June 5, 2003

DELIVERED

The 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
Department of Government Services and Lands,
Newfoundland and Labrador
Registrar of Securities, Northwest Territories
Registrar of Securities, Yukon
Registrar of Securities, Nunavut

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

Dear Sirs/Mesdames:

Proposed Multilateral Instrument 55-103 *Insider Reporting for Certain Derivative Transactions (Equity Monetization)*

This letter responds to the Notice of Proposed Multilateral Instrument 55-103 and Companion Policy 55-103CP – Insider Reporting for Certain Derivative Transactions (Equity Monetization) published at (2003) 26 OSCB 1805 (the "Multilateral Instrument"). As requested in the Notice, this letter is being provided in duplicate, and a diskette containing the submission is also enclosed. Defined terms used in the Multilateral Instrument will be used in this comment letter.

1. General Approach of the Multilateral Instrument

We agree with the initiative of the Canadian Securities Administrators ("CSA") to ensure that there is disclosure by insiders of a disposition of their economic interest in, or economic exposure to, securities of the reporting issuer of which they are an insider. Such disclosure is important for the public marketplace, particularly where an insider's previously reported

ownership of securities of a reporting issuer has been modified by the insider such that the insider is no longer exposed, in whole or in part, to the economic performance of the reporting issuer, as reflected in the share price of the securities owned by the insider.

However, we believe that in attempting to regulate to ensure that this reporting is provided by insiders, the CSA has cast too broad a net. The Multilateral Instrument subjects an excessively wide range of activities to scrutiny and then includes several very broadly drafted exemptions to distinguish activities which are not intended to be caught by the Multilateral Instrument.

The principal problem with the approach taken in the Multilateral Instrument is that the definition of “economic exposure”, a term used in paragraph (i) of subsection 2.1(a), is overly broad in making reference to “the economic, financial or pecuniary interests of the reporting issuer.” This goes beyond the relationship between the issuer and the securities of the issuer. As a consequence, the reporting requirement in section 2.1 applies to *any* insider who enters into *any* agreement, arrangement or understanding which alters the extent to which the economic, financial or pecuniary interests of the insider are aligned with those of the reporting issuer. The result is that a large number of transactions with insiders will be subject to scrutiny under the Multilateral Instrument which have nothing to do with transactions which can be the subject of an equity monetization. Not only would compensation arrangements between the reporting issuer and its insiders be subject to scrutiny by virtue of section 2.1, but section 2.1 could even encompass a commercial supply contract between the reporting issuer and a significant shareholder of the reporting issuer. Insiders would then have to review the nature of the agreement, arrangement or understanding to establish whether one of the exemptions set out in section 2.2 of the Multilateral Instrument is available in the circumstances. Given the broad ambit of section 2.1, it is likely that arrangements which have no relationship to an equity monetization will emerge which cannot access an exemption in section 2.2, likely due to technicalities of the wording of the exemptions.

The drawbacks of this approach are that it imposes high costs on insiders who must seek to comply with the Multilateral Instrument, it is more difficult for insiders to comply with insider reporting obligations without the benefit of professional advice and, therefore, there is a greater likelihood of errors being made. If for technical reasons an exemption is not available in appropriate circumstances, the result will be time and not inconsiderable expense to the insider, especially if (given the new fees in Ontario for filing applications for exemptive relief) the insider needs to seek relief from the application of the Multilateral Instrument.

If, as stated in the Companion Policy to the Multilateral Instrument, the intention is to reduce uncertainty as to when arrangements and transactions are subject to an insider reporting requirement and the Multilateral Instrument is not intended to change the existing approach to reporting (or not reporting) compensation arrangements, then the approach adopted by the Multilateral Instrument likely fails to achieve such purposes. In our view, a more focussed view of the transactions to which the Multilateral Instrument should apply should be adopted. As a

suggestion, we submit that the following, which basically is the converse of the exemption in subsection 2.2(a), if adopted as the substantive reporting requirement would meet all of the concerns that the Multilateral Instrument is seeking to address:

> an agreement, arrangement or understanding which involves, directly or indirectly, an interest in a security of the reporting issuer or a derivative in respect of which the underlying interest is or includes as a material component a security of the reporting issuer.

The reporting obligation which this Multilateral Instrument is attempting to impose should only apply to changes in the insider's economic exposure to the performance of the reporting issuer.

