake to “make a market” in the subordinated debt; and
- (e) prospectuses for income deposit security offerings describe both components (the common shares and debt) separately in great detail.

12. Accordingly, an income deposit security merely comprises two separate securities that are held together but are separable at any time shortly following their IPO. An income deposit security has no value or legal characteristics independent of its two constituent securities: only the common shares have voting rights, not the income deposit securities; only the common shares and debt carry a right to distributions (dividends and interest, respectively), not the income deposit securities.

13. ***The Royster-Clark IDSs.*** In the case of Royster-Clark, the fact that the IDSs are merely a receipt is reflected in the corporate chart that was included in the prospectus for the initial

¹ The prospectus is attached to the Anderson Affidavit at Tab A. The chart is at p. 10 of the prospectus.

public offering² (see above at paragraph 8): the IDSs themselves do not appear in the chart, only the constituent securities.

14. The IDSs are currently listed and traded on the TSX. The Common Shares are separately listed on the TSX and will be posted for trading on the TSX when RC provides the TSX with evidence that there exists a sufficient public distribution of Common Shares that are held separately from Notes. The Notes are not separately listed but may be traded on an “over-the-counter” basis.

15. Investors purchase IDSs primarily for the anticipated cash distributions to be generated by the dividend payments on the Common Shares and interest payments on the Notes. The Board of Directors of RC has adopted a policy to distribute available cash to the maximum extent possible, subject to applicable law, by way of equal monthly dividends on the Common Shares, after satisfying debt service obligations and other expense obligations. Interest is paid on the RC ULC Notes on a monthly basis.

16. In connection with the initial public offering of IDSs, RC ULC also issued, on a private placement basis, \$24.2 million principal amount of Subordinated Notes (the “Separate Subordinated Notes”) that do not comprise part of the IDSs. The Separate Subordinated Notes are identical to the Notes and were issued to and continue to be held by sophisticated institutional investors.

C. The Agrium Offer

17. Under the Agrium Offer dated November 8, 2005, Agrium is offering \$10.00 per IDS. The Agrium Offer was amended on December 13, 2005 by a Notice of Extension and Variation (the “Amendment”). The Agrium Offer, as amended, expires on December 23, 2005. The purpose of the Agrium Offer, according to Agrium in its take-over bid circular (the “Agrium Circular”),³ is to enable Agrium “to acquire all of the IDSs or the Common Shares and Subordinated Notes that comprise the IDSs”.

² The prospectus under which the IDSs were issued is attached to the Anderson Affidavit at Tab A.

³ The Agrium take-over bid circular is attached to the Anderson Affidavit at Tab D.

18. The key features of the Agrium Offer include the following:

- (a) *the Agrium Offer is for IDSs only.* Despite what the Agrium Circular describes as the purpose of the Agrium Offer, the Agrium Offer is expressed to be for IDSs only, not for the constituent securities. Accordingly, an IDS holder cannot tender Common Shares or Notes held otherwise than in the form of IDSs to the Agrium Offer;
- (b) *the allocation of the Offer price between the Common Shares and the Notes differs materially from the allocation in the July 2005 IPO of the IDSs.* For the purpose of the Agrium Offer, the purchase price of \$10.00 per IDS is allocated as to \$2.00 for each Common Share and as to \$8.00 for each \$6.08 principal amount of Notes forming part of each IDS. This is to be compared to the allocation of \$3.92 and \$6.08 to the Common Share and the Notes, respectively, per IDS at the time of Royster-Clark's IPO in July 2005;
- (c) *Agrium intends to squeeze out all remaining Common Shares, including those forming part of IDSs not tendered to the Agrium Offer and any that are separate from the IDSs (and that were therefore not the subject of the Agrium Offer).* Agrium intends to accomplish this squeeze-out through the compulsory acquisition provision of the OBCA or through a subsequent acquisition transaction in which remaining Common Shareholders would be offered \$2.00 per Common Share, and Common Shares acquired pursuant to the Agrium Offer would be treated as part of the minority for the purpose of any majority of the minority voting;
- (d) *Agrium intends to make an offer to all remaining holders of Notes forming part of IDSs not tendered to the Agrium Offer.* Pursuant to the Amendment, Agrium has indicated an intention, should it squeeze out the remaining holders of Common Shares, to make a standing offer following the squeeze-out for the remaining Notes at the \$8.00 amount allocated under the Agrium Offer to each Note per IDS; and
- (e) *the Agrium Offer is highly conditional.* The Agrium Offer contains 16 conditions, several of which include numerous sub-conditions, which must be satisfied or

waived before Agrium is obligated to take up and pay under the offer. Those conditions include at least 90% of the IDSs being tendered.

