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December 13, 2001

BY COURIER

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

Dear Mr. Stevenson:

Re: Proposed Amendments to OSC Rules 45-502 and 45-503 and Proposed Rescission of OSC Rule 72-501 (the "Proposal")

This submission is in response to the Ontario Securities Commission's (the "OSC") request for comments dated September 14, 2001 with respect to the above noted Proposal. The following comments are primarily in relation to the Proposal as it affects Rule 45-503 and its impact on issuers seeking to offer stock, options, awards, rights and other equity-based incentives to employees resident in Ontario and those seeking to re-sell such securities.

We commend the OSC for moving forward with a Proposal whose goal is to enhance the regulatory framework by reducing the need for applications in the circumstances specified in the Proposal, as more particularly commented on below. We have some comments regarding additional changes that should be considered for implementation by the OSC. The following comments will focus on the proposed issuer bid exemption, registration exemptions for first trades in shares acquired under an equity incentive plan and foreign companies with employees in Ontario.

1. The Issuer Bid Exemption

The ability of issuers to take advantage of the existing issuer bid exemptions as set out in s. 93(3)(d) of the *Securities Act* (Ontario) (the "OSA"), without seeking additional relief, has been hampered by the requirements of determining "fair market value" as prescribed under Ontario's securities legislation. We are of the view that it is important that an effective issuer bid exemption exist since it is often the case that the only practical way in which employees can take advantage of options awarded to them, is for the employee to tender shares of the employer as consideration for the exercise price of the option – the so-called 'cashless' exercise feature of many equity incentive plans. The proposed approach addresses this issue by allowing the value of the security to be determined through a service provider plan that specifies how the value of the securities acquired shall be determined. As you are probably aware, the vast majority of foreign issuer stock incentive plans contain a provision for the calculation of the fair value of shares tendered in connection with the exercise of an option.

Of equal significance to the issuer bid exemption availability in circumstances where the participant in effecting a cashless exercise to acquire shares is the change in control provisions contained in many stock option and purchase plans. Such plans frequently contain a provision allowing the issuer, in the event of a change in control, to repurchase outstanding options. It is submitted that the exemption from the issuer bid provisions of the OSA contained in the Proposal be extended to allow the repurchase, in the event of a change of control of the issuer, of securities issued under a stock incentive plan without triggering the issuer bid requirements on the same basis as outlined above. We would suggest to you that in a change of control situation, putting employee option holders on the same footing as other shareholders is only fair – to do otherwise has the potential to disenfranchise the employee-option holders and potentially render their options

worthless. The request for a decision to exempt a company from the issuer bid rules where the securities are acquired owing to a change in control is a form of relief frequently sought by this Firm from the relevant securities regulators and, for the reasons noted above, is frequently granted by securities regulators.

2. First Trade in Shares Issued Under an Employee Equity Incentive Plan

We commend the OSC for taking the initiatives outlined in the Proposal. We would suggest to you, however, that there are certain circumstances outlined below, where the Proposal should expand the exemptions currently available under Rule 45-503. Those circumstances relate to the classes of individuals who are eligible to take advantage of the exemptions from the registration requirements for first trades in securities obtained pursuant to an employee equity incentive plan.

First, there does not appear to be an any relief contained in the Rule from the registration requirements where the first trade in the security is being effected by the legal personal representatives or the beneficiaries of the estate of a deceased employee. We are not aware of any policy rational for not extending relief to such individuals.

Second, there does not appear to be any relief from the registration requirements where a former employee who acquired securities pursuant to an option while he was employed by the company but exercised the option as a former employee, trades the underlying security. It is submitted that there is no policy rational for not extending relief to such individuals.

3. Foreign Companies With Employees in Ontario

There have been instances where, because of the domestic laws affecting foreign issuers, a foreign issuer has had difficulty in providing equity incentive plans to its employees in Canada generally, and in particular, in Ontario. A good example of this issue is the Air France case ((1999), 22 OSCB 1012). In this case, as a result of French securities legislation, Ontario employees of Air France could only acquire Air France equity incentives through obtaining Units from a separate Fund (established pursuant to the legislation of the Government of France), and not directly from Air France. As a result, the exemptions specified in Rule 45-503 were not available because there was no direct employee relationship between the issuer of the securities (the Fund) and the employees. An application for relief was required and subsequently granted by the OSC. We are also familiar with other intermediary vehicles, such as off-shore trusts, that are established under U.K. laws to administer equity incentive programs but which do not clearly come within the rules.

It is submitted that circumstances such as these could be addressed by amending Rule 45-503 such that the Rule would apply where there is a direct employee–employer relationship or to cases where a third party, such as a government mandated Fund or an employee trust, is actually issuing securities representing security of the employer company to employees as a part of a common equity incentive plan, as a result of foreign

securities legislation. A possible solution is to consider broadening the definition of "Plan Administrator" contained in the Rules.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

Sean L. Morley

SLM/nr

cc. Eric Belli-Bivar