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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION**  
Washington, DC 20549

**FORM 10-K**

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(Mark One)

☒ **ANNUAL REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES  
EXCHANGE ACT OF 1934**

For the fiscal year ended June 30, 2006.

OR

☐ **TRANSITION REPORT PURSUANT TO SECTION 13 OR 15(d) OF THE SECURITIES  
EXCHANGE ACT OF 1934**

For the transition period from \_\_\_\_\_ to \_\_\_\_\_  
Commission files number 0-27544

**OPEN TEXT CORPORATION**

(Exact name of Registrant as specified in its charter)

**Canada**  
(State or other jurisdiction  
of incorporation or organization)

**98-0154400**  
(IRS Employer  
Identification No.)

**275 Frank Tompa Drive,  
Waterloo, Ontario, Canada**  
(Address of principal executive offices)

**N2L 0A1**  
(Zip code)

**Registrant's telephone number, including area code: (519) 888-7111**

**Securities registered pursuant to Section 12(b) of the Act:**

Title of each class	Name of each exchange on which registered
Common stock without par value	NASDAQ

**Securities registered pursuant to Section 12(g) of the Act:**

**None**  
(Title of Class)

Indicate by check mark if the registrant is a well-known seasoned issuer, as defined in Rule 405 of the Securities Act. Yes ☐ No ☒

Indicate by check mark if the registrant is not required to file reports pursuant to Section 13 or Section 15(d) of the Act. Yes ☐ No ☒

Indicate by check mark whether the registrant: (1) has filed all reports required to be filed by Section 13 or 15(d) of the Securities Exchange Act of 1934 during the preceding 12 months (or for such shorter period that the registrant was required to file such reports), and (2) has been subject to such filing requirements for the past 90 days. Yes ☒ No ☐

Indicate by check mark if disclosure of delinquent filers pursuant to Item 405 of Regulation S-K is not contained herein, and will not be contained, to the best of the registrant's knowledge, in definitive proxy or information statements incorporated by reference in Part III of this Form 10-K or any amendment to this Form 10-K. ☒

Indicate by check mark whether the registrant is a large accelerated filer, an accelerated filer, or a non-accelerated filer. See definition of "accelerated filer and large accelerated filer" in Rule 12b-2 of the Exchange Act).

Large accelerated filer ☐ Accelerated filer ☒ Non-accelerated filer ☐

Indicate by check mark whether the registrant is a shell company (as defined in Rule 12b-2 of the Act). Yes ☐ No ☒

Aggregate market value of the Registrant's Common Shares held by non-affiliates, based on the closing price of the Common Shares as reported by the NASDAQ Global Select Market ("NASDAQ") on December 31, 2005, was approximately \$523.3 million. The number of the Registrant's Common Shares outstanding as of September 1, 2006 was 48,971,559.

**DOCUMENTS INCORPORATED BY REFERENCE**

See Item 15 under Part IV, in this Annual Report on Form 10-K.

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## **PART I**

### **Forward-Looking Statements**

In addition to historical information, this Annual Report on Form 10-K contains forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995, Section 21E of the Securities Exchange Act of 1934, as amended, and Section 27A of the Securities Act of 1933, as amended, and is subject to the safe harbors created by those sections. Words such as “anticipates”, “expects”, “intends”, “plans”, “believes”, “seeks”, “estimates”, “may”, “could”, “would”, “might”, “will” and variations of these words or similar expressions are intended to identify forward-looking statements. In addition, any statements that refer to expectations, beliefs, plans, projections, objections, performance or other characterizations of future events or circumstances, including any underlying assumptions, are forward-looking statements. These forward-looking statements involve known and unknown risks as well as uncertainties, including those discussed herein and in the notes to our financial statements for the year ended June 30, 2006, certain sections of which are incorporated herein by reference as set forth in Items 7 and 8 of this report. The actual results that we achieve may differ materially from any forward-looking statements, which reflect management’s opinions only as of the date hereof. We undertake no obligation to revise or publicly release the results of any revisions to these forward-looking statements. You should carefully review Part 1 Item 1A “Risk Factors” and other documents we file from time to time with the Securities and Exchange Commission. A number of factors may materially affect our business, financial condition, operating results and prospects. These factors include, but are not limited to, those set forth in part 1 Item 1A “Risk Factors” and elsewhere in this report. Any one of these factors may cause our actual results to differ materially from recent results or from our anticipated future results. You should not rely too heavily on the forward-looking statements contained in this Annual Report on Form 10-K, because these forward-looking statements are relevant only as of the date they were made.

### **Item 1. Business**

#### **The Company and Industry**

Open Text Corporation was incorporated on June 26, 1991 pursuant to articles of incorporation under the Business Corporations Act (Ontario) and continued under the Canada Business Corporations Act on December 29, 2005. We amended our articles on August 1, 1995 and November 16, 1995, respectively, and filed articles of amalgamation on June 30, 1992, December 29, 1995, July 1, 1997, July 1, 1998, July 1, 2000, July 1, 2002, July 1, 2003, July 1, 2004 and July 1, 2005. References herein to the “Company”, “Open Text”, “we” or “us” refer to Open Text Corporation and its subsidiaries. Our current principal office is at 275 Frank Tompa Drive, Waterloo, Ontario, Canada N2L 0A1, and our telephone number at that location is (519) 888-7111. Our internet address is [www.opentext.com](http://www.opentext.com). Throughout this Annual Report on Form 10-K, the term “Fiscal 2006” means our fiscal year beginning on July 1, 2005 and ending on June 30, 2006, the term “Fiscal 2005” means our fiscal year beginning on July 1, 2004 and ending on June 30, 2005, and the term “Fiscal 2004” means our fiscal year beginning July 1, 2003 and ending on June 30, 2004. Unless otherwise indicated, all amounts included in this Annual Report on Form 10-K are expressed in U.S. dollars.

Access to our Annual Report on Form 10-K, Quarterly Reports on Form 10-Q, Current Reports on Form 8-K and amendments to these reports filed or furnished to the United States Securities and Exchange Commission (the “SEC”) may be obtained through the Investor Relations section of our website at [www.opentext.com](http://www.opentext.com) as soon as reasonably practical after we electronically file or furnish these reports. We do not charge for access to and viewing of these reports. Information on our Investor Relations page and our website is not part of this Annual Report on Form 10-K or any other securities filings of ours unless specifically incorporated herein by reference. In addition, our filings with the SEC may be accessed through the SEC’s Electronic Data Gathering, Analysis and Retrieval system at [www.sec.gov](http://www.sec.gov). All statements made in any of our securities filings, including all forward-looking statements or information, are made as of the date of the document in which the statement is included, and we do not assume or undertake any obligation to update any of those statements or documents unless we are required to do so by law.

## ***ECM***

We are one of the market leaders in providing Enterprise Content Management (“ECM”) solutions that help customers manage enterprise information throughout the full lifecycle from content creation, revision, approvals to archiving, and in compliance with relevant regulatory requirements. Livelink, a database or repository system forms the foundation of our products. Our solutions allow users to access, view and manage all information related to a transaction or business process, distilled into one complete picture on a worker’s desktop. In essence, Open Text ECM solutions enable people in an organization to work more effectively with each other.

### ***Value Proposition of ECM Solutions***

Our ECM solutions are tailored to address specific business problems or focus on vertical industries. The overall value proposition is anchored in three main areas:

1. Streamline information to and from the customer’s enterprise applications to enhance operational efficiencies, reduce costs, and improve performance.
2. Assure regulatory compliance by defining, securing, and controlling the process by which all content can be managed as business records under appropriate policies for retention and destruction.
3. Maximize the customer’s return on investment (“ROI”) by leveraging our customers’ current investment in technology platforms as well as their employees’ familiarity with existing systems—particularly those of Microsoft Corporation (“Microsoft”), SAP AG (“SAP”) and Oracle Corporation (“Oracle”).

## **Open Text ECM Solutions**

### ***By Business Application***

Long-term adoption and expansion of ECM software within an organization occurs by building on a series of incremental deployments focused on specific business processes. Our business solutions are designed to meet the regulatory compliance and ROI goals of our customers, by resolving specific ECM challenges for typical enterprise functional groups, such as R&D, finance, information systems and technology, and marketing and sales. We provide targeted business solutions for a variety of markets, many of which require compliance with increasingly stringent standards and regulations.

### ***Open Text Solutions for Compliance & Governance***

Our Solutions for Compliance and Governance offer a wide range of functionalities to fulfill legislative requirements. The solutions assist with enhancing business processes to generate faster time to market, comply with government regulations, and manage risk. With our solutions customers can capture, classify, and manage huge volumes of electronic data and documents—assisting with compliance to all regulatory requirements.

### ***Open Text Solutions for Email Management***

Our Solutions for Email Management are intended to allow customers to reduce the cost of overburdened email servers and help the organization mitigate its compliance and litigation risks associated with email content. Our solution can assess, identify, manage, and destroy business content stored in email records in accordance with regulations and internal policies.

### ***Open Text Solutions for Corporate Services***

Across most organizations, standard administrative services and functions support core business processes. The implementation of electronic workflow and documents can make the mission-critical difference that ensures success. The efficiency and control of those processes depend on the effective implementation of electronic workflow and documents.

Corporate Services helps customers meet business goals through the management of processes such as Environment, Health & Safety, Facilities, Fleet & Equipment Management, Legal, Performance Monitoring, Quality Management, Travel Management and Human Resources.

#### ***Open Text Solutions for Information Systems & Technology (“IT”)***

Our IT solutions can help reduce costs in the IT department through efficient IT consolidation methods. Our solutions help to switch-off legacy applications, as well as to reduce operating costs through SAP/Siebel data archiving. Our solutions are designed to fit in an existing IT landscape—with support of many operating systems, databases and storage hardware. Our solutions streamline processes that include Information Lifecycle Management, IT Consolidation, IT Operations, and SAP Support.

#### ***Open Text Solutions for Manufacturing & Operations***

Our solutions for Manufacturing and Operations can help customers improve quality, reduce product lifecycles, enforce standards, comply with regulations and decrease operational costs. Our Solutions address processes that include: Environment, Health & Safety, Facilities, Fleet & Equipment Management, Performance Monitoring, Quality Management, and Product Lifecycle Management.

#### ***Open Text Solutions for Procurement***

Procurement is a multi-party collaboration process that involves purchasing, financial accounting and inventory management professionals as well as external vendors. Open Text’s Solution for Procurement improves processes such as purchase order changes, requisition approval, and vendor selection, offering time and cost savings while adhering to the strictest financial audit traceability requirements. This product uses best practice design for an optimized and automated procurement process based on our customers’ business process realities.

#### ***By Vertical Industry***

We provide essential and tailored ECM solutions geared toward various industries. Many of these industries operate in highly-regulated or compliance-based environments.

#### ***Open Text Solutions for Government***

Our Solutions for Government are intended to provide government organizations with a fully-compliant framework that helps their agencies manage information and exchange knowledge on a web-based solution. With a focus on reducing or eliminating paper-based processes, our ECM solution provides document and records management, secure project collaboration, workflow, search, and scheduling functionality for organizations in public services.

#### ***Open Text Solutions for Pharmaceutical & Life Sciences***

Generally pharmaceutical and life sciences companies operate in a highly-regulated environment with long product lifecycles. Their operations tend to be both data and document intensive. Our ECM solutions for the Pharmaceutical and Life Sciences industries are aimed at supporting critical processes where compliant management of all paper and electronic records and documents is essential. Customers can choose from a variety of interfaces ranging from email clients to Web browsers, as well as office and specialty applications, allowing users to work in the environment most natural to them.

#### ***Open Text Solutions for Financial Services***

Our Solutions for Financial Services are intended to enhance collaboration and ensure that customers are not at risk of litigation or non-compliance with industry and government regulations. Our solutions have

been used by customers in segments of financial services, including banking, securities, trading, brokerage, and wealth management. Our solutions are intended to enable financial services organizations to foster a culture that facilitates knowledge sharing and information flow throughout an organization in a compliant manner.

### ***Open Text Solutions for Energy***

Our ECM solutions are designed to meet the requirements of the Oil and Gas, Petrochemical, Utility and Nuclear industries by facilitating the acquisition of information, its discussion, subsequent revisions and the re-distribution of the modified information.

### ***Open Text Solutions for Media***

We can help customers to cost-effectively and efficiently manage the production, brand management, and distribution of rich media assets. Open Text Solutions for Media are designed to manage the explosion of digital content produced, shared, and distributed around the world.

### ***Open Text Solutions for Manufacturing***

Our Solutions for Manufacturing can speed up critical information flow and reduce time to market. Because the information is secured, aged and archived by our solutions, other business units (e.g. research, development, legal, finance, marketing) can data mine it for re-use and repackaging, as well as best practices and lessons learned that can be key pieces of information which are essential to the successful development of future products and markets.

### ***Partner Program Overview***

We partner with prominent organizations in enterprise software and hardware in an effort to enhance the value of our ECM solutions and the investments our customers have made in their existing systems.

We are involved with three categories of partnerships and alliances, along with three levels of participation available in each category.

1. Services Partners are primarily system integrators and consulting and outsourcing firms. Their expertise may include: strategy, design, implementation, change management, project management, customization and specific vertical market and domain expertise. Along with their vision, service partners are able to combine their expertise with our products and services to deliver high-value customer solutions.

2. Solution Partners deliver comprehensive, repeatable solutions utilizing our products and services that target a specific business unit or vertical industry. Their expertise may include: vertical domain expertise, systems integration, and application development.

3. Technology Partners are vendors whose software and/or hardware offerings both complement and extend the value of our product offerings. These partners offer our customers best-of-breed technology components, which can be seamlessly integrated with our products and services. Their expertise may include: hardware and software components, database management systems and specific application environments.

### ***Open Text and Microsoft Corporation***

The strategic alliance between Microsoft and Open Text offers improved integration between Microsoft's desktop and server products. Open Text solutions increasingly rely on Microsoft Outlook as a ubiquitous user interface for accessing content in context. While reading any piece of email, information is automatically



extracted from Enterprise Resource Planning, Customer Relationship Management, ECM and other enterprise applications. This context allows knowledge workers to make decisions and take actions, all through the familiar Microsoft Outlook interface. In addition to email, SharePoint is rapidly developing as the software of choice for team collaboration and document sharing. We offer solutions that allow teams to realize SharePoint's ease of use, while seamlessly tying into established retention policies for all enterprise content. On the server side, we have expanded our support for the latest Microsoft database technology.

### ***Open Text and Oracle Corporation***

This partnership extends Open Text's recently-launched enterprise solutions framework, and builds upon the decade-long database integration relationship between Open Text and Oracle. The partnership with Oracle allows us to focus on building content-enabled solutions that solve complex, industry-specific problems. We build comprehensive solutions directly on the Oracle Content Database infrastructure using new Oracle Fusion technology. The alliance of Oracle and Open Text enables customers to fortify their existing investments in accounts payable invoice processing, and report and output management solutions from Oracle. We provide a comprehensive portfolio of solutions that enhance Oracle applications such as PeopleSoft Enterprise, JD Edwards EnterpriseOne, JD Edwards World, Oracle E-Business Suite, and Siebel.

### ***Open Text and SAP AG***

Our solutions help customers improve the way they manage content from SAP systems in order to improve efficiency in key processes, manage compliance and reduce costs. Our targeted solutions let customer create, access, manage and securely archive all content for SAP systems, including data and documents, which allows customers to address stringent requirements for risk reduction, operational efficiency and information technology consolidation. Our solutions for SAP embrace the SAP environment including SAPGUI, Portal and Netweaver.

### **Competition**

The market for our products is highly competitive and competition will continue to intensify as the ECM markets consolidate. We compete with a large number of ECM, web content management, management, workflow, document imaging and electronic document management companies. IBM is the largest company that competes directly with us in the ECM market. Documentum, a competitor in the content management market, was acquired by EMC Corporation, a large storage technology company, during 2003. EMC is now a competitor offering both content management and storage management capabilities. Additionally we compete with FileNet®, which is an entity that develops, markets, sells and supports a software platform and application development framework for ECM. On August 10, 2006, IBM announced that it had entered into a definitive agreement to acquire FileNet; if this transaction is completed, it will make IBM a more significant competitor for our business. Numerous smaller software vendors also compete in each product area. We also face competition from systems integrators who configure hardware and software into customized systems.

Large infrastructure vendors such as Oracle and Microsoft have developed products, or plan to offer products in the content management market. Other large infrastructure vendors may follow course. Software vendors such as CA™ and Symantec Corporation, each with a different core product foundation, have approached the ECM market from their individual market segments and may compete more intensely with us in the future. Additionally, new competitors or alliances among existing competitors may emerge and rapidly acquire significant market share. We also expect that competition will increase as a result of ongoing software industry consolidation.

We believe that the principal competitive factors affecting the market for our software products and services include vendor and product reputation; product quality, performance and price; the availability of software products on multiple platforms; product scalability; product integration with other enterprise applications; software functionality and features; software ease of use; and the quality of professional services, customer support services and training. We believe the relative importance of each of these factors depends upon the specific customer involved.

No single customer has accounted for more than 10% of our revenue in any of the past three fiscal years. For information on the results of operation of our operating and geographic segments for each of the years in the three year period ended June 30, 2006, see Note 16 “Segment Information” in the Notes to Consolidated Financial Statements included in Item 8 to this Annual Report on Form 10-K.

### **Acquisition Activity**

In August 2006, we entered into a definitive agreement with Hummingbird, Ltd. (“Hummingbird”) to acquire all of Hummingbird’s outstanding common shares at a price of \$27.85 per share, or approximately \$489.0 million. Hummingbird is a Toronto based global provider of ECM solutions. The transaction with Hummingbird is to be carried out by way of a statutory plan of arrangement and will be voted on by Hummingbird’s shareholders at a meeting of shareholders currently expected to be held in mid-September 2006. The arrangement is subject to court approval in the Province of Ontario as well as certain other customary conditions, including the receipt of regulatory approvals. The proposed transaction is expected to close in early-October, shortly after receipt of Hummingbird shareholder approval and final approval of the court.

Our competitive position in the marketplace requires us to maintain a complex and evolving array of technologies, products, services and capabilities. The combination of technological complexity and rapid change within our industry makes it difficult for a single company to provide all of the technological solutions that its customers request. In light of the continually evolving marketplace in which we operate, and as part of our operations, we regularly evaluate various acquisition opportunities within the ECM marketplace and elsewhere in the high technology industry. If we determine that a potential acquisition opportunity is in the best interest of our shareholders, we will conduct negotiations with the relevant entity or entities to discuss the possibility of a merger, acquisition or other mutually beneficial combination of operations. Successful negotiations lead to an agreement to enter into a merger, acquisition or combination transaction, and eventually to a completed transaction that improves our ability to compete in our chosen industry.

### **Employees**

As of June 30, 2006, we employed a total of 1,894 individuals. The composition of this employee base is approximately as follows: 411 employees in sales and marketing, 426 employees in product development, 482 employees in professional services, 255 employees in customer support, and 320 employees in general and administrative roles. We believe that relations with our employees are strong.

In July 2005, we announced a restructuring of our operations which included workforce related reductions. The details of this restructuring are covered in Note 20 “Special Charges (Recoveries)” of the “Notes to Consolidated Financial Statements” included in Item 8 to this Annual Report on Form 10-K.

### **Intellectual Property Rights**

Our success and ability to compete depend on our ability to develop and maintain our intellectual property and proprietary technology and to operate without infringing on the proprietary rights of others. Our software products are generally licensed to our customers on a non-exclusive basis for internal use in a customer’s organization. We also grant rights in our intellectual property to third parties that allow them to market certain of our products on a non-exclusive or limited-scope exclusive basis for a particular application of the product(s) or to a particular geographic area.

