June 19, 2000

DELIVERED

Mr. John Stevenson
Secretary
Ontario Securities Commission
20 Queen Street West
Suite 800, Box 55
Toronto, Ontario M5H 3S8

Dear Mr. Stevenson:

Proposed OSC Policy 57-603 – Defaults by Reporting Issuers in Complying with Financial Statement Filing Requirements

We are writing in response to the Request for Comments relating to the above-referenced instrument (the "Proposal"), published at (2000) 23 OSCB 2368. As requested, a diskette containing a duplicate of this letter is enclosed.

We have few conceptual comments on the Proposal, which we fully support. With regard to the particulars of the Proposal we would make the following comments:

1. With respect to the terms "directors, officers or insiders" within the Section 1.1 definition of "Defaulting Management and Other Insiders," it is unclear in our view whether the term "insider" in this context, is intended to differ from the meaning of "insider" under securities legislation which would typically be defined to *include* directors and senior officers. Given the use of the more general term "officer" in this same definition, rather than "senior officer" we wonder whether the intent was to capture a broader group of executives within the reporting issuer's management. If this is in fact the case, we would suggest that more specific language be considered by the Commission.

2. With regard to this same definition, we wish to address the concept of the "period covered by the financial statements" and, in particular, the categorization of all "directors, officers or insiders" during such period as "defaulting management". In our view this may cast too broad a net over the management of a reporting issuer and covers too long a time period given the potential consequences of default. The following example outlines our concern: a director resigns on January 2, 2000 from the board of a reporting issuer with a December 31 fiscal year end. The issuer files quarterly financial statements during the 2000 fiscal year but defaults in filing the annual financial

statements of the issuer for the year ended December 31, 2000, which default occurs in April of 2001. The director in this case has had no dealings with, and no responsibility for, the affairs of the reporting issuer for some fifteen months. In our view, it appears rather onerous to include this director in "defaulting management", despite him having been a director "during the period covered by the financial statements." In addition, given the possible broad interpretation of the term "financial statements" it may also be useful to specify that the "period covered by the financial statements" does not include the periods relating to the comparative or historical financial statements, which are presented as a part of such "financial statements". Consistent with our comment number 1 above, it is also unclear whether the term "management" as used in the definition of "Management and Insider Cease Trade Order" is intended to capture management other than "directors, officers or insiders".

3. Section 2.1 – "Principles, Criteria and Other Factors" states that generally the Management and Insider Cease Trade Order will be the only Cease Trade Order issued by the Commission if "*the default* is corrected within two months of the date of the default." We would suggest referring instead to "the default and any subsequent defaults" to make it clear, for example, that the Commission will take action if the issuer has corrected a default in filing annual financial statements but prior to such correction has defaulted in filing first quarter financial statements.

4. It would be desirable in our view, if the Commission would add a definition for the term "insolvency proceedings" and remove the parenthetical reference to the *Companies' Creditors Arrangement Act* ("CCAA") and to *Part III* of the *Bankruptcy and Insolvency Act* which currently appears at Section 2.2. We feel that a broader interpretation of this term may be useful and raise as an example the possibility of a U.S. or other foreign issuer being the subject of domestic "insolvency proceedings" which would not appear to entitle the reporting issuer to the benefit of Section 2.2. It may, as a result, be appropriate to draft a non-exhaustive or open-ended definition for the term "insolvency proceedings" to ensure the applicability of this section to all reporting issuers in Ontario. We also would mention that a restructuring effected under the CCAA often requires more than two months to implement and it is unclear whether the "limited period beyond two months" is flexible enough to fully accommodate such a restructuring as appears to be the intention of this Section.

5. With regard to the "Default Announcement", as drafted, Section 3.1 would require the issuer to make an announcement not only upon the initial default, but also with respect to each subsequent default. In light of the issuer's other ongoing reporting requirements, we are of the view that requiring a new Default Announcement for subsequent defaults may be unnecessary. In addition, with regard to the Policy's statement to "disclose *in detail* the reason for the (anticipated) default" it should be noted that the reasons may be highly confidential in nature and the mandated disclosure of sensitive information, or the

premature disclosure of information, could be harmful to the market and the reporting issuer. Reporting issuers remain subject to continuous disclosure obligations and in our view, the Policy's expansion of such obligations in this context would appear unnecessary. This latter comment applies equally to the "status report" obligation created at paragraph (iii) of Section 3.2.

6. Paragraph (vii) of Section 3.1 states that disclosure of material information concerning the affairs of the reporting issuer "may include unaudited financial statements." We would note that this would be inappropriate and potentially harmful to the market where the very reason for the default is delay in obtaining the approval and sign-off of the auditors. Language should perhaps be considered which would clarify that such disclosure is not required in all cases and that the reporting issuer may be permitted to justify the non-disclosure of unaudited financial statements. This comment also applies to the disclosure of unaudited financial information discussed in Section 3.4 of the Policy.

7. A further comment with respect to Section 3.2 would be to consider inserting the word "material" between the words "any" and "changes" as used in the first paragraph of this Section. In our view, the correction of clerical errors or other changes which are not material should not require the issuance of a further press release.

8. With respect to the disclosure required at Section 3.3, we note that the requirement to "file a report disclosing the same information it provides to its creditors" may be unduly burdensome for reporting issuers in certain circumstances. An example may be the situation where a reporting issuer has prepared a 300^{+} page information circular in connection with a proposed CCAA arrangement transaction. To provide "the same information" in the same manner as a news release and report of a material change may be impracticable in such circumstances. The information disclosed to certain creditors may also have been done on a confidential basis. The Commission may wish to consider alternatives for making such information publicly available including, for example, through the use of an issuer's website.

9. Finally, and as a general comment, we would caution against the wholesale application of the Policy to "other continuous disclosure obligations" as stated in Section 6.1. For example, in our view it would not be appropriate to apply with full force the strictures set out in the Policy to an issuer which filed its annual and quarterly annual financial information (including Management's Discussion and Analysis) and all required material change reports and otherwise complied with its continuous disclosure obligations other than its requirement to file an annual information form.

We are pleased to have had the opportunity to comment on the Policy. Should you have any questions or comments please feel free to contact either of the following lawyers:

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Yours very truly,

OSLER, HOSKIN & HARCOURT LLP

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