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May 5, 2006

Office of Mergers & Acquisitions  
Division of Corporation Finance  
Securities and Exchange Commission  
100 F. Street, NE  
Washington, D.C. 20549

**Attention: Brian V. Breheny and Michelle Anderson**

Ladies and Gentlemen:

**Re: Canada Pension Plan Investment Board - Request to Report on Schedule 13G as a Qualified Institutional Investor**

We are counsel to the Canada Pension Plan Investment Board (the “CPP Investment Board”) and are writing on its behalf to request the assurance of staff (“Staff”) of the United States Securities and Exchange Commission (the “Commission”) that it will not recommend enforcement action to the Commission if the CPP Investment Board reports beneficial ownership of equity securities of an issuer registered pursuant to Section 12 of the Securities Exchange Act of 1934, as amended (the “1934 Act”) (“registered equity securities”) pursuant to Section 13(d) of the 1934 Act on Schedule 13G in those circumstances in which ownership could be so reported if the CPP Investment Board was a qualified institutional investor meeting the requirements of Rule 13d-1(b)(1)(ii). This request is being made only with respect to investments made in the ordinary course of business and not with the purpose or effect of changing or influencing the control of the issuer, or in connection with or as a participant in any transaction having such purpose or effect.

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## 1.0 Background

The CPP Investment Board was established as a corporation under the *Canada Pension Plan Investment Board Act* (the “CPP Investment Board Act”), an Act of the Parliament of Canada, and is governed by the CPP Investment Board Act and the Regulations made thereunder (“CPP Investment Board Regulations”). All of the share capital of the CPP Investment Board is held by the Minister of Finance of Canada (the “Minister of Finance”).

The objectives of the CPP Investment Board under the CPP Investment Board Act are to manage amounts that are transferred to it by the Canada Pension Plan which is a retirement income and supplementary benefit program established by an Act of the Parliament of Canada and administered by the Government of Canada on behalf of all Canadian provinces and territories (except for Quebec) for the benefit of their citizens, and to invest its assets with a view to achieving a maximum rate of return, without undue risk of loss, having regard to the factors that may affect the funding of the Canada Pension Plan and the ability of the Canada Pension Plan to meet its financial obligations. The CPP Investment Board does not manage any assets, other than those that are transferred to it under the Canada Pension Plan.

The CPP Investment Board is the sole provider of investment management services to the Canada Pension Plan. It currently manages approximately Canadian \$90 billion, for the most part passively, and expects to manage in excess of Canadian \$160 billion in assets by 2014.

Pursuant to Rule 13d-3, the CPP Investment Board is the sole beneficial owner of all of the registered equity securities managed by it as it has all voting and dispositive control over those securities and, pursuant to the statutory scheme governing the Canada Pension Plan, the CPP Investment Board Act and the CPP Investment Board Regulations, the Canada Pension Plan has no ability to terminate or replace the CPP Investment Board as the manager of the assets held by it. Consequently, the Canada Pension Plan does not beneficially own any registered equity securities for the purposes of Section 13(d) of the 1934 Act.

The CPP Investment Board is eligible to report on Schedule 13G as a “passive investor” pursuant to Rule 13d-1(c). It is not one of those persons specified in Rule 13d-1(b)(1)(ii)(A)-(J) and, consequently, is not eligible to report on Schedule 13G in accordance with the timing available to a “qualified institutional investor”. The CPP Investment Board currently owns beneficially more than 5% of a class of registered equity securities of several issuers in respect of which reports on Schedule 13G as a “passive investor” have been filed.

The CPP Investment Board Regulations establish the requirements for a written statement of investment policies, standards and procedures (the “Investment Statement”) in respect of the CPP Investment Board’s portfolio of investments, and they also establish limitations on investments, including a prohibition on any direct or indirect investment in the securities of a corporation to which are attached more than 30% of the votes that may be cast to elect the directors of that corporation. Pursuant to the CPP Investment Board Regulations, the

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board of directors of the CPP Investment Board (the “Board of Directors”) is required to review the Investment Statement at least once each financial year.

The Canadian Pension Plan provides retirement pensions in respect of employment funded through contributions made by employers and employees and, as such, is the functional equivalent of a large U.S. private pension fund and the investment regime under the CPP Investment Board Regulations is substantially similar to the investment regime applicable to U.S. pension funds under the Employee Retirement Income Security Act of 1974 (“ERISA”).