We rely on a combination of copyright, patent, trademark and trade secret laws, non-disclosure agreements and other contractual provisions to establish and maintain our proprietary rights. We have obtained or applied for trademark registration for most strategic product names in most major markets. As of June 30, 2006, we own four U.S. patents which expire between 2017 and 2022. In addition, we have 16 U.S. patent applications, 6 Canadian patent applications and 14 other foreign patent applications. Some of these patents and patent applications have been filed in other jurisdictions.



## **Item 1A. Risk Factors**

### **Risk Factors**

*In addition to historical information, this Annual Report on Form 10-K contains forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995, Section 21E of the Securities Exchange Act of 1934, as amended, and Section 27A of the Securities Act of 1933, as amended, and is subject to the safe harbors created by those sections. These forward-looking statements involve known and unknown risks as well as uncertainties, including those discussed in the following cautionary statements and elsewhere in this Annual Report on Form 10-K. The actual results that we achieve may differ materially from any forward-looking statements, which reflect management's opinions only as of the date hereof. You should carefully review the following factors, as well as the other information set forth herein, when evaluating us and our business. If any of the following risks were to occur, our business, financial condition and results of operations would likely suffer. In that event, the trading price of our Common Shares would likely decline. Such risks are further discussed from time to time in our filings filed from time to time with the SEC.*

#### ***Our anticipated acquisition of Hummingbird may adversely affect our operations and finances in the short term***

In August 2006, we entered into a definitive agreement with Hummingbird to acquire all of Hummingbird's outstanding common shares at a price of \$27.85 per share, or approximately \$489.0 million. This transaction is subject to the approval of two-thirds of the votes cast by Hummingbird's shareholders at a meeting of shareholders, currently expected to be held in mid-September 2006, as well as court approval. The transaction is also subject to certain other customary conditions, including the receipt of regulatory approvals. The Hummingbird shares will be acquired for cash, and as a result we will need to borrow the funds for the Hummingbird acquisition from a syndicate of leading financial institutions. The interest costs associated with the resulting credit facility will materially increase our operating expenses, which may materially and adversely affect our profitability and the price of our Common Shares. The Hummingbird acquisition represents a significant opportunity for our business. However, the size of the acquisition and the inevitable integration challenges that will result from the acquisition may divert management's attention from the normal daily operations of our existing businesses, products and services. We cannot ensure that we will be successful in retaining key Hummingbird employees and our operations may be disrupted if we fail to adequately retain and motivate the combined employee base.

#### ***Our success depends on our relationships with strategic partners***

We rely on close cooperation with partners for product development, optimization, and sales. If any of our partners should decide for any reason to terminate or scale back their cooperative efforts with us, our business, operating results, and financial condition may be adversely affected.

#### ***If we do not continue to develop new technologically advanced products, future revenues will be negatively affected***

Our success depends upon our ability to design, develop, test, market, license and support new software products and enhancements of current products on a timely basis in response to both competitive products and evolving demands of the marketplace. In addition, new software products and enhancements must remain compatible with standard platforms and file formats. We continue to enhance the capability of our Livelink software to enable users to form workgroups and collaborate on intranets and the Internet. We increasingly must integrate software licensed or acquired from third parties with our own software to create or improve our products. These products are important to the success of our strategy, and we may not be successful in developing and marketing these and other new software products and enhancements. If we are unable to successfully integrate the technologies licensed or acquired from third parties, to develop new software products and enhancements to existing products, or to complete products currently under development, or if such

integrated or new products or enhancements do not achieve market acceptance, our operating results will materially suffer. In addition, if new industry standards emerge that we do not anticipate or adapt to, our software products could be rendered obsolete and our business would be materially harmed.

***If our products and services do not gain market acceptance, we may not be able to increase our revenues***

We intend to pursue our strategy of growing the capabilities of our ECM software offerings through the in-house research and development of new product offerings. In response to customer requests, we continue to enhance Livelink and many of our optional components and we continue to set the standard for ECM capabilities. The primary market for our software and services is rapidly evolving. As is typical in the case of a rapidly evolving industry, demand for and market acceptance of products and services that have been released recently or that are planned for future release are subject to a high level of uncertainty. If the markets for our products and services fail to develop, develop more slowly than expected or become saturated with competitors, our business will suffer. We may be unable to successfully market our current products and services, develop new software products, services and enhancements to current products and services, complete customer installations on a timely basis, or complete products and services currently under development. If our products and services or enhancements do not achieve and sustain market acceptance, our business and operating results will be materially affected.

***Current and future competitors could have a significant impact on our ability to generate future revenue and profits***

The markets for our products are intensely competitive, and are subject to rapid technological change and competitive pressures. We expect competition to increase and intensify in the future as the markets for our products continue to develop and as additional companies enter each of our markets. Numerous releases of competitive products are continually occurring and can be expected to continue in the near future. We may not be able to compete effectively with current and future competitors. If competitors were to engage in aggressive pricing policies with respect to competing products, or if significant price competition was to otherwise develop, we would likely be forced to lower our prices. This could result in lower revenues, reduced margins, loss of customers, or loss of market share for us.

***We are confronting two inexorable trends in our industry; the consolidation of our competitors and the commoditization of our products and services***

The acquisition of Documentum Inc. by EMC Corporation ("EMC") in December 2003 and the proposed acquisition of FileNet by IBM have changed the marketplace for our goods and services. If the IBM/FileNet acquisition is successful, then two comparable competitors to our company will have been replaced by larger and better capitalized companies. In addition, other large corporations with considerable financial resources either have products that compete with the products we offer, or have the ability to encroach on our competitive position within our marketplace. These large, well-capitalized companies have the financial resources to engage in competition with our products and services on the basis of marketing, services or support. They also have the ability to introduce items that compete with our maturing products and services. For example, Microsoft has launched SharePoint, a product which provides the same benefits that some of our ECM products provide at a lower cost to the customer. The threat posed by larger competitors and the goods and services that these companies can produce at a lower cost to our target customers may materially increase our expenses and reduce our revenues. Any material adverse effect on our revenue or cost structure may materially reduce the price of our common shares.

***Acquisitions, investments, joint ventures and other business initiatives may negatively affect our operating results***

We continue to seek out opportunities to acquire or invest in businesses, products and technologies that expand, complement or are otherwise related to our current business. We also consider from time to time,

opportunities to engage in joint ventures or other business collaborations with third parties to address particular market segments. These activities create risks such as the need to integrate and manage the businesses and products acquired with our own business and products, additional demands on our management, resources, systems, procedures and controls, disruption of our ongoing business, and diversion of management's attention from other business concerns. Moreover, these transactions could involve substantial investment of funds and/or technology transfers and the acquisition or disposition of product lines or businesses. Also, such activities could result in one-time charges and expenses and have the potential to either dilute the interests of existing shareholders or result in the assumption of debt. Such acquisitions, investments, joint ventures or other business collaborations may involve significant commitments of financial and other resources of our company. Any such activity may not be successful in generating revenue, income or other returns to us, and the financial or other resources committed to such activities will not be available to us for other purposes. Our inability to address these risks could negatively affect our operating results.

***Businesses we acquire may have disclosure controls and procedures and internal controls over financial reporting that are weaker than or otherwise not in conformity with ours***

We have a history of acquiring complementary businesses with varying levels of organizational size and complexity. Upon consummating an acquisition, we seek to implement our disclosure controls and procedures and internal controls over financial reporting at the acquired company as promptly as possible. Depending upon the size and complexity of the business acquired, the implementation of our disclosure controls and procedures and internal controls over financial reporting at an acquired company may be a lengthy process. Typically, we conduct due diligence prior to consummating an acquisition, however, our integration efforts may periodically expose deficiencies in the disclosure controls and procedures and internal controls over financial reporting of an acquired company. We expect that the process involved in completing the integration of our own disclosure controls and procedures and internal controls over financial reporting at an acquired business will sufficiently correct any identified deficiencies. However, if such deficiencies exist, we may not be in a position to comply with our periodic reporting requirements and our business and financial condition may be materially harmed.

***The length of our sales cycle can fluctuate significantly which could result in significant fluctuations in license revenue being recognized from quarter to quarter***

Because the decision by a customer to purchase our products often involves relatively large-scale implementation across our customer's network or networks, licenses of these products may entail a significant commitment of resources by prospective customers, accompanied by the attendant risks and delays frequently associated with significant expenditures and lengthy sales cycle and implementation procedures. Given the significant investment and commitment of resources required by an organization in order to implement our software, our sales cycle tends to take considerable time to complete. Over the past fiscal year, we have experienced a lengthening of our sales cycle as customers include more personnel in the decision-making process and focus on more enterprise-wide licensing deals. In an economic environment of reduced information technology spending, it can take several months, or even several quarters, for sales opportunities to translate into revenue. If a customer's decision to license our software is delayed and the installation of our products in one or more customers takes longer than originally anticipated, the date on which revenue from these licenses could be recognized would be delayed. Such delays could cause our revenues to be lower than expected in a particular period.

***Our international operations expose us to business risks that could cause our operating results to suffer***

We intend to continue to make efforts to increase our international operations and anticipate that international sales will continue to account for a significant portion of our revenue. We have increased our presence in the European market, especially since our acquisition of IXOS Software AG ("IXOS"). These international operations are subject to certain risks and costs, including the difficulty and expense of administering business and compliance abroad, compliance with both domestic and foreign laws, compliance

with domestic and international import and export laws and regulations, costs related to localizing products for foreign markets, and costs related to translating and distributing products in a timely manner. International operations also tend to be subject to a longer sales and collection cycle, as well as potential losses arising from currency fluctuations, and regulatory limitations regarding the repatriation of earnings. Significant international sales may also expose us to greater risk from political and economic instability, unexpected changes in Canadian, United States or other governmental policies concerning import and export of goods and technology, regulatory requirements, tariffs and other trade barriers. In addition, international earnings may be subject to taxation by more than one jurisdiction, which could also materially adversely affect our effective tax rate. Also, international expansion may be more difficult, time consuming, and costly. As a result, if revenues from international operations do not offset the expenses of establishing and maintaining foreign operations, our operating results will suffer. Moreover, in any given quarter, foreign exchange rates can impact revenue adversely.

***Our expenses may not match anticipated revenues***

We incur operating expenses based upon anticipated revenue trends. Since a high percentage of these expenses are relatively fixed, a delay in recognizing revenue from license transactions could cause significant variations in operating results from quarter to quarter and could result in operating losses. If these expenses are not subsequently followed by revenues, our business, financial condition, or results of operations could be materially and adversely affected. In addition, in July 2005, we announced our 2006 restructuring initiative to restructure our operations with the intention of streamlining our operations. We will continue to evaluate our operations, and may propose future restructuring actions as a result of changes in the marketplace, including the exit from less profitable operations or services no longer demanded by our customers. Any failure to successfully execute these initiatives on a timely basis may have a material adverse impact on our results of operations.

***Our products may contain defects that could harm our reputation, be costly to correct, delay revenues, and expose us to litigation***

Our products are highly complex and sophisticated and, from time to time, may contain design defects or software errors that are difficult to detect and correct. Errors may be found in new software products or improvements to existing products after commencement of commercial shipments. If these defects are discovered, we may not be able to successfully correct such errors in a timely manner, or at all. In addition, despite the tests we carry out on all our products, we may not be able to fully simulate the environment in which our products will operate and, as a result, we may be unable to adequately detect design defects or software errors inherent in our products and which only become apparent when the products are installed in an end-user's network. The occurrence of errors and failures in our products could result in loss of, or delay in market acceptance of our products, and alleviating such errors and failures in our products could require us to make significant expenditure of capital and other resources. The harm to our reputation resulting from product errors and failures would be damaging. We regularly provide a warranty with our products and the financial impact of these warranty obligations may be significant in the future. Our agreements with our strategic partners and end-users typically contain provisions designed to limit our exposure to claims, such as exclusions of all implied warranties and limitations on the availability of consequential or incidental damages. However, such provisions may not effectively protect us against claims and related liabilities and costs. Although we maintain errors and omissions insurance coverage and comprehensive liability insurance coverage, such coverage may not be adequate and all claims may not be covered. Accordingly, any such claim could negatively affect our financial condition.

***Other companies may claim that we infringe their intellectual property, which could result in significant costs to defend and if we are not successful it could have a significant impact on our ability to generate future revenue and profits***

Although we do not believe that our products infringe on the rights of third-parties, third-parties may assert infringement claims against us in the future, and any such assertions may result in costly litigation or require us

to obtain a license for the intellectual property rights of third-parties. Such licenses may not be available on reasonable terms, or at all. In particular, as software patents become more prevalent, it is possible that certain parties will claim that our products violate their patents. Such claims could be disruptive to our ability to generate revenue and may result in significantly increased costs as we attempt to license the patents or rework our products to ensure that they are not in violation of the claimant's patents or dispute the claims. Any of the foregoing could have a significant impact on our ability to generate future revenue and profits.

***Failure to protect our intellectual property could harm our ability to compete effectively***

We are highly dependent on our ability to protect our proprietary technology. Our efforts to protect our intellectual property rights may not be successful. We rely on a combination of copyright, patent, trademark and trade secret laws, non-disclosure agreements and other contractual provisions to establish and maintain our proprietary rights. Although we hold certain patents and have other patents pending, we generally have not sought patent protection for our products. While U.S. and Canadian copyright laws, international conventions and international treaties may provide meaningful protection against unauthorized duplication of software, the laws of some foreign jurisdictions may not protect proprietary rights to the same extent as the laws of Canada or the United States. Software piracy has been, and is expected to be, a persistent problem for the software industry. Enforcement of our intellectual property rights may be difficult, particularly in some nations outside of the United States and Canada in which we seek to market our products. Despite the precautions we take, it may be possible for unauthorized third parties, including competitors, to copy certain portions of our products or to "reverse engineer" in order to obtain and use information that we regard as proprietary.

***The loss of licenses to use third party software or the lack of support or enhancement of such software could adversely affect our business***

We currently depend on certain third-party software, the lack of availability of which could result in increased costs of, or delays in, licenses of our products. For a limited number of product modules, we rely on certain software that we license from third-parties, including software that is integrated with internally developed software and which is used in our products to perform key functions. These third-party software licenses may not continue to be available to us on commercially reasonable terms, and the related software may not continue to be appropriately supported, maintained, or enhanced by the licensors. The loss of license to use, or the inability of licensors to support, maintain, and enhance any of such software, could result in increased costs, delays, or reductions in product shipments until equivalent software is developed or licensed, if at all, and integrated with internally developed software, and could adversely affect our business.

***A reduction in the number or sales efforts by distributors could materially impact our revenues***

A significant portion of our revenue is derived from the license of our products through third parties. Our success will depend, in part, upon our ability to maintain access to existing channels of distribution and to gain access to new channels if and when they develop. We may not be able to retain a sufficient number of our existing or future distributors. Distributors may also give higher priority to the sale of products other than ours (which could include products of competitors) or may not devote sufficient resources to marketing our products. The performance of third party distributors is largely outside of our control and we are unable to predict the extent to which these distributors will be successful in marketing and licensing our products. A reduction in sales efforts, a decline in the number of distributors, or the discontinuance of sales of our products by our distributors could lead to reduced revenue.

***We must continue to manage our growth or our operating results could be adversely affected***

Our markets have continued to evolve at a rapid pace. Moreover, we have grown significantly through acquisitions in the past and continue to review acquisition opportunities as a means of increasing the size and scope of our business. Finally, we have been subject to increased regulation, including various NASDAQ rules



and Section 404 of the Sarbanes-Oxley Act of 2002 (“Sarbanes”), which has necessitated a significant use of our resources to comply with the increased level of regulation on a timely basis. Our growth, coupled with the rapid evolution of our markets and the new heightened regulations, have placed, and are likely to continue to place, significant strains on our administrative and operational resources and increased demands on our internal systems, procedures and controls. Our administrative infrastructure, systems, procedures and controls may not adequately support our operations or compliance with such regulations, and our management may not be able to achieve the rapid, effective execution of the product and business initiatives necessary to successfully penetrate the markets for our products and services and to successfully integrate any business acquisitions in the future to comply with all regulatory rules. If we are unable to manage growth effectively, or comply with such new regulations, our operating results will likely suffer and we may not be in a position to comply with our periodic reporting requirements or listing standards, which could result in our delisting from the NASDAQ stock market.

***Recently enacted and proposed changes in securities laws and related regulations could result in increased costs to us***

Recently enacted and proposed changes in the laws and regulations affecting public companies, including the provisions of Sarbanes and recent rules enacted and proposed by the SEC and NASDAQ, have resulted in increased costs to us as we respond to the new requirements. In particular, complying with the requirements of Section 404 of Sarbanes have resulted in an overall higher level of internal costs and fees from our independent accounting firm and external consultants. These rules could also impact our ability to obtain certain types of insurance, including director and officer liability insurance, and as a result, we may be forced to accept reduced policy limits and coverage and/or incur substantially higher costs to obtain the same or similar coverage. The impact of these events could also make it more difficult for us to attract and retain qualified persons to serve on our Board of Directors, on committees of our Board of Directors, or as executive officers.

***Our products rely on the stability of various infrastructure software that, if not stable, could negatively impact the effectiveness of our products, resulting in harm to our reputation and business***

Our developments of Internet and intranet applications depend and will depend on the stability, functionality and scalability of the infrastructure software of the underlying intranet, such as that of Sun Microsystems Inc., Hewlett Packard Company, Oracle, Microsoft and others. If weaknesses in such infrastructure software exist, we may not be able to correct or compensate for such weaknesses. If we are unable to address weaknesses resulting from problems in the infrastructure software such that our products do not meet customer needs or expectations, our business and reputation may be significantly harmed.

***Our quarterly revenues and operating results are likely to fluctuate which could materially impact the price of our Common Shares***

We experience, and we are likely to continue to experience, significant fluctuations in quarterly revenues and operating results caused by many factors, including changes in the demand for our products, the introduction or enhancement of products by us and our competitors, market acceptance of enhancements or products, delays in the introduction of products or enhancements by us or our competitors, customer order deferrals in anticipation of upgrades and new products, lengthening sales cycles, changes in our pricing policies or those of our competitors, delays involved in installing products with customers, the mix of distribution channels through which products are licensed, the mix of products and services sold, the timing of restructuring charges taken in connection with acquisitions completed by us, the mix of international and North American revenues, foreign currency exchange rates, acquisitions and general economic conditions.

A cancellation or deferral of even a small number of licenses or delays in installations of our products could have a material adverse effect on our results of operations in any particular quarter. Because of the impact of the timing of product introductions and the rapid evolution of our business and the markets we serve, we cannot predict whether seasonal patterns experienced in the past will continue. For these reasons, reliance should not be



placed upon period-to-period comparisons of our financial results to forecast future performance. It is likely that our quarterly revenue and operating results could always vary significantly and if such variances are significant, the market price of our Common Shares could materially decline.

***There can be no assurance that any patentable elements will be identified or, if identified, that patent protection will be obtained.***

Although we intend to protect our rights vigorously, there can be no assurance that these measures will, in all cases, be successful. Enforcement of our intellectual property rights may be difficult, particularly in some nations outside of the United States and Canada in which we seek to market our products. Certain of our license arrangements have required us to make a limited confidential disclosure of portions of the source code for our products, or to place such source code into an escrow for the protection of another party. Despite the precautions we have taken, unauthorized third parties may be able to copy certain portions of our products or to reverse engineer or obtain and use information that we regard as proprietary. Also, our competitors could independently develop technologies that are perceived to be substantially equivalent or superior to our technologies. Our competitive position may be affected by our ability to protect our intellectual property. Although we do not believe we are infringing on the intellectual property rights of others, claims of infringement are becoming increasingly common as the software industry develops and as related legal protections, including patents, are applied to software products. Although most of our technology is proprietary in nature, we do include certain third party software in our products. In these cases, this software is licensed from the entity holding our intellectual property rights. Although we believe that we have secured proper licenses for all third-party software that has been integrated into our products, third parties may assert infringement claims against us in the future, and any such assertion may result in litigation, which may be costly and require us to obtain a license for the software. Such licenses may not be available on reasonable terms or at all.

