

ALBERTA SECURITIES COMMISSION

IN THE MATTER OF The Securities Act
(SA 1981, c. S-6.1, as amended) (the "Act")

- and -

IN THE MATTER OF
Over-The-Counter Derivatives Transactions and Commodity Contracts

ORDER
(Section 9.1)

1. WHEREAS the Executive Director of the Alberta Securities Commission (the "Commission") has applied to the Commission for an order pursuant to subsection 9.1(2) of the Act declaring certain over-the-counter derivatives transactions and transactions to make or take future delivery of a commodity between certain parties not to be futures contracts as defined by subsection 1(h.01) of the Act;
2. AND WHEREAS an active over-the-counter market for derivative transactions has developed in Alberta, the parties to which are typically large, sophisticated and creditworthy institutions, including sovereign and supranational entities, municipalities, pension plans, corporations, insurance companies and banks;
3. AND WHEREAS contracts to make or take future delivery of a commodity are entered into in the ordinary course of business by participants in Alberta's resource, agricultural and other industrial, commercial and business sectors;
4. AND WHEREAS for the purposes of this order "OTC derivative" means an option, a forward contract, a contract for differences or other instruments of a type commonly considered to be a derivative, or any combination of any of them, where

- 4.1 (a) the agreement relating to, and the material economic terms of, the option, forward contract, contract for differences or other instrument have been customized to the purposes of the parties to the agreement and the agreement is not part of a fungible class of agreements that are standardized as to their material economic terms,
- (b) the creditworthiness of a party to the agreement would be a material consideration in entering into or determining the terms of the agreement, and
- (c) the agreement is not entered into or traded on or through an organized market, stock exchange or futures exchange and is not cleared by a clearing corporation; or
- 4.2 such option, forward contract, contract for differences or other instrument is not an exchange contract or a commodity contract and would not be a security but for paragraph (xvi) of the definition of "security" in subsection 1(v) of the Act;
5. AND WHEREAS for the purposes of this order "commodity contract" means a contract that contains an obligation to make or take future delivery of a commodity, which contract is not an OTC derivative and which contract may include an option for cash settlement;
6. AND WHEREAS the Act as amended requires that certain parties and their clients may no longer contract with each other for certain OTC derivatives transactions or commodity contracts in Alberta without either complying with applicable registration and prospectus requirements contained in the Act or, in certain cases, taking steps to structure their transactions to permit reliance on exemptions from the registration and prospectus requirements of the Act;
7. AND WHEREAS the Commission is currently considering an appropriate regulatory framework for OTC derivatives transactions and commodity contracts and specifically considering whether, given the nature of these transactions and the parties involved, compliance with the prospectus and registration requirements of the Act is in the public interest;
8. AND WHEREAS the Commission is satisfied that to grant this order would not be prejudicial to the public interest;
9. IT IS HEREBY ORDERED pursuant to subsection 9.1(2) of the Act that the following OTC derivatives and commodity contracts are not futures contracts as defined in subsection 1(h.01) of the Act:

- (a) an OTC derivative of which the underlying interest consists of an interest rate, Canadian or foreign currency, a foreign exchange rate, a commodity, a security, an index, a benchmark, or other variable, or another OTC derivative, or some relationship between, or combination of, one or more of any of them; or
- (b) a commodity contract; or
- (c) a contract for the sale or exchange of a commodity that provides for the physical delivery only of the subject matter of the contract;

provided that:

- 9.1 the transactions referred to in paragraphs 9(a) and (b) are between the following parties (“Qualified Parties”), each acting as principal, except in respect of (BB) and (CC), in the transaction:

Banks

- (A) a bank to which the *Bank Act* (Canada) applies;
- (B) Business Development Bank of Canada continued under *the Business Development Bank of Canada Act* (Canada);
- (C) a bank subject to the regulatory regime of a country that is a member of the Basle Accord (the "Accord") or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord if the bank has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);

Commercial User

- (D) a person or company that sells, buys, trades, produces, markets, brokers or otherwise uses in its business a commodity and as a consequence enters into an OTC derivatives transaction or a commodity contract;

Credit Unions and Caisses Populaires

- (E) a credit union central or a federation of caisses populaires or any credit union or regional caisse populaire located, in each case, in Canada;

Loans and Trust Companies

- (F) a loan or trust corporation registered under the loan and trust corporations legislation of a province or territory of Canada or under the *Trust and Loan Companies Act* (Canada);
- (G) a loan or trust company subject to the regulatory regime of a country that is a member of the Basle Accord or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord if the loan company or trust company has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);

Insurance Companies

- (H) an insurance company licensed to do business in Canada or a province or territory of Canada if the insurance company has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its equivalent in another currency);
- (I) an insurance company subject to the regulatory regime of a country that is a member of the Basle Accord or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord if the insurance company has a minimum paid up capital and surplus, as shown on the last audited balance sheet, in excess of \$100 million (or its

equivalent in another currency);