The CPP Investment Board has the capacity of a natural person and its business is managed and supervised by a board of directors appointed by the Governor in Council (being the federal cabinet in the Canadian parliamentary system) on the recommendation of the Minister of Finance in consultation with provincial finance ministers. The Board of Directors is required to establish, and has established, an audit committee and an investment committee.

The Board of Directors is required to send copies of unaudited quarterly financial statements to the Minister of Finance and the appropriate provincial Ministers within 45 days after the end of the three month period to which they relate and thereafter to make the statements public and also is required to provide the Minister of Finance and the appropriate provincial Ministers with an annual report on the operations of the CPP Investment Board (the “Annual Report”) within 60 days of the end of each financial year. The Annual Report is tabled in the Parliament of Canada and is made available to the public.

The Annual Report is required to include (i) audited annual financial statements in the form set out in the CPP Investment Board Act, (ii) a certificate of the Board of Directors stating that the investments of the CPP Investment Board held during the year were in accordance with the CPP Investment Board Act and the Investment Statement; and (iii) a statement of the CPP Investment Board’s investment policies, standards and procedures and information regarding the objectives of the CPP Investment Board.

The Minister of Finance is required to cause a special examination to be carried out at least once every six years in respect of the CPP Investment Board and its subsidiaries to determine if financial and management control and information systems and management practices are maintained in a manner that provided reasonable assurance that (i) its assets are safeguarded and controlled; (ii) its financial, human and physical resources are managed economically and efficiently; and (iii) its operations are carried out effectively. The Minister of Finance is required to consult with the appropriate provincial Ministers before a special examination is conducted. In addition, the Minister of Finance may, at any time, appoint an auditor to conduct a special audit of the CPP Investment Board or any of its subsidiaries.

Under Canadian securities legislation, specified institutions are eligible, subject to satisfying certain conditions, to participate in the Canadian alternative early warning regime for the reporting of beneficial ownership of substantial holdings of voting or equity securities of issuers that are reporting issuers under Canadian securities laws (a “reporting company”). The

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alternative early warning regime is intended to provide the market with a level and frequency of disclosure that is appropriate for holdings of securities of Canadian reporting companies by passive institutional investors and to reduce the administrative burden that would otherwise be imposed upon such investors by the early warning reporting regime.

The CPP Investment Board has obtained a decision of the Canadian securities regulatory authorities which allows it to participate in an alternative early warning reporting regime that is available to certain eligible institutional investors only as if it was an eligible institutional investor.

Under the Canadian alternative early warning reporting regime, the CPP Investment Board is required to report within ten days following the end of a month in which (i) it increases its beneficial ownership of the outstanding securities of a class of voting or equity securities of a reporting company to 10 % or more; (ii) it increases or decreases its beneficial ownership of voting or equity securities of a reporting company that are in excess of 10 % of the outstanding securities of that class of securities by 2.5 % or more of the outstanding securities of such class; (iii) it decreases its beneficial ownership of a class of voting or equity securities of a reporting company to less than 10 % of the outstanding securities of such class; or (iv) there is a change in a material fact contained in the most recently filed report. Subject to the different reporting thresholds in Canada and the United States, the time for filing reports under the Canadian alternative early warning reporting regime is the same as the time for filing reports of beneficial ownership of more than 10% of the registered equity securities of a class made by a qualified institutional investor on Schedule 13G.

## **2.0 Request for No-Action Letter**

On the basis of these facts and for the reasons outlined below, the CPP Investment Board respectfully requests, that the Division of Corporation Finance (the "Division") indicate that it would not recommend enforcement action to the Commission if the CPP Investment Board were to report beneficial ownership of more than 5% of a class of registered equity securities, under those circumstances in which ownership could be so reported if the CPP Investment Board were one of those persons specified in Rule 13d-1(b)(1)(ii)(A)-(J).

It is the view of the Canada Pension Plan that, for purposes of Section 13(d) of the 1934 Act, the Canada Pension Plan is not the beneficial owner of any registered equity securities since the CPP Investment Board has all voting and dispositive control over all registered equity securities managed by it and, pursuant to the *Canada Pension Plan*, the CPP Investment Board Act and the CPP Investment Board Regulations, the Canada Pension Plan does not have the ability to terminate or replace the CPP Investment Board as the manager of those assets held by it.