***If we are not able to attract and retain top employees, our ability to compete may be harmed***

Our performance is substantially dependent on the performance of our executive officers and key employees. The loss of the services of any of our executive officers or other key employees could significantly harm our business. We do not maintain “key person” life insurance policies on any of our employees. Our success is also highly dependent on our continuing ability to identify, hire, train, retain and motivate highly qualified management, technical, sales and marketing personnel. Specifically, the recruitment of top research developers, along with experienced salespeople, remains critical to our success. Competition for such personnel is intense, and we may not be able to attract, integrate or retain highly qualified technical and managerial personnel in the future.

***The volatility of our stock price could lead to losses by shareholders***

The market price of our Common Shares has been volatile and subject to wide fluctuations. Such fluctuations in market price may continue in response to quarterly variations in operating results, announcements of technological innovations or new products by us or our competitors, changes in financial estimates by securities analysts or other events or factors. In addition, financial markets experience significant price and volume fluctuations that particularly affect the market prices of equity securities of many technology companies and these fluctuations have often been unrelated to the operating performance of such companies or have resulted from the failure of the operating results of such companies to meet market expectations in a particular quarter. Broad market fluctuations or any failure of our operating results in a particular quarter to meet market expectations may adversely affect the market price of our Common Shares, resulting in losses to shareholders. In the past, following periods of volatility in the market price of a company’s securities, securities class action litigation have often been instituted against such a company. Due to the volatility of our stock price, we could be the target of similar securities litigation in the future. Such litigation could result in substantial costs and a diversion of management’s attention and resources, which would have a material adverse effect on our business and operating results.

***We may have exposure to greater than anticipated tax liabilities***

We are subject to income taxes and non-income taxes in a variety of jurisdictions and our tax structure is subject to review by both domestic and foreign taxation authorities. The determination of our worldwide provision for income taxes and other tax liabilities requires significant judgment. Although we believe our estimates are reasonable, the ultimate tax outcome may differ from the amounts recorded in our financial statements and may materially affect our financial results in the period or periods for which such determination is made.

**Item 1B. Unresolved Staff Comments**

As part of a review by the staff of the SEC (the “Staff”) of our Annual Report on Form 10-K for the year ended June 30, 2005 and our Quarterly Reports on Form 10-Q for the quarters ended September 30, 2005, December 31, 2005, and March 31, 2006, we have received and responded to comments from the Staff. As of the date of the filing of this Annual Report under Form 10-K certain of the Staff comments remains unresolved and these pertain primarily to our method of accounting for acquisition related costs.

**Item 2. Properties**

Our headquarters is located in Waterloo, Ontario, Canada. This facility consists of four floors totaling approximately 112,000 square feet. The land on which the building has been built is leased from the University of Waterloo (“U of W”), for a period of 49 years with an option to renew for an additional term of 49 years. The option to renew is exercisable by us upon providing written notice to the U of W not earlier than the 40th anniversary and not later than the 45th anniversary of the lease commencement date.

We have obtained a mortgage from a Canadian chartered bank which has been secured by a lien on our headquarters in Waterloo. For more information regarding this mortgage please refer to Note 9 “Bank Indebtedness” under our Notes to Consolidated Financial Statements in Item 8 to this Annual Report on Form 10-K.

Other principal offices that we currently occupy under lease are:

- Lincolnshire, IL, USA—totaling 38,115 rentable square feet;
- Beaconsfield, UK—totaling 16,948 rentable square feet;
- Grasbrunn (Munich), Germany—totaling 339,205 rentable square feet; and
- Richmond Hill, ON, Canada—totaling 101,458 rentable square feet.

In addition, we also occupy other leased facilities in the United States, Canada, Europe and Asia.

We continue to review our facilities portfolio in an effort to ensure that our operational needs are being met. In Fiscal 2006, we identified certain facilities as excess and have since taken steps to fully or partially close such excess facilities.

**Item 3. Legal Proceedings**

In the normal course of business, we are subject to various other legal matters. While the results of litigation and claims cannot be predicted with certainty, we believe that the final outcome of these other matters will not have a materially adverse effect on our consolidated results of operations or financial conditions.

**Item 4. Submission of Matters to a Vote of Security Holders**

None.

## PART II

### Item 5. Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities

Our Common Shares have traded on the NASDAQ since January 23, 1996 under the symbol "OTEX" and our Common Shares have traded on the Toronto Stock Exchange ("TSX") since June 26, 1998 under the symbol "OTC". The following table sets forth the high and low sales prices for our Common Shares, as reported by the TSX, and the NASDAQ, respectively, for the periods indicated below.

On June 30, 2006, the closing price of our Common Shares on the NASDAQ was \$14.44 USD per share. On June 30, 2006, the closing price of our Common Shares on the TSX was \$16.01 CDN per share.

	NASDAQ		TSX	
	High	Low	High	Low
	(in U.S. dollars)		(in Canadian dollars)	
Fiscal Year Ending June 30, 2006:				
Fourth Quarter . . . . .	\$19.16	\$13.25	\$21.22	\$14.80
Third Quarter . . . . .	18.36	14.10	20.99	16.44
Second Quarter . . . . .	15.92	13.15	19.06	15.53
First Quarter . . . . .	15.23	11.51	18.49	13.58
Fiscal Year Ending June 30, 2005:				
Fourth Quarter . . . . .	\$19.00	\$14.00	\$23.00	\$17.30
Third Quarter . . . . .	21.22	16.84	26.35	20.52
Second Quarter . . . . .	20.26	14.82	25.50	18.37
First Quarter . . . . .	32.06	16.44	41.45	21.48

On September 1, 2006, the closing price of our Common Shares on the NASDAQ was \$17.01 USD per share.

On September 1, 2006, the closing price of our Common Shares on the TSX was \$18.70 CDN per share.

As at August 25, 2006, there were approximately 8,950 shareholders of record holding our Common Shares of which approximately 2,947 were U.S. Shareholders of record holding our Common Shares.

All of the share information presented above and throughout this Annual Report on Form 10-K has been adjusted for the two-for-one stock split that took place in Fiscal 2004.

#### *Unregistered sales of Equity Securities*

None.

#### *Dividend Policy*

We have never paid cash dividends on our capital stock. We currently intend to retain earnings, if any, for use in our business and we do not anticipate paying any cash dividends in the foreseeable future. In Fiscal 2004, the Company declared a two-for-one split of the Company's Common Shares.

### Stock Repurchases

The following table provides details of Common Shares we repurchased during the three months ended June 30, 2006:

#### PURCHASES OF EQUITY SECURITIES OF THE COMPANY FOR THE THREE MONTHS ENDED JUNE 30, 2006

Period	(a) Total Number of Shares (or Units) Purchased	(b) Average Price Paid per Share (or Unit)	(c) Total Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs	(d) Maximum Number of Shares (or Units) that May Yet Be Purchased Under the Plans or Programs
04/1/06 to 04/30/06 .....	—	\$—	—	—
05/1/06 to 05/31/06 .....	—	—	—	2,444,104
06/1/06 to 06/30/06 .....	—	—	—	2,444,104
Total .....	—	\$—	—	2,444,104

On May 19, 2006, we registered a repurchase program (the “Repurchase Program”) that provided for the repurchase of up to a maximum of 2,444,104 Common Shares. No shares were repurchased under the Repurchase Program during the period beginning May 19, 2006 and ending on June 30, 2006. The Repurchase Program will terminate on May 18, 2007.

### Item 6. Selected Financial Data

The following table summarizes our selected consolidated financial data for the periods indicated. The selected consolidated financial data should be read in conjunction with our Consolidated Financial Statements and related notes and “Management’s Discussion and Analysis of Financial Condition and Results of Operations” appearing elsewhere in this Annual Report on Form 10-K. The selected consolidated statement of income and balance sheet data for each of the five years indicated below have been derived from our audited financial statements.

	Fiscal Year Ended June 30,				
	2006	2005	2004	2003	2002
	(in thousands, except per share data)				
<b>Statement of Income Data:</b>					
Revenue .....	\$409,562	\$414,828	\$291,058	\$177,725	\$154,372
Net income .....	\$ 4,978	\$ 20,359	\$ 23,298	\$ 27,757	\$ 16,671
Net income per share, basic .....	\$ 0.10	\$ 0.41	\$ 0.53	\$ 0.71	\$ 0.42
Net income per share, diluted .....	\$ 0.10	\$ 0.39	\$ 0.49	\$ 0.67	\$ 0.39
Weighted average number of Common Shares outstanding, basic .....	48,666	49,919	43,744	39,051	39,957
Weighted average number of Common Shares outstanding, diluted .....	49,950	52,092	47,272	41,393	42,478
	As of June 30,				
	2006	2005	2004	2003	2002
<b>Balance Sheet Data:</b>					
Total assets .....	\$671,093	\$640,936	\$668,655	\$238,687	\$186,847
Long-term liabilities .....	57,108	57,781	57,971	6,608	—
Cash dividends per Common Share .....	—	—	—	—	—

## **Item 7. Management's Discussion and Analysis of Financial Condition and Results of Operation**

*In addition to historical information, this Annual Report on Form 10-K contains forward-looking statements within the meaning of the Private Securities Litigation Reform Act of 1995, Section 21E of the Securities Exchange Act of 1934, as amended, and Section 27A of the Securities Act of 1933, as amended, and is subject to the safe harbors created by those sections. Words such as "anticipates," "expects," "intends," "plans," "believes," "seeks," "estimates," "may," "could," "would," "might," "will" and variations of these words or similar expressions are intended to identify forward-looking statements. In addition, any statements that refer to expectations, beliefs, plans, projections, objectives, performance or other characterizations of future events or circumstances, including any underlying assumptions, are forward-looking statements. These forward-looking statements involve known and unknown risks as well as uncertainties, including those discussed herein and in the notes to our financial statements for the year ended June 30, 2006, certain sections of which are incorporated herein by reference as set forth in Items 7 and 8 of this report. The actual results that we achieve may differ materially from any forward-looking statements, which reflect management's opinions only as of the date hereof. We undertake no obligation to revise or publicly release the results of any revisions to these forward-looking statements. You should carefully review Part I Item 1A "Risk Factors" and other documents we file from time to time with the Securities and Exchange Commission. A number of factors may materially affect our business, financial condition, operating results and prospects. These factors include but are not limited to those set forth in Part I Item 1A "Risk Factors" and elsewhere in this report. Any one of these factors may cause our actual results to differ materially from recent results or from our anticipated future results. You should not rely too heavily on the forward-looking statements contained in this Annual Report on Form 10-K, because these forward-looking statements are relevant only as of the date they were made.*

### **OVERVIEW**

#### **About Open Text**

We are one of the market leaders in providing Enterprise Content Management ("ECM") solutions that bring together people, processes and information. Our software combines collaboration with content management, transforming information into knowledge that provides the foundation for innovation, compliance and accelerated growth.

#### **Offer to Purchase Hummingbird Ltd ("Hummingbird")**

In July 2006, we announced our intention to make an offer to purchase all of the outstanding common shares of Hummingbird. Hummingbird is a Toronto based global provider of ECM solutions.

In August 2006, we entered into a definitive agreement with Hummingbird to acquire all of Hummingbird's outstanding common shares at a price of \$27.85 per share, or approximately \$489.0 million. The transaction with Hummingbird is to be carried out by way of a statutory plan of arrangement and will be voted on by Hummingbird's shareholders at a meeting of shareholders currently expected to be held in mid-September. The arrangement is subject to court approval in the Province of Ontario as well as certain other customary conditions, including the receipt of regulatory approvals. The proposed transaction is expected to close in early-October, shortly after receipt of Hummingbird shareholder approval and final approval of the court.

We believe that this potential acquisition will benefit the shareholders, customers, partners and employees of both companies and will substantially increase our size and global reach. Hummingbird provides a strategic fit that adds to our focus on solutions and increases the effectiveness of our global partner program.

#### **Management Changes**

We announced that effective June 1, 2006 we had appointed Paul McFeeters as the Chief Financial Officer ("CFO") of Open Text. Mr. McFeeters' prior positions included that of CFO at Platform Computing Inc. (a grid

computing software vendor), CFO at Kintana, Inc. (a privately-held IT governance software provider), as well as President and Chief Executive Officer (“CEO”) positions at MD Private Trust and Municipal Financial Corporation. He holds a Certified Management Accountant designation and attained a B.B.A (Honours) from Wilfrid Laurier University and an MBA from York University, Canada. Mr McFeeters has a strong investment background that includes having completed five public offerings and his experience within entrepreneurial high-growth companies will make him a valued advisor to our management team.

On July 5, 2006, we announced the appointment of John Wilkerson as Executive Vice President, Global Sales and Services. Mr. Wilkerson’s appointment was effective August 1, 2006. Mr. Wilkerson’s prior experience includes executive positions at Microsoft Corporation (“Microsoft”), Electronic Data Systems Corporation, Baan Corporation and Oracle Corporation (“Oracle”). With over twenty years’ experience in leadership roles in direct sales, channel sales and professional services, Mr Wilkerson brings unique credentials to leverage our global partner program within the worldwide sales and services functions. He also brings considerable experience in providing vertical solutions at the enterprise level to our global customers.

### ***Quarterly Overview***

The following table summarizes selected unaudited quarterly financial data for the past eight fiscal quarters:

	Fiscal 2006			
	Fourth Quarter	Third Quarter	Second Quarter	First Quarter
	(in thousands)			
Total revenues	\$105,235	\$100,926	\$110,771	\$ 92,630
Gross profit	67,649	65,556	75,447	59,722
Net income (loss)	\$ 7,803	\$ 7,322	\$ 2,721	\$(12,868)
Earnings (loss) per share:				
Basic	\$ 0.16	\$ 0.15	\$ 0.06	\$ (0.27)
Diluted	\$ 0.17	\$ 0.15	\$ 0.05	\$ (0.27)

  

	Fiscal 2005			
	Fourth Quarter	Third Quarter	Second Quarter	First Quarter
	(in thousands)			
Total revenues	\$109,373	\$105,167	\$114,692	\$ 85,596
Gross profit	72,091	68,136	76,744	55,689
Net income (loss)	\$ 5,033	\$ 5,342	\$ 10,970	\$ (986)
Earnings (loss) per share:				
Basic	\$ 0.10	\$ 0.11	\$ 0.22	\$ (0.02)
Diluted	\$ 0.10	\$ 0.10	\$ 0.21	\$ (0.02)

Quarterly revenues and expenses are impacted by a number of external factors including the timing of large transactions, timing of budget approvals of our customers, acquisitions, seasonality of economic activity and to some degree the timing of capital spend by our customers. Historically, our second quarter (which coincides with the fourth quarter of a number of our customers) has been our strongest quarter and we expect this trend to continue in Fiscal 2007.



## Results of Operations

The following table presents an overview of our selected financial data.

(in thousands)	Fiscal Year			% Change from Fiscal Year	
	2006	2005	2004	2005 to 2006	2004 to 2005
Total revenue	\$409,562	\$414,828	\$291,058	(1.3%)	42.5%
Cost of revenue	141,188	142,168	85,613	(0.7%)	66.1%
Gross profit	268,374	272,660	205,445	(1.6%)	32.7%
Amortization of acquired intangible assets	9,199	8,234	4,095	11.7%	101.1%
Special charges (recoveries)	26,182	(1,724)	10,005	N/A	N/A
Other operating expenses	220,042	236,842	160,876	(7.1%)	47.2%
Income from operations	12,951	29,308	30,469	(55.8%)	(3.8%)
Gross margin	65.5%	65.7%	70.6%		
Operating margin	3.2%	7.1%	10.5%		
Net income	\$ 4,978	\$ 20,359	\$ 23,298	(75.5%)	(12.6%)

Our focus in Fiscal 2006 was on increasing near-term profitability by streamlining our operations. To achieve this we announced a significant restructuring of our operations in July 2005 which resulted in a charge of \$26.2 million. This restructuring primarily included work force reductions and abandonment of excess real estate facilities. Absent the impact of this charge our operational income was \$39.1 million in Fiscal 2006 which was a substantial improvement over our operational income (absent the impact of a restructuring recovery) in Fiscal 2005, which was \$27.6 million. Going forward we expect to generate annualized savings of approximately \$38.0 to \$40.0 million as a result of this restructuring initiative. In addition, we rationalized our product portfolio and made significant progress with our global partner program, particularly with Microsoft, Oracle and SAP. We received Microsoft's Global ISV (Independent Software Vendor) of the year award and launched a program with Oracle which will include the joint selling of Oracle and Open Text products. This reinforces our belief that our global partner program is strong and we expect this momentum to continue in Fiscal 2007.

We are positive on the overall outlook for ECM in Fiscal 2007. Our objective in Fiscal 2007 is to increase our market share and we expect our level of partner sales to increase to 20% or more from our current level of approximately 15%. We will continue to adapt to market changes in the ECM sector by developing new solutions, leveraging our existing solutions and utilizing our partner programs to reach new customers, and to serve existing customers more effectively. We also expect to announce the "formal" release of Livelink ECM version 10.0, our next major product release, within the first six months of Fiscal 2007. Livelink 10.0 is a higher "value-added" application that will offer the ability to connect with or interact with various platforms from other vendors. Finally, we expect (contingent upon the successful closure of the Hummingbird acquisition) to focus our efforts on the operational integration of Hummingbird into our operations and to realize the synergies in our combined product offerings.

An analysis of each of the components of our "Results of Operations" follows:

## Revenues

### Revenue by Product Type

The following tables set forth our revenues by product and as a percentage of the related product revenue for the periods indicated:

(In thousands)	2006	2005-2006 Change in %	2005	2004-2005 Change in %	2004
License	\$122,520	(10.3%)	\$136,522	12.2%	\$121,642
Customer support	189,417	5.7%	179,178	64.7%	108,812
Services	97,625	(1.5%)	99,128	63.6%	60,604
Total	<u>\$409,562</u>	<u>(1.3%)</u>	<u>\$414,828</u>	<u>42.5%</u>	<u>\$291,058</u>

<u>(% of total revenue)</u>	<u>2006</u>	<u>2005</u>	<u>2004</u>
License .....	30.0%	32.9%	41.8%
Customer support .....	46.2%	43.2%	37.4%
Services .....	23.8%	23.9%	20.8%
Total .....	<u>100.0%</u>	<u>100.0%</u>	<u>100.0%</u>

### ***License Revenue***

License revenue consists of fees earned from the licensing of software products to customers.

License revenue decreased by approximately \$14.0 million in Fiscal 2006 compared to Fiscal 2005. The drop was primarily due to structural re-alignment of certain sales forces around the world, which decreased license revenue by approximately \$16.3 million, as we continued to focus on streamlining our operations and to focus on future profitability. This decrease was offset by improved results in North America, where license revenue increased by approximately \$5.6 million compared with Fiscal 2005. We believe the increased license revenue in North America was the result of a greater demand in North America for our ECM and SAP solutions. The remaining decrease in license revenue is attributable to a negative foreign exchange impact of \$3.3 million.