D. Unfair and Coercive Effect

19. Agrium is offering \$10.00 per IDS with \$2.00 allocated to the Common Share component and \$8.00 allocated to the Note component. That allocation was determined by starting with the overall price per IDS that Agrium was prepared to offer for Royster-Clark; the Note component was then valued based on a yield analysis; and the difference, without any separate valuation analysis, was allocated to the Common Share component.

20. *No market validation of the amounts allocated to the constituent securities.* The effect of the Agrium Offer being structured as an offer for IDSs is that the relative amounts allocated by Agrium to the Common Shares and the Notes will not be subject to the usual test of the market. Holders of the IDSs who agree with the amount allocated to the Common Shares but not the amount allocated to the Notes, or *vice versa*, do not have the option of tendering only one of the constituent securities but not the other.

21. *Remaining Common Shares may be expropriated at a value that has not been validated by the market.* Under the Agrium Offer, an IDS holder does not have the option of simply declining to tender and continuing to hold his IDSs. Agrium, having structured its offer as an offer for the IDSs, not the constituent securities, has indicated an intention to do a second stage squeeze-out in which the securities subject to the squeeze-out will not be the IDSs which were the subject of the Agrium Offer, but rather, the Common Shares. The price at which that squeeze-out will be done will be the amount that Agrium allocated to the Common Shares for the purpose of the Agrium Offer, which amount was not based on any valuation analysis of the Common Shares and will not have received the market testing and validation on which the compulsory acquisition squeeze-out mechanic is premised.

22. This is an unprecedented feature of what Agrium is proposing that results from its structuring of its offer as an offer for IDSs rather than for the constituent securities.

23. *Remaining Notes may be illiquid and stripped of material protections.* Not only is an IDS holder who chooses not to tender faced with the prospect of having his Common Shares

expropriated at a price that has not been validated by the market, but he will then be left with his Notes in what would be a disadvantageous position for the holder. The position would be disadvantageous in two key respects.

24. *First*, while investment bankers can debate the extent of the liquidity of the market that would remain for the Notes, there is no question that it will be less liquid than the IDS market. The Notes, unlike the IDSs, will only trade on the “over-the-counter” bond market which is primarily institutional and in which small retail holders are not protected in the way they are in respect of securities listed on the TSX (for example, over-the-counter trading is not subject to the transparency requirements or best price and timing rules governing TSX trading).

25. *Secondly*, under the Note indenture, there are material protective covenants that could be removed unilaterally by Agrium as the majority holder of the Notes. Those covenants subject to removal based on majority approval (see section 9.02(a) of the indenture⁴) include:

- restrictions on incurring indebtedness and issuing preferred stock (section 4.02);
- restrictions on dividends and other payments affecting subsidiaries (section 4.04);
- restrictions on asset sales (section 4.05);
- restrictions on transactions with affiliates (section 4.06);
- restrictions on incurring liens (section 4.07); and
- requirements in the event of change of control (section 4.08).

26. Restrictions of the foregoing kind are key to the covenant pattern in any high yield notes; the potential for Agrium to remove those restrictions unilaterally would be a material factor negatively affecting the liquidity and value of the Subordinated Notes.

27. ***The effect of the Amendment.*** The Amendment does not address the fundamental problem faced by an IDS holder who believes the Agrium Offer is inadequate: the alternative to accepting what Agrium is offering is to be expropriated as a Common Shareholder at a price that has not been market validated; and to be left with Notes that are less liquid and potentially less protected by restrictive covenants.

⁴ The Subordinated Notes Indenture is attached to the Anderson Affidavit at Tab B.

PART III – SUBMISSIONS

28. This Part III is in two parts:

- A. *Illegal Take-Over Bid*: we submit that the Agrium Offer fails to comply with the requirement under Part XX of the *Securities Act* that a take-over bid be to all holders of the securities that are the subject of the bid; and
- B. *Inadequate Disclosure*: further and in any event, we submit that Agrium has failed to provide proper disclosure in its take-over bid circular of all material facts relative to the Agrium Offer.

A. **Illegal Take-Over Bid**

29. The Agrium Offer fails to comply with the requirements of Part XX of the *Securities Act* because it is not an offer to all of the holders of the securities that are the subject of the bid, which include the Common Shares; rather, it is an offer only for the IDSs which themselves carry no vote or any participation in the equity of Royster-Clark. This is not a mere technical deficiency: to permit an offer to be made only for income deposit securities and not for the component securities that are also subject to the bid would be to permit differential treatment among holders of the same class of securities. This would be contrary to a fundamental principle of the Ontario take-over bid regime.