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### 3.0 Analysis

The Commission has recognized that compliance with the disclosure requirements of Schedule 13D and the requirement of prompt amendment of Schedule 13D for all material changes in the information reported imposes a substantial burden on investment institutions.<sup>1</sup> The decision to make Schedule 13G available to specified U.S. institutional investors such as investment advisers and employee benefit plans, reflects the Commission's determination that the burdens of detailed, frequent and timely disclosure required by Schedule 13D are disproportionate to the benefit to the investing public from requiring such disclosure from regulated institutional investors such as investment advisers and employee benefit plans in those situations where investments are made in the ordinary course of business and not for the purpose of changing or influencing control.

The CPP Investment Board makes portfolio investments in the ordinary course of its business which are not with the purpose or with the effect of changing or influencing the control of any issuer in whose securities such investments are made nor in connection with, or as a participant in, a transaction having such purpose or effect.

These considerations support the conclusion that the CPP Investment Board should be treated as if it were one of those persons specified in Rule 13d-1(b)(1)(ii)(A)-(J).

The Commission has not made Schedule 13G available as of right to foreign institutions which otherwise might qualify, because of the Commission's belief that it might encounter "substantial enforcement difficulties" in seeking to ensure that foreign institutions would make available to the Commission, if required, the same information they would be required to furnish in responding to the disclosure requirements of Schedule 13D.

The Commission however, has permitted foreign institutions similar to the qualified institutions to seek no-action relief to disclose their beneficial ownership of registered equity securities on Schedule 13G when the acquisitions are in the ordinary course of business and not with the purpose nor with the effect of changing or influencing control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect. In the release announcing the adoption of Schedule 13G, the Commission said:

As adopted, old Rule 13d-5 limited the use of former Form 13D-5 to domestic persons. A proposed amendment to the rule would have made Form 13D-5 available to foreign entities who otherwise qualified, provided that they agreed to make available to the Commission in the United States the same information they would be required to furnish in responding to the disclosure requirements of Schedule 13D. The Commission has determined not to adopt this amendment in view of the substantial enforcement difficulties encountered in seeking to assure compliance by foreign persons with the provisions of Section 13(d).

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<sup>1</sup> Securities Act Release No. 5609 (August 25, 1975) and Exchange Act Release No. 11616 (August 25, 1975)

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Nonetheless, the Commission will entertain applications for exemptive orders submitted by foreign institutional investors to enable them to report their beneficial ownership on Schedule 13D [sic] [should read “Schedule 13G”], when the acquisitions are in the ordinary course of business and not with the purpose nor with the effect of changing or influencing the control of the issuer, nor in connection with or as a participant in any transaction having such purpose or effect.<sup>2</sup>

The amendments to Rule 13d-1 adopted by the Commission in 1998 permit investors, including foreign investors, that satisfy the requirements of a so-called “passive investor” to file reports on Schedule 13G but not within the timeframe applicable to a “qualified institutional investor” filing a report on Schedule 13G. The Commission realized that the adoption of the 1998 amendments would not eliminate the desire of foreign investors to report as qualified institutional investors. In the 1998 release the Commission stated:

Any foreign institutional investor that would rather report on Schedule 13G as a Qualified Institutional Investor [described on Rule 13d-1(b)(1)(ii)] and does not want to rely on the Passive Investor provisions may continue to seek no-action relief from the staff under current practices.<sup>3</sup>

This request is submitted on that basis.

For the following reasons, the Commission’s concerns for precluding foreign entities from reporting on Schedule 13G as a qualified institutional investor do not apply to the CPP Investment Board:

First, the CPP Investment Board is a foreign institution subject to the obligations and restrictions of the CPP Investment Board Act, the CPP Investment Board Regulations and the Canada Pension Plan described above, including limitations on permitted investments, mandatory special examinations by the Minister of Finance, and reporting of audited and other financial statements of the CPP Investment Board. The Canadian Pension Plan provides retirement pensions in respect of employment funded through contributions made by employers and employees and, as such, is the functional equivalent of a large U.S. private pension fund and the investment regime under the CPP Investment Board Regulations is substantially similar to the investment regime applicable to U.S. pension funds under ERISA. Based on similar representations made to the Canadian securities regulatory authorities regarding the activities, obligations and restrictions of the CPP Investment Board, the Canadian securities regulatory authorities issued a decision document that permits the CPP Investment Board to file early warning reports for significant acquisitions of securities of Canadian reporting companies as if the CPP Investment Board is an “eligible institutional investor” permitted to report under the

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<sup>2</sup> Filing and Disclosure Requirements Relating to Beneficial Ownership, Securities Act Release No. 5925, Securities Exchange Act Release No. 14692 Fed. Sec. L. Rep (CCH) ¶ 81,571 at 80,305 (April 21, 1978).