License revenue increased in Fiscal 2005, compared to Fiscal 2004, by \$14.9 million. We generated approximately \$26.0 million in revenue from acquisitions and approximately \$6.0 million related to the positive impact of foreign exchange rates. This increase was offset by the discontinuance of unprofitable revenue streams obtained through acquisitions. In addition, Fiscal 2005 revenue was negatively impacted by a shift in our business model that saw customers increasingly interested in buying, substantially, a full ECM platform, which had the impact of lengthening the sales cycle and close process for new deals and deals in the pipeline. Further, sales were impacted due to our need to partially rebuild our North American sales force, during the year, to meet the needs of our evolving business model. Finally, the large drop in the Euro during the fourth quarter had the effect of delaying purchase decisions with respect to several of our large European customers. For these reasons, our organic growth decreased in Fiscal 2005.

### ***Customer Support Revenue***

Customer support revenue consists of revenue from our customer support and maintenance agreements. These agreements allow our customers to receive technical support, enhancements and upgrades to new versions of our software products when and if available. Customer support revenue is generated from such support and maintenance agreements relating to current year sales of software products and from the renewal of existing maintenance agreements for software licenses sold in prior periods. As our installed base grows, the renewal rate has a larger influence on customer support revenue than the current software revenue growth. Therefore changes in customer support revenue do not necessarily correlate directly to the changes in license revenue in a given period. Typically the term of these support and maintenance agreements is twelve months, with customer renewal options. We have historically experienced a renewal rate over 90% but continue to encounter pricing pressure from our customers during contract negotiation and renewal. New license sales create additional customer support agreements which contribute substantially to the increase in our customer support revenue.

Customer support revenue increased by approximately \$10.2 million in Fiscal 2006 compared to Fiscal 2005. All geographic regions contributed to the increase in customer support revenue from Fiscal 2005 to Fiscal 2006. North American customer support revenue rose by 5% in Fiscal 2006. European customer support revenue rose by 4% in Fiscal 2006, and customer support revenue in other regions increased by 7% in Fiscal 2006.

Customer support revenues increased by approximately \$70.4 million in Fiscal 2005 compared to Fiscal 2004. The increase in customer support revenues resulted from several factors. Customer support revenues related to the Fiscal 2004 and Fiscal 2005 acquisitions accounted for approximately 47% and 8%, respectively, of

the revenue growth. The increase in the number of licenses granted in Fiscal 2004, which resulted in an increased number of maintenance contracts, contributed to the growth in customer support revenues in Fiscal 2005. Moreover, we continued to experience very strong service support contract renewal rates for all of our products, which also contributed to the growth in customer support revenue.

### ***Service Revenue***

Service revenue consists of revenues from consulting contracts and contracts to provide training and integration services.

Service revenue remained relatively stable in Fiscal 2006 albeit dropping very slightly by \$1.5 million compared to Fiscal 2005. Service revenue was strong in North America, with revenues increasing by \$8.5 million from Fiscal 2005 to Fiscal 2006. The increase in North American service revenue was due in part to its close relationship to license revenue. We believe this growth was the result of a strong market demand for our ECM solutions, namely our Livelink platform, as well as our strategic shift in focus towards deployment solutions and services consulting.

This increase in service revenue for North America was offset by a decrease in Fiscal 2006 service revenue of \$8.2 million in Europe compared to Fiscal 2005. Approximately \$2.5 million of this decrease was the result of lower license revenue in Europe. The remaining decrease was primarily the result of the cancellation through negotiation of several over-run legacy projects, and the cancellation of these projects forced us to lose short-term revenue. Although these projects resulted in less revenue for Fiscal 2006, we believe the cancellation of these projects will avert unprofitable long-term problems in the future.

Service revenue from countries other than North America and Europe resulted in a decrease of \$1.4 million in Fiscal 2006 compared to Fiscal 2005. This decrease was primarily attributable to the decrease of license revenue in Fiscal 2006.

Overall, the foreign exchange impact on our service revenue was favorable by approximately \$400,000.

Service revenues increased by approximately \$38.5 million in Fiscal 2005 compared to Fiscal 2004. Service revenues related to Fiscal 2005 acquisitions represented 10% of the growth while Fiscal 2004 acquisitions represented approximately 45% of the growth. In Fiscal 2005, we completed the integration of the Fiscal 2004 acquisitions (most notably IXOS), aligning services with the sales verticals for consistent teaming on strategic accounts as well as delivering repeatable services solutions (as opposed to trying to deliver unique consulting solutions to each customer), which resulted in the growth in these revenues.

### **Revenue and Operating Margin by Geography**

The following table sets forth information regarding our revenue by geography

#### **Revenue by Geography**

**(In thousands)**

	<b>2006</b>	<b>2005</b>	<b>2004</b>
North America .....	\$197,852	\$173,767	\$136,346
Europe .....	189,260	215,401	138,192
Other .....	22,450	25,660	16,520
Total .....	<u>\$409,562</u>	<u>\$414,828</u>	<u>\$291,058</u>
<b>% of Total Revenue</b>	<b>2006</b>	<b>2005</b>	<b>2004</b>
North America .....	48.3%	41.9%	46.8%
Europe .....	46.2%	51.9%	47.5%
Other .....	5.5%	6.2%	5.7%
Total .....	<u>100.0%</u>	<u>100.0%</u>	<u>100.0%</u>

The overall increase in North America revenues in Fiscal 2006 versus Fiscal 2005 and Fiscal 2004 is reflective of our strengthened sales management, improved focus on sales process management, enhancement of lead generation processes and a focus on our key partnerships and verticals that represent our greatest opportunities. Decreases in European revenues reflect the weakening of European currencies and a structural re-alignment of our European sales force.

### ***North America***

The North America geographic segment includes Canada, the United States and Mexico.

Revenues in North America increased by \$24.1 million in Fiscal 2006 compared to Fiscal 2005. The increase is the result of the North American market showing greater interest in our ECM and SAP solutions. In Fiscal 2006, North America saw an increase of 24 new customers, ranging from Fortune 500 companies, major government organizations and financial institutions.

### ***Europe***

The Europe geographic segment includes Austria, Belgium, Denmark, Finland, France, Germany, Italy, Netherlands, Norway, Spain, Sweden, Switzerland and the United Kingdom.

Revenues in Europe decreased by \$26.1 million in Fiscal 2006 compared to Fiscal 2005. The decrease can be attributed to the structural realignment of certain sales forces in Fiscal 2006. In Fiscal 2006, we focused on profitability which resulted in us having to give up growth in certain areas.

### ***Other***

The “other” geographic segment includes Australia, Japan, Malaysia, and the Middle East region.

Revenues from our “other” segments decreased by \$3.2 million in Fiscal 2006 compared to Fiscal 2005 primarily due to the reorganization of our operating model in certain areas, such as the Middle East. By leveraging our partner programs in these areas, we can enhance our sales force coverage and expect to see increased cost effectiveness in the future.

### **Adjusted Operating Margin by Significant Segment**

The following table provides a summary of the Company’s adjusted operating margins by significant segment.

	<u>2006</u>	<u>2005</u>	<u>2004</u>
North America . . . . .	19.5%	13.6%	16.0%
Europe . . . . .	15.7%	12.4%	19.9%

Our adjusted operating margins have increased in all geographies in Fiscal 2006 compared to Fiscal 2005 on account of our customers being increasingly interested in purchasing a complete ECM platform which generally involves a larger dollar value transaction. This has the effect of lengthening lead times for new and existing opportunities.

The decrease in adjusted operating margins in Europe in Fiscal 2005 versus Fiscal 2004 is due to the fact that Fiscal 2004 included the results of IXOS from March 1, 2004. This resulted in a higher adjusted operating margin from IXOS than would have been realized on an annual basis due to the timing/seasonality of revenue and expenses. In addition, the rapid devaluation of the Euro in late Fiscal 2005 triggered deferrals of customer purchases late into the year.

The increase in margins in North America is due to a substantial realignment of our sales management efforts.

Adjusted operating margin is a non-GAAP financial measure. Such non-GAAP financial measures have certain limitations in that they do not have a standardized meaning and thus our definition may be different from similar non-GAAP financial measures used by other companies. We use this financial measure to supplement the information provided in our consolidated financial statements, which are presented in accordance with U.S. GAAP. The presentation of adjusted operating margin is not meant to be a substitute for net income presented in accordance with U.S. GAAP, but rather should be evaluated in conjunction with and as a supplement to such U.S. GAAP measures. Adjusted operating margin is calculated based on net income before including the impact of amortization of acquired intangibles, special charges, other income/expense, share-based compensation expenses and the provision for taxes. These items are excluded based upon the manner in which our management evaluates our business. We believe the provision of this non-GAAP measure allows our investors to evaluate the operational and financial performance of our core business using the same evaluation measures that we use to make decisions. As such we believe this non-GAAP measure is a useful indication of our performance or expected performance of recurring operations and may facilitate period-to-period comparisons of operating performance.

A reconciliation of our adjusted operating margin to net income as reported in accordance with U.S. GAAP is provided below:

	<u>Year ended June 30, 2006</u>	<u>Year ended June 30, 2005</u>	<u>Year ended June 30, 2004</u>
<b>Revenue</b>			
North America . . . . .	\$197,852	\$173,767	\$136,346
Europe . . . . .	189,260	215,401	138,192
Other . . . . .	22,450	25,660	16,520
Total revenue . . . . .	<u>\$409,562</u>	<u>\$414,828</u>	<u>\$291,058</u>
<b>Adjusted operating margin</b>			
North America . . . . .	\$ 38,569	\$ 23,686	\$ 21,768
Europe . . . . .	29,796	26,646	27,511
Other . . . . .	4,971	2,786	2,383
Total adjusted operating margin . . . . .	<u>73,336</u>	<u>53,118</u>	<u>51,662</u>
Less:			
Aggregate amortization of all acquired intangible assets . . . . .	28,099	24,409	11,306
Special charges (recoveries) . . . . .	26,182	(1,724)	10,005
Share-based compensation . . . . .	5,196	—	—
Other expense (income) . . . . .	4,788	3,116	(217)
Provision for income taxes . . . . .	4,093	6,958	7,270
Net income . . . . .	<u>\$ 4,978</u>	<u>\$ 20,359</u>	<u>\$ 23,298</u>

## Cost of Revenue and Gross Margin by Product Type

The following tables set forth the changes in cost of revenues and gross margin by product type for the periods indicated:

### Cost of Revenue:

<u>(In thousands)</u>	<u>2006</u>	<u>2005-2006</u> <u>Change in %</u>	<u>2005</u>	<u>2004-2005</u> <u>Change in %</u>	<u>2004</u>
License .....	\$ 11,196	(3.0%)	\$ 11,540	7.0%	\$10,784
Customer Support .....	31,482	(4.8%)	33,086	63.0%	20,299
Service .....	79,610	(2.2%)	81,367	72.0%	47,319
Amortization of acquired technology acquired intangible .....	18,900	16.8%	16,175	124.3%	7,211
Total .....	<u>\$141,188</u>	<u>(0.7%)</u>	<u>\$142,168</u>	<u>66.1%</u>	<u>\$85,613</u>
<u>Cost of revenue as a % of revenue</u>			<u>2006</u>	<u>2005</u>	<u>2004</u>
License .....			9.1%	8.5%	8.9%
Customer Support .....			16.6%	18.5%	18.7%
Service .....			81.5%	82.1%	78.1%

### *Cost of license revenue*

Cost of license revenue consists primarily of royalties payable to third parties and product media duplication, instruction manuals and packaging expenses.

Cost of license revenues decreased in Fiscal 2006 as our license revenues decreased, but the gross margin on licenses has remained stable over Fiscal 2006, Fiscal 2005 and Fiscal 2004 due to the fact that our overall cost structure has remained relatively unchanged.

### *Cost of customer support revenues*

Cost of customer support revenues is comprised primarily of technical support personnel and related costs.

Cost of customer support revenues decreased by \$1.6 million in Fiscal 2006 over Fiscal 2005 due to operational efficiencies achieved as the result of our global restructuring efforts.

Cost of customer support revenues increased \$12.8 million in Fiscal 2005 compared to Fiscal 2006. The majority of the increase is attributable to personnel costs related to Fiscal 2004 acquisitions. The increased number of personnel in our customer support organization also drove increases in other general and administrative expenses including communication, travel and office expenses.

### *Cost of service revenues*

Cost of service revenues consists primarily of the costs of providing integration, customization and training with respect to our various software products. The most significant component of these costs is personnel related expenses. The other components include travel costs and third party subcontracting.

Cost of service revenues decreased by \$1.8 million in Fiscal 2006 versus Fiscal 2005 due to reduced professional services and training costs of \$1.9 million offset by higher direct marketing costs of \$108,000. Cost of service revenues as a percentage of service revenues remained stable at 81.5 % in Fiscal 2006 compared to 82.1% in Fiscal 2005.



Cost of service revenues increased by \$34.0 million in Fiscal 2005 versus Fiscal 2004 due to additional costs assumed as a result of the Fiscal 2004 acquisitions since our Europe-based Fiscal 2004 acquisitions have made the service cost structure higher as a percentage of revenue.

### ***Amortization of acquired technology intangible assets***

Amortization of acquired technology intangible assets increased by \$2.7 million in Fiscal 2006 compared to Fiscal 2005. The increase is due to the full year impact of the amortization of intangibles relating to our Fiscal 2005 acquisitions.

Amortization of acquired technology intangible assets increased by \$9.0 million in Fiscal 2005 compared to Fiscal 2004. The increase is due to the impact of the Fiscal 2005 acquisitions and a full year's amortization of the IXOS intangible assets, versus four months amortization in the prior year.

### **Operating Expenses**

The following table sets forth total operating expenses by function and as a percentage of total revenue for the periods indicated:

<u>(In thousands)</u>	<u>2006</u>	<u>2005-2006 Change in %</u>	<u>2005</u>	<u>2004-2005 Change in %</u>	<u>2004</u>
Research and development .....	\$ 59,184	(9.1%)	\$ 65,139	49.3%	\$ 43,616
Sales and marketing .....	104,419	(8.8%)	114,553	31.1%	87,362
General and administrative .....	45,336	(1.7%)	46,110	102.3%	22,795
Depreciation .....	11,103	0.6%	11,040	55.4%	7,103
Amortization of acquired intangible assets .....	9,199	11.7%	8,234	101.1%	4,095
Special charges (recoveries) .....	26,182	N/A	(1,724)	N/A	10,005
Total .....	<u>\$255,423</u>	<u>5.0%</u>	<u>\$243,352</u>	<u>39.1%</u>	<u>\$174,976</u>

  

<u>(in % of total revenue)</u>	<u>2006</u>	<u>2005</u>	<u>2004</u>
Research and development .....	14.5%	15.7%	15.0%
Sales and marketing .....	25.5%	27.6%	30.0%
General and administrative .....	11.1%	11.1%	7.8%
Depreciation .....	2.7%	2.7%	2.4%
Amortization of acquired intangible assets .....	2.2%	2.0%	1.4%
Special charges (recoveries) .....	6.4%	(0.4%)	3.4%

### ***Research and development expenses***

Research and development expenses consist primarily of personnel expenses, contracted research and development expenses, and facility costs.

Research and development expenses decreased by \$6.0 million in Fiscal 2006 compared to Fiscal 2005 primarily due to a favorable reduction of labour expenses of \$4.4 million owing to a reduction of headcount in Fiscal 2006, a reduction in overhead expenses of \$1.9 million and recoverable input tax credits of \$1.0 million offset by share-based payment expenses of \$1.3 million.

Research and development expenses increased by \$21.5 million in Fiscal 2005 compared to Fiscal 2004. The increase relates primarily to an increase of approximately \$13.6 million in expenses relating to IXOS and Fiscal 2005 acquisitions, and an additional \$3.2 million relating to increased personnel costs. The balance of the increase relates to the increased spending in our core development organization relating to the integration of IXOS archiving products with Open Text's Livelink records management and collaboration products.

### ***Sales and marketing expenses***

Sales and marketing expenses consist primarily of personnel expenses and costs associated with advertising and trade shows.

Sales and marketing expenses declined by \$10.1 million in Fiscal 2006 compared to Fiscal 2005. This decline relates primarily to a \$7.4 million reduction of labour costs attributable to a reduction of headcount in Fiscal 2006, a reduction of \$3.0 million in marketing expenses, a reduction of \$2.1 million in overhead allocations offset by an increase of \$2.0 million of share-based payment expenses and the rest due to miscellaneous increases in costs.

Sales and marketing expenses increased \$27.2 million in Fiscal 2005 compared to Fiscal 2004. The absolute dollar increase in sales and marketing expenses in Fiscal 2005 relates to an increase of \$14.9 million relating to the impact of IXOS. Additionally, we spent an additional \$4.5 million on labor costs, \$2.1 million on increased marketing expenses and \$2.4 million on increased commissions to sales staff, related to an increased number of license sales. The rest of the increase relates to core operational spending on training, travel, recruitment and other miscellaneous costs. Additionally, sales and marketing personnel increased from 498 individuals at the end of Fiscal 2004 to 514 at the end of Fiscal 2005.

### ***General and administrative expenses***

General and administrative expenses consist primarily of salaries of administrative personnel, related overhead, facility expenses, audit fees, consulting expenses and separate public company costs.

General and administrative expenses as a percentage of sales have remained stable over both Fiscal 2006 and Fiscal 2005. These expenses increased marginally in absolute dollar terms as a result of a decrease in consulting and compliance related costs offset partially by an increase due to stock compensation expenses.

General and administrative expenses increased \$23.3 million in Fiscal 2005 compared to Fiscal 2004. The absolute dollar increase in general and administrative expenses in Fiscal 2005 over Fiscal 2004 relates to an increase of \$9.1 million relating to the impact of the IXOS acquisition. Additionally, in Fiscal 2005, we spent an additional \$3.4 million on labor costs, \$2.7 million on consulting costs, and \$5.6 million as a result of separate public company costs, including additional audit fees, and Sarbanes-Oxley compliance fees.

### ***Depreciation expenses***

Depreciation expenses increased marginally in Fiscal 2006 over Fiscal 2005 due to additions in capital assets relating primarily to the addition of the Waterloo building and computer equipment.

Depreciation expenses increased by \$3.9 million in Fiscal 2005 compared to Fiscal 2004 as a direct result of the increased value of capital assets acquired and additions through business acquisitions.

### ***Amortization of acquired intangible assets***

Amortization of acquired intangible assets includes the amortization of patents and customer assets. Amortization of acquired technology is included as an element of cost of sales. The \$1.0 million increase in amortization in Fiscal 2006 over Fiscal 2005 is due to the full year impact of the amortization of intangibles relating to our Fiscal 2005 acquisitions.

Amortization of acquired intangible assets increased \$4.1 million in Fiscal 2005 compared to Fiscal 2004. The increase is due to the impact of the Fiscal 2005 acquisitions and a full year's amortization of the IXOS intangible assets, versus four months amortization in the prior year. Because the amortization of acquired intangible assets is only included from the date of acquisition, this expense continued to increase substantially in Fiscal 2005 when a full year amortization was recorded for the Fiscal 2004 acquisitions.

***Special charges (recoveries)***

In Fiscal 2006, we recorded special charges of \$26.2 million. This charge is primarily comprised of \$21.6 million, relating to the Fiscal 2006 restructuring, \$3.8 million related to the impairment of capital assets, and \$1.0 million related to the impairment of intangible assets. This charge was offset by a recovery of miscellaneous expenses related to the Fiscal 2004 restructuring. Details of each component of special charges (recoveries) are discussed below.

