June 13, 2000

SENT BY COURIER

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
The Manitoba Securities Commission
Ontario Securities Commission
Office of the Administrator, New Brunswick
Registrar of Securities, Prince Edward Island
Nova Scotia Securities Commission
Securities Division, Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon Territory
Registrar of Securities, Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8

- and –

Claude St. Pierre, Secrétaire
Commission des valeurs mobilières du Québec
800 Victoria Square
Stock Exchange Tower
P.O. Box 246, 22nd Floor
Montréal, Québec H4Z 1G3

Dear Sirs/Mesdames:

Concept Proposal for an Integrated Disclosure System

This letter is submitted in response to the Notice and Request for Comment (the "Notice") issued by the Canadian Securities Administrators (the "CSA") on January 28, 2000 in respect of the concept proposal (the "Concept Proposal") for an integrated disclosure system (the "IDS"). As requested, this submission has been prepared in duplicate and a diskette containing an electronic copy of this submission in WordPerfect for Windows format is also included.

General

We would like to begin by commending the CSA for the initiative and work which has been dedicated to producing the Concept Proposal. Assisting in the raising of capital, while enhancing information available to investors for making investment decisions, are important regulatory objectives. We support the CSA's objective of shifting the focus of securities regulation from transactional offering disclosure to continuous disclosure in order to ensure that investors in the secondary markets have access to prospectus-quality information and to provide issuers with faster and more flexible access to public capital markets. The enhancement of continuous disclosure standards in Canada is critical for maintaining and improving the reputation and competitiveness of Canadian capital markets.

However, we are concerned that the Concept Proposal attempts to effect too many changes in one instrument: to the process for offering securities; to the secondary market disclosure regime; and to the marketing rules. We are concerned that by attempting to effect significant changes to each of these regimes in one instrument, the significance of certain proposals will not be fully appreciated, and the interaction of certain proposals with existing regimes will not be thoroughly canvassed.

For example, if a new marketing scheme is introduced for IDS participants (and we will address this matter more fully in our comments below), the result will be that IDS issuers and their underwriters will be able to conduct very different marketing activities than non-IDS issuers and their underwriters, simultaneously and in the same markets. We are concerned about the inevitable resulting confusion to investors and in the markets. Similarly, IDS issuers will be required to issue a SIF in respect of certain of their press releases, which press releases will then be certified as to the accuracy of their content. Non-IDS issuers will not be certifying their press releases, but the market may not fully absorb this rather subtle difference and may accord unwarranted weight and authority to press releases of such issuers.

We are also concerned about the introduction of the requirement for much of the continuous disclosure material of an IDS issuer to be certified. If secondary market purchasers would have rights of action under the certificates (which we assume is intended to be the case), the certification requirement effectively implements the concept of liability for secondary market disclosure through the backdoor. We do not believe that the Concept Proposal should introduce any mechanism which can be used to impart liability or increase the likelihood of liability for disclosure in the secondary markets, as such topic is rightly the subject of other significant CSA initiatives.

Consequently, while we applaud the extension of the benefits of the short form prospectus system to a broader group of participants in the Canadian capital markets, we believe the Concept Proposal casts too broad a net. The modifications to the short form system can be accomplished by either recasting the Concept Proposal to deal only with those matters or,

preferably, by expanding the group of eligible short form issuers through amendments to the short form prospectus rule. Changes to the manner by which the accuracy of the content of secondary market disclosure documents is assured should be dealt with separately, and within CSA initiatives looking at liability for disclosure in secondary markets. Finally, for the reasons we discuss below, we believe initiatives relating to the regulation of marketing securities should address the marketing of all securities by all issuers; the changes suggested by the IDS do not necessarily lead to the conclusion that marketing practices for IDS issuers should be different.

Pilot Testing

We are strongly of the view that if the CSA decides to proceed with implementation of the IDS, it should not be introduced on a pilot basis. We hold this view for three reasons. Firstly, we believe that few issuers will perceive the IDS to offer sufficient advantages over the existing short form prospectus and shelf distribution procedures to outweigh the disadvantages of an increased compliance burden. Secondly, investors should not be presented with a two-tiered system of issuer disclosure. Investors should be entitled to receive the same quality of disclosure, regardless of whether the reporting issuer is an IDS participant. Thirdly, even though participation in the IDS would be voluntary during the pilot stage, its standards could become *de facto* standards for all participants in the capital markets, even those which had deliberately chosen not to participate in the test. We are concerned, for example, that a plaintiff could argue that a non-participant's failure to comply with the pilot IDS standards constitutes a negligent deviation from the appropriate market standard.