30. **Relevant statutory provisions.** A “take-over bid” means “an offer to acquire outstanding *voting or equity securities* of a class ...” (emphasis added) (s.89.1). With respect to a “take-over bid”, the offeror is obliged:

- (a) to make the bid “to all holders of securities of the class that is subject to the bid ...” (s.95.1); and
- (b) to offer to all such holders “identical consideration” (s.97(1)).

31. **The securities that are subject to the Agrium Offer.** The Agrium Offer is expressed to be made for IDSs only: “This Offer is for IDSs only, and deposits to the Offer of any separate

common shares...will not constitute a valid acceptance of the Offer...”⁵ However, having regard to the nature of an IDS as described above, to make an offer for IDSs is, in effect, an offer for the Common Shares and the Notes that comprise the IDSs. Indeed, the Common Shares are the only “voting or equity” security that corresponds to the definition of a “take-over bid” since an IDS itself carries no vote or equity participation.

32. The Agrium Circular acknowledges that Common Shares are a subject of the bid: “The purpose of the Offer is to enable the Offeror to acquire all of the IDSs *or the Common Shares* and Subordinated Notes that comprise the IDSs”⁶ (emphasis added). The Agrium Circular also acknowledges that the effect of the bid will be Agrium acquiring Common Shares (see the discussion of second stage transactions which speaks to the implications of Agrium acquiring under the Agrium Offer more or less than “90% of the issued and outstanding Common Shares”)⁷.

33. Therefore, the Agrium Offer, although styled as an offer for IDSs only, is in substance an offer for Common Shares and Notes: the result of Agrium taking up and paying for IDSs deposited under the Agrium offer is that Agrium acquires Common Shares and Notes.

34. ***Non-compliance of the Agrium Offer with Part XX.*** Since Common Shares are a subject of the Agrium Offer, s.95.1 requires that the offer be extended to all holders of the Common Shares; and s.97(1) requires that all such holders be offered identical consideration.

35. The Agrium Offer clearly fails to comply with these requirements as a matter of form. The Agrium Offer, by its terms, is being made only to holders of Common Shares who hold their shares through IDSs or who can combine their separate Common Shares with separate Notes to form IDSs. The Agrium Offer states that “any separate Common Shares...which may be held otherwise than in the form of IDSs, whether as a result of the separation of the IDSs or otherwise, will not constitute a valid acceptance of the Offer by the holders thereof and such separate Common Shares...will not be taken up by the Offeror”⁸. Thus the Agrium Offer, by its

⁵ *Agrium Circular*, Anderson Affidavit, Tab D, cover page

⁶ *Agrium Circular*, Anderson Affidavit, Tab D, p. 7

⁷ *Agrium Circular*, Anderson Affidavit, Tab D, p. 7

⁸ *Agrium Circular*, Anderson Affidavit, Tab D, cover page

terms, is differentiating between holders of a class of securities that is subject to the offer, namely, Common Shares.

36. *Why there is a concern of substance and not merely of form.* Agrium is suggesting in its materials filed on this application that this objection to the structure of the Offer is, at most, a matter of form since, in fact, there are no Common Shares separate from the IDSs and therefore an offer to all holders of IDSs is also an offer to all holders of Common Shares. Royster-Clark does not dispute Agrium's assertion that, at the moment, there are no Common Shares separate from the IDSs. However this does not answer the securities regulatory concerns that the Agrium Offer presents.

37. *The precedent concern.* The income deposit security structure is a novel one. Other issuers of income deposit securities will undoubtedly become the subject of take-over bids. While in the case of Royster-Clark, there may not happen to be any Common Shares separate from the IDSs at this time, in a future take-over bid for an issuer of IDSs, there may well have been separation from the IDSs of component securities as of the time of the bid.

38. It is important to establish in this first test, which will become the precedent for take-over bids for IDS issuers, that a bid for IDSs must be structured as a bid for the component securities in order to ensure that all holders of the securities that are the subject of the bid are treated equally.

39. *The impairment of the market concern.* Furthermore, the structure of the Agrium Offer as a bid for IDSs rather than for the component securities means that market will not be able to perform its usual price discovery function in relation to each of the component securities, which is undesirable in policy terms (see paragraph 20 above).

40. *The unfairness to non-tendering IDS holders concern.* The lack of market testing and validation for the amounts allocated to the component securities in turn exposes IDS holders to the unfairness described above: non-tendering holders are potentially subject to having their Common Shares expropriated under the compulsory acquisition provisions of the OBCA at a price that has not been validated by the market. If Agrium were required to make separate offers for the component securities, that result could be avoided.