<sup>3</sup> Amendments to Beneficial Reporting Requirements, Securities Exchange Act Release No. 39538 Fed. Sec. L. Rep (CCH) ¶ 86,002 at 80,111 (January 12, 1998).

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Canadian alternative early warning rules described above. As described above, “eligible institutional investors” are defined under Canadian securities laws to include regulated pension funds and other specified categories of institutional investors similar to certain categories of investors enumerated in Rule 13d-1(b)(1)(ii).

Second, the CPP Investment Board is subject to comprehensive regulation in Canada which address concerns similar to Section 13(d) of the 1934 Act. Where appropriate, the CPP Investment Board must comply with disclosure obligations relating to significant acquisitions of securities under the alternative early warning rules prescribed under applicable Canadian securities laws and described above.

Third, since the adoption of Schedule 13G, the Commission has negotiated memoranda of understanding (“MOUs”) with the Ontario Securities Commission, the Quebec Securities Commission (Commission des Valeurs Mobilières du Québec) and the British Columbia Securities Commission in Canada,<sup>4</sup> to provide mutual assistance and cooperation in a number of areas including the administration and enforcement of U.S. securities laws. The Ontario Securities Commission and the Commission are also signatories to the International Organization of Securities Commissions Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information.

Fourth, the CPP Investment Board understands that reporting on Schedule 13G would not be available, and that a filing on Schedule 13D would be required, in any instance in which the CPP Investment Board purchases more than 5% of a class of registered equity securities with the purpose or the effect of changing or influencing the control of the issuer thereof or in connection with or as a participant in any transaction having such purpose or effect. The CPP Investment Board would undertake, and has authorized us to confirm its undertaking, to make any such filing.

Finally, to alleviate any concerns that the Commission may have with respect to the accessibility of information, the CPP Investment Board has authorized us to confirm with you its agreement to make available to the Commission, at the request of the Commission, the information which would otherwise be required to be furnished in response to the disclosure requirements of Schedule 13D with respect to the CPP Investment Board and any supporting material or documents necessary to verify the accuracy of such information.

#### **4.0 Conclusion**

Based on the facts, undertakings and representations set forth above, the CPP Investment Board respectfully requests that the Division of Corporation Finance not recommend enforcement action to the Commission if the CPP Investment Board were to report beneficial ownership of more than 5% of a class of registered equity securities subject to Section 13(d) of

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<sup>4</sup> See Intl. Ser. Release No. 6 (January 7, 1988).

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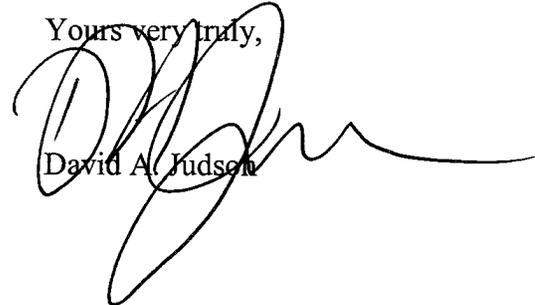
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the 1934 Act on Schedule 13G under those circumstances in which such ownership could be so reported if the CPP Investment Board were a person specified in Rule 13d-1(b)(1)(ii)(A)-(J).

The Commission has previously recognized that Canadian pension funds such as the Ontario Municipal Employees Retirement Fund (“OMERS”) (February 14, 1994); the Ontario Teachers Pension Plan Board (“Teachers”) (May, 1992) and the Canadian National Railways Pension Trust Fund (“CN Fund”) (April 17, 1987), may report beneficial ownership of more than 5% of a class of registered equity securities on Schedule 13G as if it is a qualified institutional investor. A response by Staff favourable to the CPP Investment Board would be consistent with its “no-action” letters cited above.

We appreciate your consideration, at your earliest convenience, of the CPP Investment Board’s application for a no-action letter determination and would be pleased to discuss this application or any questions relating thereto with you. We request the opportunity to speak with the Staff in the event that the Staff proposes to limit or withhold the no-action relief requested herein. If you have any questions or need any additional information concerning the foregoing, please telephone the undersigned at (416) 601-7882. Pursuant to Securities Act Release No. 6269 (December 5, 1980), one original and seven copies of this request is enclosed.

Yours very truly,

A handwritten signature in black ink, appearing to read 'D. Judson', written over the typed name 'David A. Judson'.

David A. Judson

DAJ:mt  
att