Submissions

If, in any event, the CSA determines to proceed with the IDS in essentially the form reflected in the Concept Proposal, we have the following comments concerning the Concept Proposal. Our submissions correspond with the questions set forth in the Notice.

Reporting Issuer in All Jurisdictions

1. **Should reporting issuer status in all CSA jurisdictions be a condition of IDS eligibility? What are the advantages and disadvantages of this approach? Would requiring all-jurisdiction reporting issuer status be a deterrent to IDS participation? If so, why?**

   We do not believe that all-jurisdiction reporting issuer status is an appropriate pre-condition to participation in the IDS. Issuers, particularly issuers with limited resources, should have the right, as they do now, to determine how their resources will be allocated. Such decisions will include costs of regulatory compliance. We see no compelling reason to introduce this requirement.

2. **Do you agree with the CSA's approach to language requirements under the IDS. If not, why not? Should IDS issuers be obligated to translate all continuous disclosure filings in jurisdictions in which they have previously filed a prospectus (IDS or otherwise) or in which they have a substantial investor base? If so, how would you suggest the CSA define "substantial investor base" for this purpose? Would the imposition of such a requirement be a significant disincentive to IDS participation? Do issuers normally provide investors on a voluntary basis with translated continuous disclosure documents to accommodate their language preferences?**

   We have concerns about the IDS translation requirements. The costs of translating all documents incorporated by reference can be significant both to smaller issuers and in respect of offerings which are not large or do not have a significant connection with the province requiring translation. It would be regrettable if investors in a province or provinces did not have the opportunity to participate in an offering because the issuer did not feel it would be a responsible use of corporate assets to incur translation fees. We also are concerned about the ability of the translation infrastructure, for both written text and the enhanced financial disclosure required of IDS issuers, to support the potentially significant increase in translation work. We would therefore recommend that the requirements to translate continuous offering documents be subject to exemptions depending upon the size of the issuer, the overall size of the offering, or the size of the portion of the offering in the province(s) requiring translation.

3. **Although the proposed IDS would harmonize the continuous disclosure requirements for participating issuers across Canada, differences in other reporting issuer obligations would continue to exist. Would this pose a significant burden on issuers? If so, why?**

   Ensuring compliance with diverse reporting issuer requirements in thirteen Canadian jurisdictions imposes a significant burden on all issuers, and this burden is particularly onerous for smaller issuers with limited resources to expend on compliance matters. We would encourage the CSA to hasten their efforts to harmonize all reporting issuer obligations in all CSA jurisdictions in anticipation of the introduction of the proposed IDS.

Seasoning Requirement

4. **Should "seasoning" be included as a condition of IDS eligibility? If so, what would be an appropriate seasoning period? Should the imposition of a seasoning requirement be dependent upon an issuer's revenues, assets or market capitalization?**

5. **Are there any advantages or disadvantages of a seasoning requirement not discussed above?**

We agree that, given advances in information technology and the high disclosure standard under the IDS, there is no significant additional benefit to be derived from the imposition a "seasoning" period as a condition of IDS eligibility.

Quantitative (Size) Requirement

6. **Should the IDS impose quantitative IDS eligibility criteria? If so, what should these criteria be, and why?**

We agree that the IDS should be broadly accessible and that the CSA should not impose quantitative IDS eligibility criteria, which can result in arbitrary exclusions. The decision to participate in the IDS should be largely at the issuer's option.

7. **Do larger issuers provide a higher quality of disclosure than smaller ones? Please explain.**

In our experience, issuer size is one of a number of factors which affect the quality of issuer disclosure. Other factors include issuers' financial and human resources and reliance on capital markets to meet on-going financing needs. The quality of issuer disclosure does not correspond directly to issuer size.

8. **Do you believe that the "analyst following" argument is relevant in today's markets? Please explain.**

We believe that high regulatory standards are critical to supporting timely and comprehensive disclosure. While analyst following may encourage issuers to maintain and improve their disclosure, we are not persuaded that the "analyst following" argument should lead to size restrictions on IDS eligibility.