***Fiscal 2006 Restructuring***

In the first quarter of Fiscal 2006, our Board approved, and we began to implement restructuring activities to streamline our operations and consolidate our excess facilities (“Fiscal 2006 restructuring plan”). Total costs to be incurred in conjunction with the Fiscal 2006 restructuring plan are expected to be approximately \$22.0 million of which \$21.6 million has been recorded as of June 30, 2006. These charges relate to work force reductions, abandonment of excess facilities and other miscellaneous direct costs. On a quarterly basis we conduct an evaluation of these balances and revise our assumptions and estimates as appropriate. The provision related to workforce reduction is expected to be substantially paid by December 31, 2006 and the provisions relating to the abandonment of excess facilities, such as contract settlements and lease costs, are expected to be paid by January 2014.

A reconciliation of the beginning and ending liability is shown below:

<b><u>Fiscal 2006 Restructuring Plan</u></b>	<b><u>Work force reduction</u></b>	<b><u>Facility costs</u></b>	<b><u>Other</u></b>	<b><u>Total</u></b>
Balance as of June 30, 2005 .....	\$ —	\$ —	\$ —	\$ —
Accruals .....	13,982	6,708	933	21,623
Cash payments .....	(11,788)	(2,770)	(924)	(15,482)
Foreign exchange and other adjustments .....	491	197	—	688
Balance as of June 30, 2006 .....	<u>\$ 2,685</u>	<u>\$ 4,135</u>	<u>\$ 9</u>	<u>\$ 6,829</u>

The following table outlines restructuring charges incurred under the Fiscal 2006 restructuring plan, by segment, for the year ended June 30, 2006.

<b><u>Fiscal 2006 Restructuring Plan – by Segment</u></b>	<b><u>Work force reduction</u></b>	<b><u>Facility costs</u></b>	<b><u>Other</u></b>	<b><u>Total</u></b>
North America .....	\$ 7,798	\$2,983	\$415	\$11,196
Europe .....	5,706	3,533	446	9,685
Other .....	478	192	72	742
Total charge for year ended June 30, 2006 .....	<u>\$13,982</u>	<u>\$6,708</u>	<u>\$933</u>	<u>\$21,623</u>

### ***Fiscal 2004 Restructuring***

In the three months ended March 31, 2004, we recorded a restructuring charge of approximately \$10 million relating primarily to our North America segment. The charge consisted primarily of costs associated with a workforce reduction, excess facilities associated with the integration of the IXOS acquisition, write downs of capital assets and legal costs related to the termination of facilities. On a quarterly basis we conduct an evaluation of these balances and revise our assumptions and estimates, as appropriate. As a result of these evaluations, we recorded a recovery to this restructuring charge of \$306,000 during the year ended June 30, 2006. This recovery represents primarily reductions to previous charges for estimated employee termination costs and recoveries in estimates relating to accruals for abandoned facilities. All actions relating to employer workforce reduction were completed as of March 31, 2006. The provision for facility costs is expected to be expended by 2011. The activity of our provision for the 2004 restructuring charge is as follows for each period presented below:

<b><u>Fiscal 2004 Restructuring Plan</u></b>	<b><u>Work force reduction</u></b>	<b><u>Facility costs</u></b>	<b><u>Total</u></b>
Balance as of June 30, 2005 .....	\$ 167	\$1,878	\$2,045
Revisions to prior accruals .....	(167)	(139)	(306)
Cash payments .....	—	(659)	(659)
Foreign exchange and other adjustments .....	—	90	90
Balance as of June 30, 2006 .....	<u>\$ —</u>	<u>\$1,170</u>	<u>\$1,170</u>

<b><u>Fiscal 2004 Restructuring Plan</u></b>	<b><u>Work force reduction</u></b>	<b><u>Facility costs</u></b>	<b><u>Other</u></b>	<b><u>Total</u></b>
Balance as of June 30, 2004 .....	\$ 3,290	\$2,538	\$ 90	\$ 5,918
Revisions to prior accruals .....	(1,423)	(301)	—	(1,724)
Cash payments .....	(1,700)	(359)	(90)	(2,149)
Foreign exchange and other adjustments .....	—	—	—	—
Balance as of June 30, 2005 .....	<u>\$ 167</u>	<u>\$1,878</u>	<u>\$ —</u>	<u>\$ 2,045</u>

<b><u>Fiscal 2004 Restructuring Plan</u></b>	<b><u>Work force reduction</u></b>	<b><u>Facility costs</u></b>	<b><u>Other</u></b>	<b><u>Total</u></b>
Balance as of June 30, 2003 .....	\$ —	\$ —	\$ —	\$ —
Revisions to prior accruals .....	5,656	3,317	1,032	10,005
Cash payments .....	(2,366)	(779)	(942)	(4,087)
Foreign exchange and other adjustments .....	—	—	—	—
Balance as of June 30, 2004 .....	<u>\$ 3,290</u>	<u>\$2,538</u>	<u>\$ 90</u>	<u>\$ 5,918</u>

### ***Impairment Charges***

#### ***Impairment of capital assets***

During Fiscal 2006, impairment charges of \$3.8 million were recorded against capital assets that were written down to fair value, including various leasehold improvements at vacated premises and redundant office equipment. Fair value was determined based on our estimate of disposal proceeds, net of anticipated costs to sell.

#### ***Impairment of intangible assets***

During Fiscal 2006, impairment charges of \$1.0 million were recorded relating to a write-down of intellectual property in North America. The intellectual property represents the fair value of acquired technology from the Corechange acquisition which closed in the 2003 fiscal year. The triggering event that gave rise to the impairment was a shift in the marketing and development strategy associated with this acquired technology and

an assessment of where the technology is in terms of our assessment of the product lifecycle. The impairment was measured as the excess of the carrying amount over the discounted projected future net cash flows.

### ***Income taxes***

We recorded a tax provision of \$4.1 million in Fiscal 2006 compared to \$7.0 million during Fiscal 2005 and \$7.3 million in Fiscal 2004. This equates to an effective tax rate of 42.4% in Fiscal 2006 versus an effective tax rate of 25.2% and 22.8% in Fiscal 2005 and Fiscal 2004, respectively. The increase in our effective tax rate in Fiscal 2006 versus the two preceding fiscal years is in part due to the fact that the corresponding tax benefit has not been realized on losses that resulted from our Fiscal 2006 restructuring charge.

Our deferred tax assets totaling \$65.9 million are based upon available income tax losses and future income tax deductions. Our ability to use these income tax losses and future income tax deductions is dependent upon us generating income in the tax jurisdictions in which such losses or deductions arose. The recognized deferred tax liability of \$31.7 million is primarily made up of three components. The first component relates to \$23.0 million arising from the amortization of timing differences relating to acquired intangible assets and future income inclusions. The second component of \$4.1 million relates primarily to deferred credits arising from non capital losses and undeducted scientific research and development experimental expenditures acquired at a discount on asset acquisitions, which will be included in income as they are utilized. The third component of \$1.4 million relates to deferred tax liability arising from investment tax credits. We record a valuation allowance against deferred income tax assets when we believe it is more likely than not that some portion or all of the deferred income tax assets will not be realized. Based on the reversal of deferred income tax liabilities, projected future taxable income, the character of the income tax asset and tax planning strategies, we have determined that a valuation allowance of \$127.5 million is required in respect of our deferred income tax assets as at June 30, 2006. (A valuation allowance of \$127.6 million was required for the deferred income tax assets as at June 30, 2005). This valuation allowance is primarily attributable to valuation allowances set up based on losses incurred in the year in certain foreign jurisdictions. In order to fully utilize the recognized deferred income tax assets of \$65.9 million, we will need to generate aggregate future taxable income in applicable jurisdictions of approximately \$188.0 million. Based on our current projection of taxable income for the periods in the jurisdictions in which the deferred income tax assets are deductible, it is more likely than not that we will realize the benefit of the recognized deferred income tax assets as of June 30, 2006.

### **Liquidity and Capital Resources**

The following table summarizes the changes in our cash and cash equivalents and cash flows over the periods indicated:

<u>(in thousands)</u>	<u>June 30, 2006</u>	<u>June 30, 2005</u>	<u>Change in %</u>
Cash and cash equivalents . . . . .	\$107,354	\$ 79,898	34.4%
Net cash provided by (used in):			
Operating activities . . . . .	60,798	57,264	6.2%
Investing activities . . . . .	(54,727)	(77,383)	(29.3)%
Financing activities . . . . .	18,202	(58,920)	(130.9)%

### ***Net Cash Provided by Operating Activities***

Net cash provided by operating activities increased by approximately \$3.5 million in Fiscal 2006 compared to Fiscal 2005 as a result of an increase in non cash adjustments of approximately \$11.0 million and a net increase in operating assets and liabilities of approximately \$7.9 million. The increase in net cash provided by operating activities was offset by a decrease in net income of approximately \$15.4 million.

### ***Net Cash Used in Investing Activities***

Net cash used in investing activities decreased by approximately \$22.7 million in Fiscal 2006 compared to Fiscal 2005. The overall decrease in investing expenditures was primarily due to the fact that we did not make any business acquisitions in Fiscal 2006 (which represented approximately \$31.5 million in spending in Fiscal 2005) and our acquisition-related costs were lower by \$5.7 million. In addition, we also spent \$9.1 million less in Fiscal 2006 than Fiscal 2005 purchasing IXOS and Gauss shares. These savings in investment were offset by our increased capital spending of \$1.4 million, \$2.1 million on prior period acquisitions and an investment of \$20.2 million in the shares of Hummingbird.

We currently own approximately 96% of IXOS. Based on current estimates we anticipate the additional cost of acquiring IXOS shares to be approximately \$12.0 million.

### ***Net Cash Provided by (Used in) Financing Activities***

Net cash provided by financing increased by approximately \$77.1 million in Fiscal 2006 compared to Fiscal 2005. This increase was primarily due to the fact that we did not repurchase any of our Common Shares in Fiscal 2006, which represented \$63.8 million in spending in Fiscal 2005 and as a result of the mortgage financing we secured on our Waterloo building, which represented approximately \$12.9 million in Fiscal 2006.

In Fiscal 2006 we secured a demand operating facility of CDN \$40.0 million with a Canadian chartered bank. Borrowings under this facility bear interest at varying rates depending upon the nature of the borrowing. We have pledged certain of our assets as collateral for this demand operating facility. There are no stand-by fees for this facility. As of June 30, 2006, there were no borrowings outstanding under this facility.

We intend to finance the offer to purchase Hummingbird shares through loan facilities that are currently being negotiated with a Canadian chartered bank. The loan facilities were not finalized as of the date of the filing of this Annual report under Form 10-K. The facilities will potentially include a term loan facility and a revolving facility.

We anticipate that our cash and cash equivalents, available credit facilities and committed loan facilities will be sufficient to fund our anticipated cash requirements for working capital, contractual commitments and capital expenditures for at least the next 12 months.

### **Commitments and Contractual Obligations**

We have entered into the following contractual obligations with minimum annual payments for the indicated fiscal periods as follows:

	Payments due by Fiscal year ended June 30,				
	Total	2007	2008 to 2009	2010-2011	2012 and beyond
Long-term debt obligations . . . . .	\$ 16,322	\$ 1,089	\$ 2,178	\$13,055	\$ —
Operating lease obligations * . . . . .	93,663	19,185	35,280	27,467	11,731
Purchase obligations . . . . .	4,584	2,370	1,776	438	—
	<u>\$114,569</u>	<u>\$22,644</u>	<u>\$39,234</u>	<u>\$40,960</u>	<u>\$11,731</u>

\* Net of \$6.2 million of non-cancelable sublease income we are to receive from properties which we have subleased to other parties.

Rental expense of \$11.3 million, \$15.5 million and \$14.3 million was recorded during the fiscal years ended June 30, 2006, 2005 and 2004, respectively.



The long-term debt obligations are comprised of interest and principal payments on the five year mortgage on our recently constructed building in Waterloo, Ontario. See Note 9 “Bank Indebtedness” in our Notes to Consolidated Financial Statements under Item 8, in this Annual Report on this Form 10-K.

### ***IXOS domination agreements***

Based on the number of minority IXOS shareholders as of June 30, 2006, the estimated amount of Annual Compensation payable to IXOS minority shareholder was approximately \$504,000 for the fiscal year ended June 30, 2006. Because we are unable to predict, with reasonable accuracy, the number of IXOS minority shareholders that will be on record in future periods, we are unable to predict the amount of Annual Compensation that will be payable in future years.

Certain IXOS shareholders have filed for a procedure granted under German law at the district court of Munich, Germany, asking the court to reassess the amount of the Annual Compensation and the Purchase Price for the amounts offered under the IXOS DA. It cannot be predicted at this stage, whether the court will increase the Annual Compensation and/or the Purchase Price.

The costs associated with the above mentioned procedure are direct incremental costs associated with the ongoing step acquisitions of shares held by the minority shareholders. These disputes are a normal and probable part of the process of acquiring minority shares in Germany. We are unable to predict the future costs associated with these activities that will be payable in future periods.

For further details relating to the IXOS domination agreement refer to Note 13 “Commitments and Contingencies” in our Notes to Consolidated Financial Statements under Item 8 to this Annual Report on Form 10-K.

### ***Gauss Squeeze out***

We have recorded our best estimate of the amount payable to the minority shareholders of Gauss under the Squeeze Out. As of June 30, 2006, we had accrued \$75,000 for such payments. We are currently not able to determine the final amount payable and we are unable to predict the date on which the resolutions will be registered in the commercial register.

We continue to incur direct and incremental costs associated with the Squeeze Out procedures and registration thereof. We are unable to predict the future costs associated with these activities that will be payable in future periods.

For further details relating to the Gauss Squeeze out refer to Note 13 “Commitments and Contingencies” in our Notes to Consolidated Financial Statements under Item 8, to this Annual Report on Form 10-K.

### ***Litigation***

We are subject from time to time to legal proceedings and claims, either asserted or unasserted, that arise in the ordinary course of business. While the outcome of these proceedings and claims cannot be predicted with certainty, our management does not believe that the outcome of any of these legal matters will have a material adverse effect on our consolidated financial position, results of operations or cash flows.

### ***Off-Balance Sheet Arrangements***

We do not enter into off-balance sheet financing as a matter of practice except for the use of operating leases for office space, computer equipment, and vehicles. In accordance with U.S. GAAP, neither the lease liability nor the underlying asset is carried on the balance sheet, as the terms of the leases do not meet the criteria for capitalization.

## **CRITICAL ACCOUNTING POLICIES AND ESTIMATES**

Our discussion and analysis of our financial condition and results of operations are based on our Consolidated Financial Statements, which are prepared in accordance with U.S. GAAP. The preparation of the Consolidated Financial Statements in accordance with U.S. GAAP necessarily requires us to make estimates and judgments that affect the reported amounts of assets, liabilities, revenues and expenses, and related disclosure of contingent assets and liabilities. On an on-going basis, we re-evaluate our estimates, including those related to revenues, bad debts, investments, intangible assets, income taxes, contingencies and litigation. We base our estimates on historical experience and on various other assumptions that are believed at the time to be reasonable under the circumstances. Under different assumptions or conditions, the actual results will differ, potentially materially, from those previously estimated. Many of the conditions impacting these assumptions and estimates are outside of our control.

We believe that the accounting policies described below are critical to understanding our business, results of operations and financial condition because they involve significant judgment and estimates used in the preparation of our Consolidated Financial Statements. An accounting policy is deemed to be critical if it requires a judgment or accounting estimate to be made based on assumptions about matters that are highly uncertain, and if different estimates that could have been used, or if changes in the accounting estimates that are reasonably likely to occur periodically, could materially impact our Consolidated Financial Statements. Management has discussed the development, selection and application of our critical accounting policies with the audit committee of our Board of Directors, and our audit committee has reviewed our disclosure relating to our critical accounting policies in the “Management’s Discussion and Analysis of Financial Condition and Results of Operations.”

Other significant accounting policies, primarily those with lower levels of uncertainty than those discussed below, are also critical to understanding our Consolidated Financial Statements. The notes to the Consolidated Financial Statements contain additional information related to our accounting policies and should be read in conjunction with this discussion.

The following critical accounting policies affect our more significant judgments and estimates used in the preparation of our Consolidated Financial Statements:

### ***Business combinations***

We account for acquisitions of companies in accordance with Financial Accounting Standards Board (“FASB”) Statement of Financial Accounting Standards (“SFAS”) No. 141, “Business Combinations” (“SFAS 141”). We allocate the purchase price to tangible assets, intangible assets and liabilities based on estimated fair values at the date of acquisition with the excess of purchase price, if any, being allocated to goodwill.

### ***Impairment of long-lived assets***

We account for the impairment and disposition of long-lived assets in accordance with FASB SFAS No. 144, “Accounting for Impairment or Disposal of Long-Lived Assets” (“SFAS 144”). We test long-lived assets or asset groups, such as capital assets and definite lived intangible assets, for recoverability when events or changes in circumstances indicate that their carrying amount may not be recoverable. Circumstances which could trigger a review include, but are not limited to: significant adverse changes in the business climate or legal factors; current period cash flow or operating losses combined with a history of losses or a forecast of continuing losses associated with the use of the asset; and a current expectation that the asset will more likely than not be sold or disposed of before the end of its estimated useful life.

Recoverability is assessed based on comparing the carrying amount of the asset to the aggregate pre-tax undiscounted cash flows expected to result from the use and eventual disposal of the asset or asset group. An impairment is recognized when the carrying amount is not recoverable and exceeds the fair value of the asset or asset group. The impairment loss, if any, is measured as the amount by which the carrying amount exceeds

discounted projected future cash flows. We recorded an impairment charge of \$1.0 million during the year ended June 30, 2006. (See Note 20 “Special Charges (Recoveries)” under Item 8 on this form 10-K).

### ***Acquired intangibles***

This category consists of acquired technology and contractual relationships associated with various acquisitions, as well as trademarks and patents.

Acquired technology is initially recorded at fair value based on the present value of the estimated net future income-producing capabilities of software products acquired on acquisitions. Acquired technology is amortized over its estimated useful life on a straight-line basis.

Contractual relationships represent relationships that we have with certain customers on contractual or legal rights and are considered separable. We acquired these contractual relationships through business combinations and they were initially recorded at their fair value based on the present value of expected future cash flows. Contractual relationships are amortized on a straight-line basis over their useful lives.

We continually evaluate the remaining useful life of our intangible assets being amortized to determine whether events and circumstances warrant a revision to the remaining period of amortization.

### ***Goodwill***

FASB SFAS No. 142, “Goodwill and Other Intangible Assets” (“SFAS 142”), requires that goodwill and other intangible assets with indefinite useful lives be tested for impairment annually or earlier if events or changes in circumstances indicate that the carrying amount of these assets may not be recoverable.

In accordance with SFAS 142, we do not amortize goodwill. We performed, in accordance with SFAS 142, our annual impairment analysis of goodwill as of April 1, 2006. Historically, we performed our annual goodwill impairment test coincident with our year end of June 30. In Fiscal 2005, the date of the test was moved to the first day of the fourth quarter, in order to provide us with more adequate time to complete the analysis given the acceleration of public company reporting requirements. We believe that the accounting change described above is an alternative accounting principle that is preferable under the circumstances and that the change was not intended to delay, accelerate or avoid an impairment charge. The analysis in all years indicated that there was no impairment of goodwill in any of the reporting units. If estimates change, a materially different impairment conclusion could result.