B. Inadequate Disclosure

41. Further and in any event, Agrium is obliged to provide disclosure in its take-over bid circular of all material facts relative to the Agrium Offer. The disclosure in the Agrium Circular is deficient in two respects:

- (a) the Agrium Circular fails to disclose that, upon completion of the Offer, Agrium will be in a position to amend the Note indenture to strip important protections for Note holders; and
- (b) the Agrium Circular fails to disclose that Agrium may not be permitted to use the compulsory acquisition provisions of the OBCA.

42. ***Relevant securities regulatory provisions.*** There are two relevant provisions:

- (a) Item 19 (“Other Material Facts”) of Form 32 under the *Securities Act* requires that Agrium describe “any other matter not disclosed in the foregoing that has not previously been generally disclosed and is known to the offeror but which would reasonably be expected to affect the decision of the securityholders of the offeree issuer to accept or reject the offer.”
- (b) Item 24 (“Certificate”) of Form 32 under the Act requires certification that the circular “does not omit to state a material fact that is required to be stated or that is necessary to make a statement not misleading in light of the circumstances in which it was made.”

43. ***Stripping protective covenants from Note indenture.*** Apart from a specific list of amendments which require the consent of all Note holders, the Indenture permits amendments to be made with the approval of holders of a majority in principal amount of the Notes outstanding. Accordingly, upon completion of the Agrium Offer, Agrium will be in a position to unilaterally amend or remove certain protective covenants contained in the Note indenture, including:

- restrictions on incurring indebtedness and issuing preferred stock;
- restrictions on dividends and other payments affecting subsidiaries;
- restrictions on asset sales;
- restrictions on transactions with affiliates;
- restrictions on incurring liens; and

- requirements in the event of change of control.

44. The possibility that, following completion of the Agrium Offer, Agrium may unilaterally amend or remove many protective covenants in the Note indenture is a material fact “that has not previously been generally disclosed and is known to the offeror [i.e. Agrium] but which would reasonably be expected to affect the decision of the securityholders of the offeree issuer to accept or reject the offer.” CIBC has advised that the foregoing restrictions are key to the covenant pattern in any high yield notes and that the potential for Agrium to remove those restrictions unilaterally would be a material factor negatively affecting the liquidity and value of the Notes.

45. ***Legal uncertainty about compulsory acquisition provisions.*** Section 188(1) of the OBCA allows an offeror under a “take-over bid”⁹ to expropriate securities held by non-tendering offerees where “the bid is accepted by holders of not less than 90 per cent of the securities of any class to which the bid relates...” In other words, only the securities of the class “to which the bid relates” may be expropriated by the offeror.

46. Under the compulsory acquisition mechanic, a non-tendering offeree is required to elect “to transfer his, her or its securities to the offeror on the terms on which the offeror acquired the securities of the offerees who accepted the bid” or “to demand payment of the fair value of his, her or its securities”.

47. As discussed above, the Agrium Offer is expressed to be for the IDSs only, and not for the component securities. Particularly if Agrium’s own characterization of its offer is accepted (contrary to Royster-Clark’s submissions above at paragraphs 31-35), there is a serious question whether Agrium can rely on the OBCA compulsory acquisition mechanic in respect of securities (the Common Shares) which were not the subject of a distinct offer allowing for market validation of the bid price. It would be wrong, in policy terms, to permit compulsory acquisition of shares at a price that has not been validated by the market, which would be the case here given the structure of the Agrium Offer.

⁹ “Take-over bid” is defined in the OBCA as “an offer made to security holders of an offeree corporation to purchase directly or indirectly voting securities of the offeree corporation” where those voting securities, together with securities owned by the offeror and its affiliates and associates, carry 10 per cent or more of the voting rights (see section 187(2)).

48. Consequently, in the absence of a separate offer for the Common Shares, it is not clear that Agrium will be entitled to use the compulsory acquisition provisions in section 188 of the OBCA to squeeze-out the dissenting shareholders. This potential inability to use the compulsory acquisition mechanic is a material fact “that has not previously been generally disclosed and is known to the offeror [i.e. Agrium] but which would reasonably be expected to affect the decision of the securityholders of the offeree issuer to accept or reject the offer.”

PART IV – ORDER REQUESTED

49. Royster-Clark therefore respectfully requests an order directing Agrium:
- (a) to reformulate the Agrium Offer as an offer to all of the holders of the securities that are the subject of the offer which include the RC Common Shares; and
 - (b) to provide disclosure in its take-over bid circular of all material facts relative to its offer.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

JAMES C. TORY

Of counsel for Royster-Clark Ltd. and Royster-Clark
ULC