IDS Continuous Disclosure

9. **Are there any disclosure items that should, or should not be, included in the proposed IDS AIF or QIF?**

10. **Are there any other continuous disclosure enhancements that should be included as part of the IDS? If so, should these enhancements be extended to all issuers?**

11. **Are there any specified events that should, or should not, trigger the filing of an SIF?**

We have concerns with the requirements concerning SIFs which require a SIF to be issued when an acquisition or disposition is "probable". We see no reason to depart from current materiality standards and have significant reservations about the difficulty the introduction of such a standard would introduce for issuers and their advisors. Similarly, we do not understand how issuers could comply with the requirement to issue a SIF upon forming a "reasonable expectation" of a prospectus distribution. Many issuers live in continuous hope of completing a prospectus distribution; who can say with certainty precisely when this hope becomes a "reasonable expectation". Further, we are concerned that there may be unintended consequences arising from the interaction between this requirement and the new marketing rules contained in the Concept Proposal.

12. **As an alternative to requiring the filing of an SIF for changes in an IDS issuer's name and auditor as outlined in Part III.C.1(a)(iii) of the Concept Proposal, should an IDS issuer's SEDAR profile (which could include such information) be included in its IDS disclosure base? Given that an issuer's SEDAR profile is a changing document, an IDS issuer would disclose these changes by filing an amended copy of its SEDAR profile under cover of an SIF.**

Capital markets participants have come to rely on issuers' SEDAR profiles as a useful source of information. Unfortunately, the information contained in these profiles is not always current. We would support expanding the scope of information available on the SEDAR profile. We agree that including the SEDAR profile as part of an issuer's IDS disclosure base would be a practical way to update changes in corporate information and we believe that the introduction of this requirement would increase the reliability of issuers' SEDAR profiles.

13. **The CSA propose to require IDS issuers to file SIFs containing prospectus-level disclosure about all completed business combinations within 75 days. Is the 75 day deadline appropriate? Are there business combinations for which the 75 day deadline or the prospectus-level disclosure requirement cannot be met?**

We support the 75 day proposal, but only for *pro forma* financial information concerning the completed business acquisition. We believe any higher standard of disclosure in such a relatively short time period could impose an undue and unjustified burden on the issuer. Further, we believe our proposal reflects current U.S. requirements.

14. **The CSA believe that IDS AIFs and QIFs should be delivered to investors in compliance with existing statutory requirements. As discussed in Part III.E of the Concept Proposal, the CSA would permit the delivery of all IDS disclosure documents by electronic means in accordance with the principles set out in National Policy 11-201 *Delivery of Documents by Electronic Means*. Should alternative**

methods of delivery of IDS AIFs and QIFs be permitted under the IDS? If so, which methods would you suggest?

We support the delivery of IDS disclosure documents by electronic means in accordance with the principles set out in National Policy 11-201. We further support drafting the instrument broadly enough to permit other delivery means as they evolve.

15. **The CSA propose to require that interim financial statements filed as part of an issuer's continuous disclosure record have been reviewed by the issuer's audit committee and approved by the issuer's board of directors or equivalent. The CSA are also considering requiring that interim financial statements have been reviewed by an auditor, as required in the United States. Would such a requirement be appropriate? If not, why not?**

We support the CSA proposal to require that interim financial statements be reviewed by the issuer's audit committee, approved by the issuer's board of directors, and reviewed by the issuer's auditor. We believe that the competitiveness of Canadian capital markets is enhanced by raising Canadian continuous disclosure standards to U.S. levels.

Certification

16. **Would the proposed certification requirements materially affect the extent to which signatories participate in the preparation of IDS continuous disclosure documents? Are there practical impediments to the certification of such documents?**

As discussed above under the heading "General", we strongly oppose the introduction in this Concept Proposal of a certification requirement. It raises a possibility of liability for secondary market disclosure, without any consideration being given to when such liability should actually be incurred, by whom, to whom, in what amount, and the defences which should be available.