### ***Allowance for doubtful accounts***

We maintain an allowance for doubtful accounts for estimated losses resulting from the inability of customers to make payments. We evaluate the credit worthiness of our customers prior to order fulfillment and based on these evaluations, adjust credit limits to the respective customers. In addition to these evaluations, we conduct on-going credit evaluations of our customers’ payment history and current credit worthiness. The allowance is maintained for 100% of all accounts deemed to be uncollectible and, for those receivables not specifically identified as uncollectible, an allowance is maintained for a specific percentage of those receivables based upon the aging of accounts, our historical collection experience and current economic expectations. To date, the actual losses have been within management expectations. No single customer accounted for more than 10% of the accounts receivable balance as of June 30, 2006 and 2005.

### ***Asset retirement obligations***

We account for asset retirement obligations in accordance with FASB SFAS No. 143, “Accounting for Asset Retirement Obligations” (“SFAS 143”), which applies to certain obligations associated with the retirement

of tangible long-lived assets. SFAS 143 requires that a liability be initially recognized for the estimated fair value of the obligation when it is incurred. The associated asset retirement cost is capitalized as part of the carrying amount of the long-lived asset and depreciated over the remaining life of the underlying asset and the associated liability is accreted to the estimated fair value of the obligation at the settlement date through periodic accretion charges recorded within general and administrative expenses. When the obligation is settled, any difference between the final cost and the recorded amount is recognized as income or loss on settlement.

## ***Revenue recognition***

### ***a) License revenues***

We recognize revenue in accordance with Statement of Position (“SOP”) 97-2, “Software Revenue Recognition”, issued by the American Institute of Certified Public Accountants (“AICPA”) in October 1997 as amended by SOP 98-9 issued in December 1998.

We record product revenue from software licenses and products when persuasive evidence of an arrangement exists, the software product has been shipped, there are no significant uncertainties surrounding product acceptance, the fees are fixed and determinable and collection is considered probable. We use the residual method to recognize revenue on delivered elements when a license agreement includes one or more elements to be delivered at a future date if evidence of the fair value of all undelivered elements exists. If an undelivered element for the arrangement exists under the license arrangement, revenue related to the undelivered element is deferred based on vendor-specific objective evidence (“VSOE”) of the fair value of the undelivered element.

Our multiple-element sales arrangements include arrangements where software licenses and the associated post contract customer support (“PCS”) are sold together. We have established VSOE of the fair value of the undelivered PCS element based on the contracted price for renewal PCS included in the original multiple element sales arrangement, as substantiated by contractual terms and our significant PCS renewal experience, from our existing worldwide base. Our multiple element sales arrangements generally include rights for the customer to renew PCS after the bundled term ends. These rights are irrevocable to the customer’s benefit, are for specified prices and the customer is not subject to any economic or other penalty for failure to renew. Further, the renewal PCS options are for services comparable to the bundled PCS and cover similar terms.

It is our experience that customers generally exercise their renewal PCS option. In the renewal transaction, PCS is sold on a stand-alone basis to the licensees one year or more after the original multiple element sales arrangement. The renewal PCS price is consistent with the renewal price in the original multiple element sales arrangement although an adjustment to reflect consumer price changes is not uncommon.

If VSOE of fair value does not exist for all undelivered elements, all revenue is deferred until sufficient evidence exists or all elements have been delivered.

We assess whether payment terms are customary or extended in accordance with normal practice relative to the market in which the sale is occurring. Our sales arrangements generally include standard payment terms. These terms effectively relate to all customers, products, and arrangements regardless of customer type, product mix or arrangement size. The only time exceptions are made to these standard terms is on certain sales in parts of the world where local practice differs. In these jurisdictions, our customary payment terms are in line with local practice.

### ***b) Service revenues***

Service revenues consist of revenues from consulting, implementation, training and integration services. These services are set forth separately in the contractual arrangements such that the total price of the customer arrangement is expected to vary as a result of the inclusion or exclusion of these services. For

those contracts where the services are not essential to the functionality of any other element of the transaction, we determine VSOE of fair value for these services based upon normal pricing and discounting practices for these services when sold separately. These consulting and implementation services contracts are primarily time and materials based contracts that are, on average, less than six months in length. Revenue from these services is recognized at the time such services are rendered as the time is incurred by us.

We also enter into contracts that are primarily fixed fee arrangements to render specific consulting services. The percentage of completion method is applied to these more complex contracts that involve the provision of services relating to the design or building of complex systems, because these services are essential to the functionality of other elements in the arrangement. Under this method, the percentage of completion is calculated based on actual hours incurred compared to the estimated total hours for the services under the arrangement. For those fixed fee contracts where the services are not essential to the functionality of a software element, the proportional performance method is applied to recognize revenue. Revenues from training and integration services are recognized in the period in which these services are performed.

#### ***c) Customer support revenues***

Customer support revenues consist of revenue derived from contracts to provide PCS to license holders. These revenues are recognized ratably over the term of the contract. Advance billings of PCS are not recorded to the extent that the term of the PCS has not commenced or payment has not been received.

#### ***Research and development costs***

Research and development costs internally incurred in creating computer software to be sold, licensed or otherwise marketed, are expensed as incurred unless they meet the criteria for deferral and amortization, described in FASB SFAS No. 86 "Accounting for the Costs of Corporate Software to be Sold, Released, or Otherwise Marketed" ("SFAS 86"). In accordance with SFAS 86, costs related to research, design and development of products are charged to expenses as incurred and capitalized between the dates that the product is considered to be technologically feasible and is considered to be ready for general release to customers.

In our historical experience, the dates relating to the achievement of technological feasibility and general release of the product have substantially coincided. In addition, no significant costs are incurred subsequent to the establishment of technological feasibility. As a result we do not capitalize any research and development costs relating to internally developed software to be sold, licensed or otherwise marketed.

#### ***Income taxes***

We account for income taxes in accordance with FASB SFAS No. 109, "Accounting for Income Taxes" ("SFAS 109"). Deferred tax assets and liabilities arise from temporary differences between the tax bases of assets and liabilities and their reported amounts in the consolidated financial statements that will result in taxable or deductible amounts in future years. These temporary differences are measured using enacted tax rates. A valuation allowance is recorded to reduce deferred tax assets to the extent that management considers it is more likely than not that a deferred tax asset will not be realized. In determining the valuation allowance, management considers factors such as the reversal of deferred income tax liabilities, projected taxable income, and the character of income tax assets and tax planning strategies. A change to these factors could impact the estimated valuation allowance and income tax expense.

In addition, we are subject to examinations by taxation authorities of the jurisdictions in which we operate in the normal course of operations. We regularly assess the status of these examinations and the potential for adverse outcomes to determine the adequacy of the provision for income and other taxes.

### ***Restructuring charges***

We record restructuring charges relating to contractual lease obligations and other exit costs in accordance with FASB SFAS No. 146, "Accounting for Costs Associated with Exit or Disposal Activities" ("SFAS 146"). SFAS 146 requires recognition of costs associated with an exit or disposal activity when the liability is incurred and can be measured at fair value.

We record restructuring charges relating to employee termination costs in accordance with FASB SFAS No. 112, "Accounting for Post Employment Benefits" ("SFAS 112"). SFAS 112 applies to post-employment benefits provided to employees under on-going benefit arrangements. In accordance with SFAS 112, we record such charges when the termination benefits are capable of being determined or estimated in advance, from either the provisions of our policy or from past practices, the benefits are attributable to services already rendered and the obligation relates to rights that vest or accumulate.

The recognition of restructuring charges requires management to make certain judgments regarding the nature, timing and amount associated with the planned restructuring activities, including estimating sublease income and the net recoverable amount of equipment to be disposed of. At the end of each reporting period, we evaluate the appropriateness of the remaining accrued balances.

### ***Litigation***

We are a party, from time to time, in legal proceedings. In these cases, management assesses the likelihood that a loss will result, as well as the amount of such loss and the financial statements provide for our best estimate of such losses. To the extent that any of these legal proceedings are resolved and the result is that we are required to pay an amount in excess of what has been provided for in the financial statements, we would be required to record, against earnings, such excess at that time. If the resolution resulted in a gain to us, or a loss less than that provided for, such gain is recognized when received or receivable.

### ***New Accounting Standards***

#### ***Adoption of SFAS 123R***

On July 1, 2005, we adopted the fair value-based method for measurement and cost recognition of employee share-based compensation under the provisions of FASB SFAS 123R, using the modified prospective transitional method. Previously, we had been accounting for employee share-based compensation using the intrinsic value method, which generally did not result in any compensation cost being recorded for stock options since the exercise price was equal to the market price of the underlying shares on the date of grant.

Our stock options are now accounted for under SFAS 123R. The fair value of each option granted is estimated on the date of the grant using the Black-Scholes option-pricing model.

For the year ended June 30, 2006, the weighted-average fair value of options granted, as of the grant date, was \$7.68, using the following weighted average assumptions: expected volatility of 52%; risk-free interest rate of 4.6%; expected dividend yield of 0%; and expected life of 5.2 years.

For the year ended June 30, 2005, the weighted-average fair value of options granted, as of the grant date, during the periods was \$8.35, using the following weighted-average assumptions: expected volatility of 61%; risk-free interest rate of 3.2%; expected dividend yield of 0%; and expected life of 4.3 years.

For the year ended June 30, 2004, the weighted-average fair value of options granted, as of the grant date, during the periods was \$10.33, using the following weighted-average assumptions: expected volatility of 60%; risk-free interest rate of 3.0%; expected dividend yield of 0%; and expected life of 3.5 years.



Share-based compensation cost included in the statement of income for the year ended June 30, 2006 was approximately \$5.2 million. Additionally, deferred tax assets of \$622,000 were recorded, as of June 30, 2006 in relation to the tax effect of certain stock options that are eligible for a tax deduction when exercised. As of June 30, 2006 the total compensation cost related to unvested awards not yet recognized is \$9.2 million which will be recognized over a weighted average period of approximately 2 years.

We made no modifications to the terms of our outstanding share options in anticipation of the adoption of SFAS 123R. Also, we made no changes in either the quantity or type of instruments used in our share option plans or the terms of our share option plans.

Additionally, effective July 1, 2005, we amended the terms of our Employee Share Purchase Plan (“ESPP”) to set the amount at which Common Shares may be purchased by employees to 95% of the average market price on the Toronto Stock Exchange (“TSX”) or the NASDAQ on the last day of the purchase period. As a result of the amendments, the ESPP is no longer considered a compensatory plan under the provisions of SFAS 123R, and as a result no compensation cost is recorded related to the ESPP.

In order to calculate the fair value of share-based payment awards, we use the Black-Scholes model. This model requires the input of subjective assumptions, including stock price volatility, the expected exercise behavior and forfeiture rate. Expected volatilities are based on the historical volatility of our stock. The expected life of options granted is based on historical experience and represents the period of time that options granted are expected to be outstanding. The risk-free rate for periods within the contractual life of the option are determined by the US Treasury yields and the Government of Canada benchmark bond yields for U.S. dollar and Canadian dollar options, respectively, in effect at the time of the grant.

The assumptions used in calculating the fair value of share-based payment awards represent management’s best estimates, but these estimates involve inherent uncertainties and the application of management judgment. As a result, if factors change or we use different assumptions, our stock-based compensation expense could be materially different in the future. We are also required to estimate the forfeiture rate and only recognize the expense for those shares expected to vest. If our actual forfeiture rate is materially different from our estimate, our stock-based compensation expense could be significantly different from what we have recorded in the period such determination is made.

#### *Accounting for Uncertain Tax Positions*

In July 2006, the FASB issued FASB Interpretation No. 48 on Accounting for Uncertain Tax Positions—an interpretation of FASB Statement No. 109, “Accounting for Income Taxes” (“FIN 48”).

FIN 48 will be effective as of the beginning of the first annual period beginning after December 15, 2006 and will be adopted by us for the year ended June 30, 2008. We are currently assessing the impact of FIN 48 on our financial statements.

#### **Item 7A. Quantitative and Qualitative Disclosures about Market Risk**

We are primarily exposed to market risks associated with fluctuations in foreign currency exchange rates.

##### *Foreign currency risk*

Businesses generally conduct transactions in their local currency which is also known as their functional currency. Additionally, balances that are denominated in a currency other than the entity’s reporting currency must be adjusted to reflect changes in foreign exchange rates during the reporting period.

As we operate internationally, a substantial portion of our business is also conducted in currencies other than the U.S. dollar. Accordingly, our results are affected, and may be affected in the future, by exchange rate

fluctuations of the U.S. dollar relative to the Canadian dollar, to various European currencies, and, to a lesser extent, other foreign currencies. Revenues and expenses generated in foreign currencies are translated at exchange rates during the month in which the transaction occurs. We cannot predict the effect of foreign exchange rate fluctuations in the future; however, if significant foreign exchange losses are experienced, they could have a material adverse effect on our results of operations. Moreover, in any given quarter, exchange rates can impact revenue adversely.

We have net monetary asset and liability balances in foreign currencies other than the U.S. Dollar, including primarily the Euro (“EUR”), the Pound Sterling (“GBP”), the Canadian Dollar (“CDN”), and the Swiss Franc (“CHF”). Our cash and cash equivalents are primarily held in U.S. Dollars. We do not currently use financial instruments to hedge operating expenses in foreign currencies.

The following tables provide a sensitivity analysis on our exposure to changes in foreign exchange rates. For foreign currencies where we engage in material transactions, the following table quantifies the absolute impact that a 10% increase/decrease against the U.S. dollar would have had on our total revenues, operating expenses, and net income for the year ended June 30, 2006. This analysis is presented in both functional and transactional currency. Functional currency represents the currency of measurement for each of an entity’s domestic and foreign operations. Transactional currency represents the currency in which the underlying transactions take place. The impact of changes in foreign exchange rates for those foreign currencies not presented in these tables is not material.

10% Change in Functional Currency (in thousands)			
	<u>Total Revenue</u>	<u>Operating Expenses</u>	<u>Net Income</u>
Euro . . . . .	\$17,371	\$16,205	\$1,166
British Pound . . . . .	4,384	3,007	1,377
Canadian Dollar . . . . .	2,855	6,837	3,982
Swiss Franc . . . . .	4,053	2,290	1,763

10% Change in Transactional Currency (in thousands)			
	<u>Total Revenue</u>	<u>Operating Expenses</u>	<u>Net Income</u>
Euro . . . . .	\$11,479	\$10,113	\$1,366
British Pound . . . . .	3,764	2,636	1,128
Canadian Dollar . . . . .	2,848	6,856	4,008
Swiss Franc . . . . .	2,586	1,476	1,110

## **Item 8. Financial Statements and Supplementary Data**

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## **Report of Independent Registered Public Accounting Firm**

The Board of Directors and Shareholders  
Open Text Corporation

We have audited management's assessment, included under Part II, Item 9A of this Form 10-K, that Open Text Corporation maintained effective internal control over financial reporting as of June 30, 2006, based on criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO). Open Text Corporation's management is responsible for maintaining effective internal control over financial reporting and for its assessment of the effectiveness of internal control over financial reporting. Our responsibility is to express an opinion on management's assessment and an opinion on the effectiveness of the Company's internal control over financial reporting based on our audit.

We conducted our audit in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether effective internal control over financial reporting was maintained in all material respects. Our audit included obtaining an understanding of internal control over financial reporting, evaluating management's assessment, testing and evaluating the design and operating effectiveness of internal control, and performing such other procedures as we considered necessary in the circumstances. We believe that our audit provides a reasonable basis for our opinion.

A company's internal control over financial reporting is a process designed to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles. A company's internal control over financial reporting includes those policies and procedures that (1) pertain to the maintenance of records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company; (2) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that receipts and expenditures of the company are being made only in accordance with authorizations of management and directors of the company; and (3) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use, or disposition of the company's assets that could have a material effect on the financial statements.

Because of its inherent limitations, internal control over financial reporting may not prevent or detect misstatements. Also, projections of any evaluation of effectiveness to future periods are subject to the risk that controls may become inadequate because of changes in conditions, or that the degree of compliance with the policies or procedures may deteriorate.

In our opinion, management's assessment that Open Text Corporation maintained effective internal control over financial reporting as of June 30, 2006, is fairly stated, in all material respects, based on criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO). Also, in our opinion, Open Text Corporation maintained, in all material respects, effective internal control over financial reporting as of June 30, 2006, based on criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO).

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the consolidated balance sheets of Open Text Corporation as of June 30, 2006 and 2005, and the related consolidated statements of income, shareholders' equity and cash flows for each of the years in the three-year period ended June 30, 2006, and our report dated September 5, 2006 expressed an unqualified opinion on those consolidated financial statements.

/s/ KPMG LLP

Toronto, Canada  
September 5, 2006

## **Report of Independent Registered Public Accounting Firm**

The Board of Directors and Shareholders  
Open Text Corporation

We have audited the accompanying consolidated balance sheets of Open Text Corporation (and subsidiaries) as of June 30, 2006 and 2005, and the related consolidated statements of income, shareholders' equity, and cash flows for each of the years in the three-year period ended June 30, 2006. These consolidated financial statements are the responsibility of the Company's management. Our responsibility is to express an opinion on these consolidated financial statements based on our audits.

We conducted our audits in accordance with the standards of the Public Company Accounting Oversight Board (United States). Those standards require that we plan and perform the audit to obtain reasonable assurance about whether the financial statements are free of material misstatement. An audit includes examining, on a test basis, evidence supporting the amounts and disclosures in the financial statements. An audit also includes assessing the accounting principles used and significant estimates made by management, as well as evaluating the overall financial statement presentation. We believe that our audits provide a reasonable basis for our opinion.

In our opinion, the consolidated financial statements referred to above present fairly, in all material respects, the financial position of Open Text Corporation as of June 30, 2006 and 2005, and the results of its operations and its cash flows for each of the years in the three-year period ended June 30, 2006, in conformity with U.S. generally accepted accounting principles.

As discussed in note 2 to the consolidated financial statements, the Company changed its method of accounting for share-based payments.

We also have audited, in accordance with the standards of the Public Company Accounting Oversight Board (United States), the effectiveness of Open Text Corporation's internal control over financial reporting as of June 30, 2006, based on criteria established in Internal Control—Integrated Framework issued by the Committee of Sponsoring Organizations of the Treadway Commission (COSO), and our report dated September 5, 2006 expressed an unqualified opinion on management's assessment of, and the effective operation of, internal control over financial reporting.