2. <u>Specific Comments</u>

We have a number of specific comments on certain elements of the Multilateral Instrument. To some extent these are illustrative of our general concern noted above.

(a) Section 2.1 appears to require insiders who enter into a compensation arrangement with a reporting issuer pursuant to which they are entitled to receive cash or securities to file an insider report disclosing the existence and material terms of the compensation arrangement. Subsection 2.2(b)(i) provides an exemption from this insider reporting requirement if the compensation arrangement between the insider and the reporting issuer is described in certain publicly filed disclosure documents prepared by the reporting issuer. However, the exemption only permits the insider to rely upon it if the *reporting issuer* has disclosed sufficient information about the compensation arrangement. Therefore, the insider is not in control of whether the exemption is available to it. Furthermore, as the exemption in subsection 2.2(b)(i) states that the disclosure must be of the compensation arrangement "between the insider and the reporting issuer", it would appear, on its face, that the disclosure cannot simply be of the general terms of a compensation plan applicable to any number of insiders, but must be and specific information in respect of that particular insider's compensation arrangement. Currently, the executive compensation disclosure required under securities legislation only requires such specific breaking out of compensation information in respect of the CEO and the next four most highly compensated officers of a reporting issuer. The exemption should therefore be recast to ensure that, at most, general disclosure concerning a plan is sufficient.

(b) Subsection 2.2(a) is currently too narrow. Any understanding which indirectly involves a security or a derivative will not be exempt under this provision. Subsection 2.2(a) should be revised to apply to any agreement, arrangement or

understanding which does not involve, directly or indirectly, "*an interest in*" a security of the reporting issuer or a derivative.

(c) Subsection 2.2(b)(ii) requires that the terms of the compensation arrangement be set out in a written document and the alteration to the economic exposure or economic interest of the insider results from satisfaction of pre-established criterion or condition set out in *the* written document. In our experience, many compensation plan documents set out the general terms of the plan but the specifics of the grant of the compensation is done by way of a board resolution. Technically, this would not comply with the wording of 2.2(b)(ii). We suggest that the words "in the written document" be replaced with "in writing".

3. <u>Retroactive Application of the Multilateral Instrument</u>

Section 2.3 provides that insiders who have entered into equity monetization transactions prior to the effective date of the Multilateral Instrument which are still in force at the effective date, and which would have had to have been reported if the Multilateral Instrument had been in effect on the date the transaction had been entered into, will be required to report those transactions. The Notice accompanying the Multilateral Instrument states that if "insiders are not required to disclose such pre-existing arrangements, the market will have no way of determining whether an insider's publicly reported holdings truly reflect the insider's economic position in the insider's reporting issuer".

We agree with this statement. Nevertheless we have a grave concern with requiring reporting of pre-existing arrangements. At the time such arrangements were entered into, there was no requirement to make public disclosure of them. It is likely this was a consideration to certain insiders who entered into the arrangement. There may have been a concern that disclosure of the insider's disposal of its economic exposure to the share performance of the issuer could cause a downward effect on the trading price of the shares. We agree that the Multilateral Instrument seeks to ensure this transparency, precisely so that the market price of the shares reflects such a disposition, and we agree that this result should take effect for every transaction going forward. However, if disclosure of pre-existing arrangements causes a decrease in share price now, then it is current investors who will suffer the economic consequence. It does not, in our view, seem right that they bear any risk of loss arising as a result of the disclosure. More importantly, the insider, who long ago hedged his/her/its economic exposure to the share price of the issuer, will be the one person or entity who will not bear any economic risk or impairment from the disclosure.

We submit that the unintended result of economically penalizing current investors for a pre-existing transaction of an insider, particularly when the insider will be immune from any economic consequence in respect of the securities which were the subject of the transaction, is not supportable on a public policy basis. The need for full information in the marketplace must

be outweighed by the cost to innocent investors of making the information about pre-existing transactions transparent.

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We appreciate the opportunity to have commented on the proposed Multilateral Instrument. If you have any questions or comments please feel free to contact Randall Pratt at 416.862.5908; Andrew MacDougall at 416.862.4732; Mark DesLauriers at 416.862.6709; Steven Smith at 416.862.6547 or Janet Salter at 416.862.5886.

Yours very truly,

OSLER, HOSKIN & HARCOURT LLP

JS:vkl
Enclosure