17. **Is the "full, true and plain disclosure of all material facts" standard of disclosure attainable on a timely basis in connection with IDS continuous disclosure filings? If not, why not? What alternative disclosure standard would be appropriate given the objectives of the integrated disclosure system? Would an alternative misrepresentation standard be more appropriate for some continuous disclosure documents (i.e., "The foregoing does not make a statement that, in a material respect and in the light of the circumstances is misleading or untrue and does not omit a fact that is required to be stated or that is necessary to make the foregoing not misleading")?**

Subject to our comment in item 16, we support a "no misrepresentation" disclosure standard for IDS continuous disclosure filings. We are concerned whether any single

document (such as a SIF) could by itself constitute "full, true and plain disclosure of all material facts". We support the suggested alternative standard.

Involvement of Advisers in Continuous Disclosure

18. **Is it realistic to expect that advisors will become more involved in continuous disclosure in order to address increased time pressure at the time of an IDS prospectus? Alternatively, will the expedited offering process result in a deterioration of the due diligence conducted by advisors in respect of information incorporated by reference in a prospectus? If so, how would this affect the ability of underwriters to certify the prospectus?**

The expedited offering process under the IDS presents challenges which are similar to those involved in short form prospectus and shelf distribution offerings. It may not be reasonable to expect that the level of involvement of advisors in the preparation of continuous disclosure documents will ever reach the level of their involvement in a traditional long-form prospectus.

Delivery of the Preliminary IDS Prospectus

19. **Do preliminary and final prospectuses assist investors in making their investment decisions and is it relied upon for this purpose today? If not, on what basis are investors in the primary market currently making their investment decisions?**

We believe that the preliminary prospectus continues to serve an important function in investors' decision-making process. Investors in the primary market also rely on road shows, analysts reports, retail investment advisors and issuers' continuous disclosure base when making their investment decisions. We believe that the final prospectus adds little additional value for primary market investors, as the final prospectus is delivered after the investment decision has been made.

20. **As discussed in Part III.D.4(a) of the Concept Proposal, the CSA considered specifying the timing of the delivery of the preliminary IDS prospectus to ensure that a prescribed minimum period of time would be available to an investor before an investment decision becomes binding. Would a prescribed minimum preliminary IDS prospectus delivery period (for example, a specified number of days before pricing or the signing of a subscription agreement) be suitable for all investors and all situations? If so, what would be an appropriate period of time? If not, why not?**

We do not perceive any need to specify a minimum preliminary IDS prospectus delivery period. The time required to evaluate the purchase of a security depends largely on the nature of the offering. The prospectus delivery period will be driven largely by

marketing considerations and we are of the view that market forces, together with the statutory rescission period, offer investors sufficient protection.

21. **Should the IDS require filing and delivery of the preliminary IDS prospectus? Should alternative methods of delivering the preliminary IDS prospectus be permitted? If so, how?**

We support maintaining the requirement to file and deliver the preliminary IDS prospectus. If alternative prospectus delivery methods are introduced, they should be available to all offerings and not just IDS offerings.

Content of IDS Prospectuses

22. **Are the preliminary IDS prospectus disclosure items outlined in Part III.D.2(a) of the Concept Proposal appropriate to ensure that an investor can make an informed investment decision? Please explain.**

We believe that the proposed IDS prospectus disclosure items are appropriate.

23. **What are the advantages and disadvantages of a streamlined form of final IDS prospectus? Which form of final IDS prospectus would issuers and investors prefer? Should the traditional form of final IDS prospectus be mandatory? If so, why?**

We support the proposal to introduce a streamlined form of final prospectus. The traditional form of final prospectus plays little or no role in the initial purchaser's investment decision (although it may be relied upon by investors in the secondary market). The streamlined form of final prospectus would be of much greater utility to purchasers in the primary market, as it would highlight new information from the date of the preliminary prospectus. We believe that the streamlined form of final prospectus would also be welcomed by issuers, who would benefit from reduced printing and distribution costs. We do not believe that both a streamlined and a traditional form of final prospectus should be alternatives available to issuers; there should be only one permitted form of final prospectus.