/s/ KPMG LLP

Toronto, Canada  
September 5, 2006

**OPEN TEXT CORPORATION**  
**CONSOLIDATED BALANCE SHEETS**  
(In thousands of U.S. Dollars, except share data)

	June 30,	
	2006	2005
<b>ASSETS</b>		
Current assets:		
Cash and cash equivalents	\$107,354	\$ 79,898
Accounts receivable trade, net of allowance for doubtful accounts of \$2,736 as of June 30, 2006 and \$3,125 as at June 30, 2005 (note 8)	75,016	81,936
Income taxes recoverable	11,924	11,350
Prepaid expenses and other current assets	8,520	8,438
Deferred tax assets (note 15)	28,724	10,275
Total current assets	231,538	191,897
Investments in marketable securities (note 3)	21,025	—
Capital assets (note 4)	41,262	36,070
Goodwill (note 5)	235,523	243,091
Acquired intangible assets (note 6)	102,326	127,981
Deferred tax assets (note 15)	37,185	36,499
Other assets (note 7)	2,234	5,398
	<u>\$671,093</u>	<u>\$640,936</u>
<b>LIABILITIES AND SHAREHOLDERS' EQUITY</b>		
Current liabilities:		
Accounts payable and accrued liabilities (note 10)	\$ 62,535	\$ 80,468
Current portion of long-term debt (note 9)	405	—
Deferred revenues	74,687	72,373
Deferred tax liabilities (note 15)	12,183	10,128
Total current liabilities	149,810	162,969
Long-term liabilities:		
Accrued liabilities (note 10)	21,121	25,579
Long-term debt (note 9)	12,963	—
Deferred revenues	3,534	2,957
Deferred tax liabilities (note 15)	19,490	29,245
Total long-term liabilities	57,108	57,781
Minority interest	5,804	4,431
Shareholders' equity:		
Share capital (note 11)		
48,935,042 and 48,136,932 Common Shares issued and outstanding at June 30, 2006 and June 30, 2005, respectively; Authorized Common Shares:		
unlimited	414,475	406,580
Commitment to issue shares	—	813
Additional paid-in capital	28,367	22,341
Accumulated other comprehensive income	42,654	18,124
Accumulated deficit	(27,125)	(32,103)
Total shareholders' equity	458,371	415,755
	<u>\$671,093</u>	<u>\$640,936</u>
Commitments and Contingencies (note 13)		
Subsequent Events (note 22)		

See accompanying notes to consolidated financial statements



**OPEN TEXT CORPORATION**  
**CONSOLIDATED STATEMENTS OF INCOME**  
(In thousands of U.S. Dollars, except share and per share data)

	Year ended June 30,		
	2006	2005	2004
Revenues:			
License .....	\$ 122,520	\$ 136,522	\$ 121,642
Customer support .....	189,417	179,178	108,812
Service .....	97,625	99,128	60,604
Total revenues .....	409,562	414,828	291,058
Cost of revenues:			
License .....	11,196	11,540	10,784
Customer support .....	31,482	33,086	20,299
Service .....	79,610	81,367	47,319
Amortization of acquired technology intangible assets .....	18,900	16,175	7,211
Total cost of revenues .....	141,188	142,168	85,613
	268,374	272,660	205,445
Operating expenses:			
Research and development .....	59,184	65,139	43,616
Sales and marketing .....	104,419	114,553	87,362
General and administrative .....	45,336	46,110	22,795
Depreciation .....	11,103	11,040	7,103
Amortization of acquired intangible assets .....	9,199	8,234	4,095
Special charges (recoveries) (note 20) .....	26,182	(1,724)	10,005
Total operating expenses .....	255,423	243,352	174,976
Income from operations .....	12,951	29,308	30,469
Other income (expense) (note 14) .....	(4,788)	(3,116)	217
Interest income, net .....	1,487	1,377	1,210
Income before income taxes .....	9,650	27,569	31,896
Provision for income taxes (note 15) .....	4,093	6,958	7,270
Net income before minority interest .....	5,557	20,611	24,626
Minority interest .....	579	252	1,328
Net income for the year .....	\$ 4,978	\$ 20,359	\$ 23,298
Net income per share—basic (note 19) .....	\$ 0.10	\$ 0.41	\$ 0.53
Net income per share—diluted (note 19) .....	\$ 0.10	\$ 0.39	\$ 0.49
Weighted average number of Common Shares outstanding—basic .....	48,666,139	49,918,541	43,743,508
Weighted average number of Common Shares outstanding—diluted .....	49,949,593	52,091,860	47,272,113

See accompanying notes to consolidated financial statements

**OPEN TEXT CORPORATION**  
**CONSOLIDATED STATEMENTS OF SHAREHOLDERS' EQUITY**  
(In thousands)

	<u>Common Shares</u>		<u>Warrants</u>		<u>Commitment</u>	<u>Additional</u>	<u>Accumulated</u>	<u>Accumulated Other</u>	
	<u>Shares</u>	<u>Amount</u>	<u>Number</u>	<u>Amount</u>	<u>to Issue</u>	<u>Paid in</u>	<u>Deficit</u>	<u>Comprehensive</u>	<u>Total</u>
Balance as of June 30, 2003 .....	39,136	\$204,343	—	—	—	—	\$(41,827)	\$ (119)	\$162,397
Issuance of Common Shares									
Under employee stock option plans .....	1,986	14,943	—	—	—	—	—	—	14,943
Under employee stock purchase plans .....	305	3,387	—	—	—	—	—	—	3,387
Acquisition of DOMEA eGovernment .....	117	2,411	—	—	—	—	—	—	2,411
Acquisition of IXOS .....	9,286	190,907	2,640	24,820	—	—	—	—	215,727
Under IXOS warrants exercised .....	225	6,775	(225)	(2,115)	—	—	—	—	4,660
Income tax effect related to stock options .....	—	4,249	—	—	—	—	—	—	4,249
Comprehensive income:									
Foreign currency translation adjustment .....	—	—	—	—	—	—	—	1,933	1,933
Net income for the year .....	—	—	—	—	—	—	23,298	—	23,298
Total comprehensive income .....									25,231
Balance as of June 30, 2004 .....	51,055	427,015	2,415	22,705	—	—	(18,529)	1,814	433,005
Issuance of Common Shares									
Under employee stock option plans .....	343	2,049	—	—	—	—	—	—	2,049
Under employee stock purchase plans .....	260	4,350	—	—	—	—	—	—	4,350
Under IXOS warrant exercised .....	38	1,137	(38)	(364)	—	—	—	—	773
Reclass warrants to additional paid in capital on expiration .....	—	—	(2,377)	(22,341)	—	22,341	—	—	—
Domea eGovernment earn out .....	—	—	—	—	813	—	—	—	813
Repurchase and cancellation of shares .....	(3,559)	(29,902)	—	—	—	—	(33,933)	—	(63,835)
Income tax benefit related to stock options exercised .....	—	1,931	—	—	—	—	—	—	1,931
Comprehensive income:									
Foreign currency translation adjustment .....	—	—	—	—	—	—	—	16,845	16,845
Minimum pension liability, net of tax .....	—	—	—	—	—	—	—	(535)	(535)
Net income for the year .....	—	—	—	—	—	—	20,359	—	20,359
Total comprehensive income .....									36,669
Balance as of June 30, 2005 .....	48,137	406,580	—	—	813	22,341	(32,103)	18,124	415,755
Issuance of Common Shares									
Under employee stock option plans .....	470	3,663	—	—	—	5,161	—	—	8,824
Under employee stock purchase plans .....	281	3,419	—	—	—	—	—	—	3,419
Acquisition of DOMEA eGovernment .....	47	813	—	—	(813)	—	—	—	—
Income tax benefit related to stock options exercised .....	—	—	—	—	—	865	—	—	865
Comprehensive income:									
Foreign currency translation adjustment .....	—	—	—	—	—	—	—	24,622	24,622
Minimum pension liability, net of tax .....	—	—	—	—	—	—	—	(47)	(47)
Unrealized holding losses on available-for-sale securities, net of tax .....	—	—	—	—	—	—	—	(45)	(45)
Net income for the year .....	—	—	—	—	—	—	4,978	—	4,978
Total comprehensive income .....									29,508
Balance as of June 30, 2006 .....	<u>48,935</u>	<u>\$414,475</u>	<u>—</u>	<u>\$ —</u>	<u>\$ —</u>	<u>\$28,367</u>	<u>\$(27,125)</u>	<u>\$42,654</u>	<u>\$458,371</u>

See accompanying notes to consolidated financial statements

**OPEN TEXT CORPORATION**  
**CONSOLIDATED STATEMENTS OF CASH FLOWS**  
(In thousands of U.S. Dollars)

	Year ended June 30,		
	2006	2005	2004
Cash flows from operating activities:			
Net income for the year	\$ 4,978	\$ 20,359	\$ 23,298
Adjustments to reconcile net income to net cash provided by operating activities:			
Depreciation and amortization	39,202	35,449	18,409
Share-based compensation expense	5,196	—	—
Undistributed earnings related to minority interest	579	252	1,328
Deferred taxes	(4,314)	(1,168)	(2,244)
Impairment of capital assets	3,819	—	—
Impairment of intangible assets	1,046	—	—
Changes in operating assets and liabilities:			
Accounts receivable	9,406	6,452	(2,461)
Prepaid expenses and other current assets	(65)	(1,327)	5,058
Income taxes (paid) recoverable	(3,818)	(3,902)	188
Accounts payable and accrued liabilities	(3,204)	(4,489)	(9,877)
Deferred revenue	5,228	7,224	1,616
Other assets	2,745	(1,586)	2,204
Net cash provided by operating activities	60,798	57,264	37,519
Cash flows from investing activities:			
Acquisition of capital assets	(19,278)	(17,909)	(6,112)
Purchase of Optura, net of cash acquired	—	(3,347)	—
Purchase of Vista, net of cash acquired	—	(23,690)	—
Purchase of Artesia, net of cash acquired	—	(4,475)	—
Additional purchase consideration for prior period acquisitions	(3,284)	(1,182)	—
Purchase of Gauss, net of cash acquired	—	(487)	(9,764)
Purchase of DOMEA eGovernment, net of cash acquired	—	—	(3,403)
Purchase of IXOS, net of cash acquired	(5,126)	(13,779)	19,367
Other acquisitions	—	—	(3,163)
Investments in marketable securities	(20,241)	—	—
Acquisition related costs	(6,798)	(12,514)	(16,538)
Net cash used in investment activities	(54,727)	(77,383)	(19,613)
Cash flow from financing activities:			
Payment of obligations under capital leases	—	(68)	(386)
Excess tax benefits on share-based compensation expense	865	—	—
Proceeds from issuance of Common Shares	4,569	6,399	18,330
Proceeds from exercise of warrants	—	773	4,660
Repurchase of Common Shares	—	(63,835)	—
Repayment of short-term bank loan	—	(2,189)	—
Proceeds from long-term debt	12,928	—	—
Repayment of long-term debt	(160)	—	—
Other	—	—	(668)
Net cash provided by (used in) financing activities	18,202	(58,920)	21,936
Foreign exchange gain on cash held in foreign currencies	3,183	1,950	591
Increase (decrease) in cash and cash equivalents during the year	27,456	(77,089)	40,433
Cash and cash equivalents at beginning of the year	79,898	156,987	116,554
Cash and cash equivalents at end of the year	<u>\$107,354</u>	<u>\$ 79,898</u>	<u>\$156,987</u>
Supplementary cash flow disclosures (note 17)			

See accompanying notes to consolidated financial statements

## **OPEN TEXT CORPORATION**

### **Notes to Consolidated Financial Statements (Tabular amounts in thousands, except per share data)**

#### **NOTE 1—NATURE OF OPERATIONS**

Open Text Corporation (the “Company” or “Open Text”) develops, markets, sells, and supports Enterprise Content Management (“ECM”) solutions. The Company’s principal product is called Livelink®. The Company offers its solutions both as end-user stand alone products and as fully integrated modules. Open Text markets and licenses its products and services in North America, Europe and the Asia Pacific region.

#### **NOTE 2—SIGNIFICANT ACCOUNTING POLICIES**

##### ***Basis of presentation***

These consolidated financial statements are expressed in U.S. dollars and are prepared in accordance with accounting principles generally accepted in the United States of America (“U.S. GAAP”).

##### ***Basis of consolidation***

The consolidated financial statements include the accounts of Open Text Corporation and its subsidiaries, all of which are wholly-owned with the exception of IXOS Software AG (“IXOS”) and Gauss Interprise AG, (“Gauss”) which as of June 30, 2006, were 96% and 95% owned, respectively, and as of June 30, 2005, were 94% and 95% owned, respectively. All inter-company balances and transactions have been eliminated. The Company has recorded a minority interest on its balance sheet in respect of IXOS to reflect the non-controlling interest in IXOS. Since Gauss had a deficit in shareholders’ equity on acquisition, no minority interest has been recorded (see Note 18—“Acquisitions” to our Notes to Consolidated Financial Statements).

##### ***Use of estimates***

The preparation of financial statements in conformity with U.S. GAAP requires management to make estimates, judgments and assumptions, which are evaluated on an ongoing basis, that affect the amounts reported in the financial statements. Management bases its estimates on historical experience and on various other assumptions that it believes are reasonable at that time, the results of which form the basis for making judgments about the carrying values of assets and liabilities that are not readily apparent from other sources. Actual results may differ from those estimates. In particular, significant estimates, judgments and assumptions include those related to revenue recognition, allowance for doubtful accounts, testing goodwill for impairment, the valuation of acquired intangible assets, long-lived assets, the recognition of contingencies, facility and restructuring accruals, acquisition accruals, asset retirement obligations, realization of investment tax credits, and the valuation allowance relating to the Company’s deferred tax assets.

##### ***Reclassifications***

Certain prior period comparative figures have been adjusted to conform to current period presentation including the reclassification of amortization of acquired technology intangible assets to Cost of revenues from “Amortization of acquired intangible assets” set forth under “Operating Expenses”. The reclassification of amortization of acquired technology intangible assets to Cost of revenues decreased gross profit by \$16.2 million for the year ended June 30, 2005, and \$7.2 million of the year ended June 30, 2004 from previously reported amounts, with no change to income from operations or net income (loss) per share in any of the periods presented.

##### ***Cash and cash equivalents***

Cash and cash equivalents include investments that have terms to maturity of three months or less at the time of acquisition. Cash equivalents are recorded at cost and typically consist of term deposits, commercial paper, U.S. dollar denominated Canadian federal government securities or short-term interest bearing investment-grade securities and demand accounts of a major Canadian chartered bank.

### ***Investments in marketable securities***

Investments in marketable securities are comprised of investments in the equity of a publicly listed corporation. The Company has classified this investment as Available-for-Sale (“AfS”). AfS investments are carried at fair value, with unrealized gains and losses, net of tax, reported in a separate component of shareholders’ equity until realized. A decline in the market value of any AfS security below cost that is deemed to be other-than-temporary results in a reduction in carrying amount to fair value. The impairment is charged to earnings and a new cost basis for the security is established. To determine whether an impairment is other-than-temporary, the Company considers whether it has the ability and intent to hold the investment until a market price recovery and considers whether evidence indicating the cost of the investment is recoverable outweighs evidence to the contrary. Evidence considered in this assessment includes the reasons for the impairment, the severity and duration of the impairment, changes in value subsequent to year end, and forecasted performance of the investee.

### ***Capital assets***

Capital assets are stated at cost and are depreciated on a straight-line basis over the estimated useful lives of the related assets. Gains and losses on asset disposals are taken into income in the year of disposition. The following represents the estimated useful lives of capital assets:

Furniture and fixtures	5 to 10 years
Office equipment	5 years
Computer hardware	3 to 7 years
Computer software	3 years
Leasehold improvements	Over the term of the lease
Building	40 years

### ***Business combinations***

The Company accounts for acquisitions of companies in accordance with Financial Accounting Standards Board (“FASB”) Statement of Financial Accounting Standards (“SFAS”) No. 141, “Business Combinations” (“SFAS 141”). The Company allocates the purchase price to tangible assets, intangible assets and liabilities based on estimated fair values at the date of acquisition with the excess of purchase price, if any, being allocated to goodwill.

### ***Impairment of long-lived assets***

The Company accounts for the impairment and disposition of long-lived assets in accordance with FASB SFAS No. 144, “Accounting for Impairment or Disposal of Long-Lived Assets” (“SFAS 144”). The Company tests long-lived assets or asset groups, such as capital assets and definite lived intangible assets, for recoverability when events or changes in circumstances indicate that their carrying amount may not be recoverable. Circumstances which could trigger a review include, but are not limited to: significant adverse changes in the business climate or legal factors; current period cash flow or operating losses combined with a history of losses or a forecast of continuing losses associated with the use of the asset; and a current expectation that the asset will more likely than not be sold or disposed of before the end of its estimated useful life.

Recoverability is assessed based on comparing the carrying amount of the asset to the aggregate pre-tax undiscounted cash flows expected to result from the use and eventual disposal of the asset or asset group. An impairment is recognized when the carrying amount is not recoverable and exceeds the fair value of the asset or asset group. The impairment loss, if any, is measured as the amount by which the carrying amount exceeds discounted projected future cash flows. The Company recorded an impairment of technology assets charge of \$1.0 million during the year ended June 30, 2006. (See Note 20 “Special Charges (Recoveries)” for more details).

### ***Acquired intangibles***

This category consists of acquired technology and contractual relationships associated with various acquisitions, as well as trademarks and patents.

Acquired technology is initially recorded at fair value based on the present value of the estimated net future income-producing capabilities of software products acquired on acquisitions. Acquired technology is amortized over its estimated useful life on a straight-line basis over its estimated useful life.

Contractual relationships represent relationships that the Company has with certain customers on contractual or legal rights and are considered separable. These contractual relationships were acquired by the Company through business combinations and were initially recorded at their fair value based on the present value of expected future cash flows. Contractual relationships are amortized on a straight-line basis over their estimated useful life.

The Company continually evaluates the remaining estimated useful life of its intangible assets being amortized to determine whether events and circumstances warrant a revision to the remaining period of amortization.

### ***Goodwill***

FASB SFAS No. 142, "Goodwill and Other Intangible Assets" ("SFAS 142"), requires that goodwill and other intangible assets with indefinite useful lives be tested for impairment annually or earlier if events or changes in circumstances indicate that the carrying amount of these assets may not be recoverable.

In accordance with SFAS 142, the Company does not amortize goodwill. The Company performed, in accordance with SFAS 142, its annual impairment analysis of goodwill as of April 1, 2006. Historically, the Company performed its annual goodwill impairment test coincident with its year-end of June 30. In Fiscal 2005, the date of the test was moved to the first day of the fourth quarter, in order to provide the Company with more adequate time to complete the analysis given the acceleration of public company reporting requirements. The Company believes that the accounting change described above is an alternative accounting principle that is preferable under the circumstances and that the change was not intended to delay, accelerate or avoid an impairment charge. The analysis in all years indicated that there was no impairment of goodwill in any of the reporting units. If estimates change, a materially different impairment conclusion could result.

### ***Allowance for doubtful accounts***

The Company maintains an allowance for doubtful accounts for estimated losses resulting from the inability of customers to make payments. The Company evaluates the credit worthiness of its customers prior to order fulfillment and based on these evaluations, adjusts credit limits to the respective customers. In addition to these evaluations, the Company conducts on-going credit evaluations of its customers' payment history and current credit worthiness. The allowance is maintained for 100% of all accounts deemed to be uncollectible and, for those receivables not specifically identified as uncollectible, an allowance is maintained for a specific percentage of those receivables based upon the aging of accounts, the Company's historical collection experience and current economic expectations. To date, the actual losses have been within management expectations. No single customer accounted for more than 10% of the accounts receivable balance as of June 30, 2006 and 2005.

### ***Asset retirement obligations***

The Company accounts for asset retirement obligations in accordance with FASB SFAS No. 143, "Accounting for Asset Retirement Obligations" ("SFAS 143"), which applies to certain obligations associated with the retirement of tangible long-lived assets. SFAS 143 requires that a liability be initially recognized for the



estimated fair value of the obligation when it is incurred. The associated asset retirement cost is capitalized as part of the carrying amount of the long-lived asset and depreciated over the remaining life of the underlying asset and the associated liability is accreted to the estimated fair value of the obligation at the settlement date through periodic accretion charges recorded within general and administrative expenses. When the obligation is settled, any difference between the final cost and the recorded amount is recognized as income or loss on settlement.

## ***Revenue recognition***

### ***a) License revenues***

The Company recognizes revenue in accordance with Statement of Position (“SOP”) 97-2, “Software Revenue Recognition”, issued by the American Institute of Certified Public Accountants (“AICPA”) in October 1997 as amended by SOP 98-9 issued in December 1998.

The Company records product revenue from software licenses and products when persuasive evidence of an arrangement exists, the software product has been shipped, there are no significant uncertainties surrounding product acceptance, the fees are fixed and determinable and collection is considered probable. The Company uses the residual method to recognize revenue on delivered elements when a license agreement includes one or more elements to be delivered at a future date if evidence of the fair value of all undelivered elements exists. If an undelivered element for the arrangement exists under the license arrangement, revenue related to the undelivered element is deferred based on vendor-specific objective evidence (“VSOE”) of the fair value of the undelivered element.