Sophisticated Entities

- (J) a person or company that
- (i) together with its affiliates has entered into one or more transactions involving OTC derivatives or commodity contracts with counterparties that are not its affiliates, if
 - (a) the transactions had a total gross dollar value of or equivalent to at least \$1 billion in notional principal amount; and
 - (b) any of the contracts relating to one of these transactions were outstanding on any day during the previous 15 month period, or
 - (ii) together with its affiliates had total gross marked-to-market positions of or equivalent to at least \$100 million aggregated across counterparties, with counterparties that are not its affiliates in one or more transactions involving OTC derivatives or commodity contracts on any day during the previous 15 month period;

Individuals

- (K) an individual who has a net worth of at least \$5 million (or its equivalent in another currency) excluding the value of his or her principal residence, and any holding company of which such individual owns all of the shares;

Governments/Agencies

- (L) Her Majesty in right of Canada or any province or territory of Canada and all crown corporations, instrumentalities and agencies of the Canadian federal or provincial or territorial governments or the Alberta Treasury Branch;
- (M) a national government of a country that is a member of the Basle Accord or a country that is not an initial signatory to the Accord but has adopted the regulatory and supervisory rules set out in the Accord and any instrumentality or

agency of that government or corporation wholly-owned by that government;

- (N) a Canadian municipality with a population in excess of 50,000 and any Canadian provincial or territorial capital city;

Corporations and other Entities

- (O) a company, partnership, unincorporated association, organization or trust, other than an entity referred to in (A), (B), (C), (D) (E), (F), (G), (H), (I) and (J) with total assets, as shown on the last audited balance sheet, in excess of \$25 million (or its equivalent in another currency);

Pension Plan or Fund

- (P) a pension fund that is regulated by either the Office of the Superintendent of Financial Institutions (Canada) or a provincial or territorial pension commission, if the pension fund has total net assets, as shown on the last audited balance sheet, in excess of \$50 million, provided that, in determining net assets, the liability of a fund for future pension payments shall not be included;

Mutual Funds and Investment Funds

- (Q) a mutual fund or non-redeemable investment fund if each investor in the fund is a Qualified Party;
- (R) a mutual fund if the investments of the fund are managed by a company that is registered under the Act or securities legislation of another province or territory in Canada as a portfolio manager;
- (S) a non-redeemable investment fund if the person responsible for providing investment advice to the fund is registered under the Act or securities legislation of another province or territory in Canada as an adviser, other than a securities adviser;

Brokers/Investment Dealers

- (T) a person or company registered under the Act or securities legislation of

another province or territory in Canada as a broker or an investment dealer or both;

- (U) a person or company registered under the Securities Act (Ontario) as an international dealer if the person or company has total assets, as shown on its last audited balance sheet, in excess of \$100 million or its equivalent in another currency;
- (V) a person or company whose account is fully managed by a registered portfolio manager or broker or investment dealer acting as a trustee or agent for such person or company;
- (W) a direct or indirect wholly-owned subsidiary of any of the entities described in paragraphs (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (L), (M), (N), (O), (P), (T) and (U);
- (X) a holding body corporate of which any of the entities described in paragraphs (A), (B), (C), (D), (E), (F), (G), (H), (I), (J), (L), (M), (N), (O), (T) and (U) is a direct or indirect wholly-owned subsidiary;
- (Y) a direct or indirect wholly-owned subsidiary of a holding body corporate described in paragraph (X);
- (Z) a firm, partnership or joint venture or other form of unincorporated association in which one or more of the entities described in paragraphs (W), (X) or (Y) have a direct or indirect controlling interest;
- (AA) a party whose obligations in respect of the OTC derivatives transaction or commodity contract for which the determination is made are fully guaranteed by another Qualified Party;
- (BB) a portfolio manager or a financial intermediary referred to in paragraphs (A), (E), (F), (H), (T) or (U) above, while acting as manager of accounts of a person, company, pension fund or pooled fund trust, which accounts are fully managed by such portfolio manager or financial intermediary; and
- (CC) a broker or investment dealer acting as a trustee or agent for the person,

company, pension fund or pooled fund trust under section 65 of Commission rules.

9.2 for the purposes of this order, a party is a Qualified Party for the purpose of any OTC derivative transaction or commodity contract if that party is a Qualified Party at the time the party enters into the transaction or contract; and

9.3 all requirements contained in paragraph 9.1 that are based on the amounts shown on the balance sheet of an entity shall be determined by reference to the audited consolidated balance sheet of the entity for its most recently completed financial year end.

10. AND IT IS HEREBY FURTHER ORDERED that this order shall be effective as of June 1, 1999.

Dated at the City of CALGARY)	
)	
in the Province of ALBERTA)	<u>“original signed by”</u>
)	W.L. Hess, Q.C., Chair
this 29th day of July, 1999.)	
)	<u>“original signed by”</u>
)	Eric T. Spink, Vice-Chair