IDS Marketing Regime

24. **Is the proposed definition of "marketing communication" in the IDS appropriate? What types of communications should be excluded from the definition, and why?**

25. **What are your views concerning the proposed IDS marketing restrictions? Are others necessary for investor protection purposes? Would the proposed IDS marketing restrictions restrict valid corporate communications?**

26. **How should "distribution period" be defined for the purposes of determining which written marketing materials must be incorporated by reference in an IDS prospectus? Should it be defined as commencing a specified number of days (e.g., 15 days) before the first offer of the securities, upon the filing of the preliminary IDS prospectus or some other event? When should the distribution period be considered terminated for this purpose?**

We have not fully canvassed all of the possible ramifications of the proposed IDS marketing regime. We are concerned, however, about the effect of this section of the Concept Proposal, which will begin to treat marketing documents as offering documents or continuous offering documents. We firmly believe that issuers should not be responsible or liable for the contents of documents they have not been involved in preparing. Liability for misrepresentations in marketing documents should attach to the person or entities preparing or distributing such documents unless the issuer has specifically instructed the person or entity to prepare or distribute such a document, and has approved its form and content and its use for that purpose Further, it will be difficult for advisors to assist clients in determining *a priori* whether any particular material "pertains" to an offering.

We are also concerned about the possibility of having two marketing regimes existing concurrently – one for IDS issuers and one for non-IDS issuers. However, we do not believe the solution is to eliminate the non-IDS marketing rules. Ultimately, we are not convinced that more secondary market disclosure changes the marketing concerns that the current marketing regime attempts to address. Our view is that two sets of marketing rules would be untenable, and this view underlies in large part our strong recommendation that IDS not be tested on a pilot basis.

For the purposes of determining the "distribution period", we would support a bright line test commencing at the time the issuer determines to effect an offering and terminating upon the cessation of offers and sales under the final IDS prospectus. We do not believe that an issuer should be required to incorporate by reference, and assume liability for, any document prepared prior to its determination to effect an offering and without its prior review and approval.

Proposals for Changes Outside the IDS

27. **Should the IDS disclosure enhancements be broadly applied to all issuers?**

28. **The CSA propose to extend to non-IDS issuers the IDS certification requirements discussed in Part III.B.1 of this Notice and Part III.C.2(c) of the Concept Proposal. Does this raise concerns unique to non-IDS issuers? If so, what are they?**

29. **Should the IDS marketing restrictions discussed in Part IV.B be broadly applied to non-IDS offerings?**

30. **Are there any other elements of the IDS that should be broadly applied to all issuers?**

We strongly support the extension of certain of the IDS disclosure enhancements to all issuers. In particular, we support the proposed upgraded content of annual and interim reports, and accelerated filing periods for annual reports and interim reports.

We are concerned, however, that reconciliation to Canadian GAAP for interim financial statements would represent a disincentive for participation in Canadian capital markets. We are of the view that reconciliation to Canadian GAAP and GAAS in annual financial statements would be adequate to meet the needs of Canadian investors.

Pilot Introduction of the IDS

31. **Would issuers be interested in participating in the pilot introduction of the IDS? If not, why not?**

32. **Would issuers who are currently eligible to use the prompt offering qualification system be interested in participating in the pilot introduction of the IDS? If not, why not?**

33. **What do you perceive as the main benefits of the IDS, as compared with the existing distribution procedures?**

34. **If the IDS proves to be a successful alternative to the short form prospectus and shelf distribution systems, the CSA will consider eliminating the short form and shelf distribution procedures for IDS-eligible issuers. Is this appropriate? If not, why not?**

We believe that relatively few issuers will perceive the IDS to offer significant advantages over the existing short form prospectus and shelf distribution procedures when compared with a significant increase in reporting issuers' compliance burden. Accordingly, there will be little incentive for issuers to participate in the pilot introduction of the IDS unless and until the continuous disclosure enhancements set forth in the Concept Proposal are extended to non-IDS offerings. We are also concerned that if the continuous disclosure enhancements set forth in the Concept Proposal are not applied to all issuers, then investors would be presented with a two-tiered system of issuer disclosure. In our view, investors should be entitled to receive the same quality of disclosure, regardless of whether the issuer is an IDS participant.

In the event that the continuous disclosure enhancements set forth in the Concept Proposal are applied universally and take effect simultaneously, the IDS will offer several compelling advantages. Issuers who are not eligible to use the short form prospectus or shelf distribution procedures will be eligible to use streamlined procedures under the IDS. Issuers who are eligible to use short form prospectus or shelf distribution procedures would benefit from faster and more predictable timing when qualifying a prospectus distribution.

We are pleased to have had this opportunity to review and comment on the Concept Proposal. If you have any questions or comments, please contact Janet Salter at (416) 862-5886, Robert Lando at (416) 862-5928 or Carl DeLuca at (416) 862-6535.

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP

MJS/RCL/CJD