The Company’s multiple-element sales arrangements include arrangements where software licenses and the associated post contract customer support (“PCS”) are sold together. The Company has established VSOE of the fair value of the undelivered PCS element based on the contracted price for renewal PCS included in the original multiple element sales arrangement, as substantiated by contractual terms and the Company’s significant PCS renewal experience, from its existing worldwide base. The Company’s multiple element sales arrangements generally include rights for the customer to renew PCS after the bundled term ends. These rights are irrevocable to the customer’s benefit, are for specified prices and the customer is not subject to any economic or other penalty for failure to renew. Further, the renewal PCS options are for services comparable to the bundled PCS and cover similar terms.

It is the Company’s experience that customers generally exercise their renewal PCS option. In the renewal transaction, PCS is sold on a stand-alone basis to the licensees one year or more after the original multiple element sales arrangement. The renewal PCS price is consistent with the renewal price in the original multiple element sales arrangement although an adjustment to reflect consumer price changes is not uncommon.

If VSOE of fair value does not exist for all undelivered elements, all revenue is deferred until sufficient evidence exists or all elements have been delivered.

The Company assesses whether payment terms are customary or extended in accordance with normal practice relative to the market in which the sale is occurring. The Company’s sales arrangements generally include standard payment terms. These terms effectively relate to all customers, products, and arrangements regardless of customer type, product mix or arrangement size. The only time exceptions are made to these standard terms is on certain sales in parts of the world where local practice differs. In these jurisdictions, the Company’s customary payment terms are in line with local practice.

### ***b) Service revenues***

Service revenues consist of revenues from consulting, implementation, training and integration services. These services are set forth separately in the contractual arrangements such that the total price of the customer arrangement is expected to vary as a result of the inclusion or exclusion of these services. For those contracts where the services are not essential to the functionality of any other element of the

transaction, the Company determines VSOE of fair value for these services based upon normal pricing and discounting practices for these services when sold separately. These consulting and implementation services contracts are primarily time and materials based contracts that are, on average, less than six months in length. Revenue from these services is recognized at the time such services are rendered as the time is incurred by the Company.

The Company also enters into contracts that are primarily fixed fee arrangements to render specific consulting services. The percentage of completion method is applied to these more complex contracts that involve the provision of services relating to the design or building of complex systems, because these services are essential to the functionality of other elements in the arrangement. Under this method, the percentage of completion is calculated based on actual hours incurred compared to the estimated total hours for the services under the arrangement. For those fixed fee contracts where the services are not essential to the functionality of a software element, the proportional performance method is applied to recognize revenue. Revenues from training and integration services are recognized in the period in which these services are performed.

#### ***c) Customer support revenues***

Customer support revenues consist of revenue derived from contracts to provide PCS to license holders. These revenues are recognized ratably over the term of the contract. Advance billings of PCS are not recorded to the extent that the term of the PCS has not commenced or payment has not been received.

#### ***Deferred revenue***

Deferred revenue primarily relates to support agreements which have been paid for by customers prior to the performance of those services. Generally, the services will be provided in the next twelve months.

#### ***Research and development costs***

Research and development costs internally incurred in creating computer software to be sold, licensed or otherwise marketed, are expensed as incurred unless they meet the criteria for deferral and amortization, described in FASB SFAS No. 86 "Accounting for the Costs of Corporate Software to be Sold, Released, or Otherwise Marketed" ("SFAS 86"). In accordance with SFAS 86, costs related to research, design and development of products are charged to expenses as incurred and capitalized between the dates that the product is considered to be technologically feasible and is considered to be ready for general release to customers.

In the Company's historical experience, the dates relating to the achievement of technological feasibility and general release of the product have substantially coincided. In addition, no significant costs are incurred subsequent to the establishment of technological feasibility. As a result, the Company does not capitalize any research and development costs relating to internally developed software to be sold, licensed or otherwise marketed.

#### ***Income taxes***

The Company accounts for income taxes in accordance with FASB SFAS No. 109, "Accounting for Income Taxes" ("SFAS 109"). Deferred tax assets and liabilities arise from temporary differences between the tax bases of assets and liabilities and their reported amounts in the consolidated financial statements that will result in taxable or deductible amounts in future years. These temporary differences are measured using enacted tax rates. A valuation allowance is recorded to reduce deferred tax assets to the extent that management considers it is more likely than not that a deferred tax asset will not be realized. In determining the valuation allowance, management considers factors such as the reversal of deferred income tax liabilities, projected taxable income, and the character of income tax assets and tax planning strategies. A change to these factors could impact the estimated valuation allowance and income tax expense.

In addition, the Company is subject to examinations by taxation authorities of the jurisdictions in which the Company operates in the normal course of operations. The Company regularly assesses the status of these examinations and the potential for adverse outcomes to determine the adequacy of the provision for income and other taxes.

#### ***Fair value of financial instruments***

Carrying amounts of certain financial instruments, including cash and cash equivalents, accounts receivable and accounts payable (trade and accrued liabilities) approximate their fair value due to the relatively short period of time between origination of the instruments and their expected realization.

The fair value of the Company's long-term debt approximates its carrying value based upon changes in interest rates and credit risk.

#### ***Foreign currency translation***

The functional currency of the majority of the Company's subsidiaries is the local currency. For such subsidiaries, monetary assets and liabilities denominated in foreign currencies are translated into local currencies at the year-end rate of exchange. Non-monetary assets and liabilities denominated in foreign currencies are translated at historic rates, and revenue and expenses are translated at average exchange rates prevailing during the month of the transaction. Exchange gains or losses are reflected in the statements of income.

The accounts of the Company's self-sustaining foreign operations for which the functional currency is other than the U.S. dollar are translated into U.S. dollars using the current rate method. Assets and liabilities are translated at the year-end exchange rate, and revenue and expenses are translated at average exchange rates prevailing during the month of the transaction. Unrealized gains and losses arising from the translation of the financial statements of these foreign operations are accumulated in the "Cumulative translation adjustment" account, a separate component of shareholders' equity.

#### ***Restructuring charges***

The Company records restructuring charges relating to contractual lease obligations and other exit costs in accordance with FASB SFAS No. 146, "Accounting for Costs Associated with Exit or Disposal Activities" ("SFAS 146"). SFAS 146 requires recognition of costs associated with an exit or disposal activity when the liability is incurred and can be measured at fair value.

The Company records restructuring charges relating to employee termination costs in accordance with FASB SFAS No. 112, "Accounting for Post Employment Benefits" ("SFAS 112"). SFAS 112 applies to post-employment benefits provided to employees under on going benefit arrangements. In accordance with SFAS 112, the Company records such charges when the termination benefits are capable of being determined or estimated in advance, from either the provisions of the Company's policy or from past practices, the benefits are attributable to services already rendered and the obligation relates to rights that vest or accumulate.

The recognition of restructuring charges requires management to make certain judgments regarding the nature, timing and amount associated with the planned restructuring activities, including estimating sublease income and the net recoverable amount of equipment to be disposed of. At the end of each reporting period, the Company evaluates the appropriateness of the remaining accrued balances.

#### ***Litigation***

The Company is a party, from time to time, in legal proceedings. In these cases, management assesses the likelihood that a loss will result, as well as the amount of such loss and the financial statements provide for the Company's best estimate of such losses. To the extent that any of these legal proceedings are resolved and result in the Company being required to pay an amount in excess of what has been provided for in the financial statements,

the Company would be required to record, against earnings, such excess at that time. If the resolution resulted in a gain to the Company, or a loss less than that provided for, such gain is recognized when received or receivable.

### ***Net income per share***

Basic net income per share is computed using the weighted average number of common shares outstanding including contingently issuable shares where the contingency has been resolved. Diluted net income per share is computed using the weighted average number of common shares and stock equivalents outstanding using the treasury stock method during the year (see Note 19 “Net Income Per Share” in these Notes to Consolidated Financial Statements for more details).

### ***Change in accounting policy***

#### ***Share-based payment***

On July 1, 2005, the Company adopted the fair value-based method for measurement and cost recognition of employee share-based compensation arrangements under the provisions of Financial Accounting Standards Board (“FASB”) Statement of Financial Accounting Standards No. (“SFAS”) 123 (Revised 2004), “Share-Based Payment” (“SFAS 123R”), using the modified prospective transitional method. Previously, the Company had elected to account for employee share-based compensation using the intrinsic value method based upon Accounting Principles Board Opinion No. 25, “Accounting for Stock Issued to Employees” (“APB 25”) and related interpretations. The intrinsic value method generally did not result in any compensation cost being recorded for employee stock options since the exercise price was equal to the market price of the underlying shares on the date of grant.

Under the modified prospective transitional method, share-based compensation is recognized for awards granted, modified, repurchased or cancelled subsequent to the adoption of SFAS 123R. In addition, share-based compensation is recognized, subsequent to the adoption of SFAS 123R, for the remaining portion of the vesting period (if any) for outstanding awards granted prior to the date of adoption. Prior periods have not been adjusted and the Company continues to provide pro forma disclosure as if it had accounted for employee share-based payments in all periods presented under the fair value provisions of SFAS No. 123, “Accounting for Stock-based Compensation”, which is presented below.

The Company measures share-based compensation costs on the grant date, based on the calculated fair value of the award. The Company has elected to treat awards with graded vesting as a single award when estimating fair value. Compensation cost is recognized on a straight-line basis over the employee requisite service period, which in the Company’s circumstances is the stated vesting period of the award, provided that total compensation cost recognized at least equals the pro rata value of the award that has vested. Compensation cost is initially based on the estimated number of options for which the requisite service is expected to be rendered. This estimate is adjusted in the period once actual forfeitures are known.

Had the Company adopted the fair value-based method for accounting for share-based compensation in all prior periods presented, the pro-forma impact on net income and net income per share would be as follows:

	<b><u>Year ended June 30, 2005</u></b>	<b><u>Year ended June 30, 2004</u></b>
Net income for the period:		
As reported .....	\$20,359	\$23,298
Share-based compensation cost not recognized in net income .....	6,035	3,410
Pro forma .....	<u>\$14,324</u>	<u>\$19,888</u>
Net income per share—basic		
As reported .....	\$ 0.41	\$ 0.53
Pro forma .....	\$ 0.29	\$ 0.45
Net income per share—diluted		
As reported .....	\$ 0.39	\$ 0.49
Pro forma .....	\$ 0.27	\$ 0.42

Refer to Note 12 “Share-Based Payments and Option Plans” in these Notes to Consolidated Financial Statements for details of stock options and share-based compensation costs recorded during the year ended June 30, 2006.

### ***Recently issued accounting pronouncements***

#### *Accounting changes and error corrections*

In May 2005, the FASB issued SFAS No. 154, “Accounting Changes and Error Corrections” (“SFAS 154”), which replaces Accounting Principles Board Opinion No. 20, “Accounting Changes”, and SFAS No. 3, “Reporting Accounting Changes in Interim Financial Statements”. SFAS 154 provides guidance on the accounting for, and reporting of, changes in accounting principles and error corrections. SFAS 154 requires retrospective application to prior period’s financial statements of voluntary changes in accounting principles and changes required by new accounting standards when the standard does not include specific transition provisions, unless it is impracticable to do so. Certain disclosures are also required for restatements due to correction of an error. SFAS 154 is effective for accounting changes and corrections of errors made in fiscal years beginning after December 15, 2005, and will be adopted by the Company for the year ended June 30, 2007. The impact that the adoption of SFAS 154 will have on the Company’s results of operations and financial condition will depend on the nature of future accounting changes and the nature of transitional guidance provided in future accounting pronouncements.

#### *Accounting for Uncertain Tax Positions*

In July 2006, the FASB issued FASB Interpretation No. 48 on Accounting for Uncertain Tax Positions—an interpretation of FASB Statement No. 109, “Accounting for Income Taxes” (“FIN 48”).

Under FIN 48, an entity should presume that a taxing authority will examine a tax position when evaluating the position for recognition and measurement; therefore, assessment of the probability of the risk of examination is not appropriate. In applying the provisions of FIN 48, there will be distinct recognition and measurement evaluations. The first step is to evaluate the tax position for recognition by determining if the weight of available evidence indicates it is more likely than not, based solely on the technical merits, that the position will be sustained on audit, including resolution of related appeals or litigation processes, if any. The second step is to measure the appropriate amount of the benefit to recognize. The amount of benefit to recognize will be measured as the maximum amount which is more likely than not, to be realized. The tax position should be derecognized when it is no longer more likely than not of being sustained. On subsequent recognition and measurement the maximum amount which is more likely than not to be recognized at each reporting date will represent management’s best estimate, given the information available at the reporting date, even though the outcome of the tax position is not absolute or final. Subsequent recognition, derecognition, and measurement should be based on new information. A liability for interest or penalties or both will be recognized as deemed to be incurred based on the provisions of the tax law, that is, the period for which the taxing authority will begin assessing the interest or penalties or both. The amount of interest expense recognized will be based on the difference between the amount recognized in the financial statements and the benefit recognized in the tax return. On transition, the change in net assets due to applying the provisions of the final interpretation will be considered as a change in accounting principle with the cumulative effect of the change treated as an offsetting adjustment to the opening balance of retained earnings in the period of transition.

FIN 48 will be effective as of the beginning of the first annual period beginning after December 15, 2006 and will be adopted by the Company for the year ended June 30, 2008. The Company is currently assessing the impact of FIN 48 on its financial statements.

### NOTE 3—INVESTMENTS IN MARKETABLE SECURITIES

The Company's investments in marketable securities consist of investments in the equity of Hummingbird Limited ("Hummingbird"). The cost of the investment was \$21.1 million. Unrealized losses on this investment, net of tax, are included in accumulated other comprehensive income in shareholders' equity. As of June 30, 2006, the Company recorded a cumulative loss of \$45,000. The fair value of this investment as of June 30, 2006 was approximately \$21.0 million and was determined based on the closing price of Hummingbird on the Toronto Stock Exchange. Because the Company has the ability and intent to hold this investment until market price recovery, this investment is not considered other than temporarily impaired.

The Company did not own any investments in marketable securities as of June 30, 2005.

On July 5, 2006, the Company announced its intention to make an offer to purchase all of the common shares of Hummingbird. For details relating to this offer see Note 22 "Subsequent Events" in these Notes to Consolidated Financial Statements.

### NOTE 4—CAPITAL ASSETS

	As of June 30, 2006		
	Cost	Accumulated Depreciation	Net
Furniture and fixtures . . . . .	\$ 8,605	\$ 6,360	\$ 2,245
Office equipment . . . . .	8,281	6,992	1,289
Computer hardware . . . . .	66,714	54,995	11,719
Computer software . . . . .	17,023	11,737	5,286
Leasehold improvements . . . . .	12,374	8,064	4,310
Building . . . . .	16,726	313	16,413
	<u>\$129,723</u>	<u>\$88,461</u>	<u>\$41,262</u>

  

	As of June 30, 2005		
	Cost	Accumulated Depreciation	Net
Furniture and fixtures . . . . .	\$ 9,635	\$ 6,998	\$ 2,637
Office equipment . . . . .	9,976	8,550	1,426
Computer hardware . . . . .	65,900	54,122	11,778
Computer software . . . . .	12,842	9,514	3,328
Leasehold improvements . . . . .	17,588	10,366	7,222
Building . . . . .	9,679	—	9,679
	<u>\$125,620</u>	<u>\$89,550</u>	<u>\$36,070</u>

During the year ended June 30, 2006, impairment charges of \$3.8 million were recorded against capital assets that were written down to fair value. For more details relating to this impairment refer to Note 20 "Special Charges (Recoveries)" in these Notes to Consolidated Financial Statements.



## NOTE 5—GOODWILL

Goodwill is recorded when the consideration paid for an acquisition of a business exceeds the fair value of identifiable net tangible and intangible assets. The following table summarizes the changes in goodwill since June 30, 2004:

Balance, June 30, 2004 .....	\$223,752
Goodwill recorded during fiscal 2005:	
Vista .....	8,714
Artesia .....	2,136
Optura .....	2,352
Adjustments relating to prior acquisitions .....	(822)
Adjustments on account of foreign exchange .....	6,959
Balance, June 30, 2005 .....	243,091
Adjustments relating to prior acquisitions .....	(17,470)
Adjustments on account of foreign exchange .....	9,902
Balance, June 30, 2006 .....	<u>\$235,523</u>

Adjustments relating to prior acquisitions primarily relate to the reduction of goodwill on account of corresponding reductions in valuation allowances based upon the review and evaluation of the tax attributes of acquisition-related operating loss carry forwards and deductions originally assessed at the various dates of acquisition and offset by increases to goodwill relating to IXOS share purchases and step accounting adjustments.

## NOTE 6—ACQUIRED INTANGIBLE ASSETS

	Technology Assets	Customer Assets	Total
Net book value, June 30, 2004 .....	\$ 76,816	\$39,772	\$116,588
Assets acquired and activity during fiscal 2005:			
Vista .....	8,660	11,700	20,360
Artesia .....	3,300	1,600	4,900
Optura .....	1,300	700	2,000
Amortization expense .....	(16,175)	(8,234)	(24,409)
Other, including foreign exchange impact .....	2,207	6,335	8,542
Net book value, June 30, 2005 .....	76,108	51,873	127,981
Activity during fiscal 2006:			
Amortization expense .....	(18,900)	(9,199)	(28,099)
Impairment of intangible assets .....	(1,046)	—	(1,046)
Other, including foreign exchange impact .....	(988)	4,478	3,490
Net book value, June 30, 2006 .....	<u>\$ 55,174</u>	<u>\$47,152</u>	<u>\$102,326</u>

The range of amortization periods for intangible assets is from 4-10 years.

The following table shows the estimated future amortization expense for each of the next five years, assuming no further adjustments to acquired intangible assets are made:

	<b>Fiscal years ending June 30,</b>
2007 .....	\$27,838
2008 .....	27,290
2009 .....	20,942
2010 .....	8,742
2011 .....	6,228
Total .....	<u>\$91,040</u>

The Company recorded a \$1.0 million impairment of technology assets charge relating to a write down of intellectual property in North America. Refer to Note 20 “Special Charges (Recoveries)” in these Notes to Consolidated Financial Statements for details of the impairment relating to these intangible assets.

#### **NOTE 7—OTHER ASSETS**

	<b>As of June 30,</b>	
	<b>2006</b>	<b>2005</b>
Restricted cash .....	\$ 218	\$2,442
Deposits .....	1,585	2,246
Loan receivable .....	228	266
Long-term prepaid expenses .....	199	379
Other .....	4	65
	<u>\$2,234</u>	<u>\$5,398</u>

The restricted cash relates to cash on hand that has been restricted in accordance with facility lease agreements. Deposits relate to security deposits provided to landlords in accordance with facility lease agreements.

#### **NOTE 8—ALLOWANCE FOR DOUBTFUL ACCOUNTS**

Balance of allowance for doubtful accounts as of June 30, 2003 .....	\$ 1,933
Bad debt expense for the year .....	(940)
Write-off/adjustments .....	2,635
Balance of allowance for doubtful accounts as of June 30, 2004 .....	3,628
Bad debt expense for the year .....	1,814
Write-off/adjustments .....	(2,317)
Balance of allowance for doubtful accounts as of June 30, 2005 .....	3,125
Bad debt expense for the year .....	1,485
Write-off/adjustments .....	(1,874)
Balance of allowance for doubtful accounts as of June 30, 2006 .....	<u>\$ 2,736</u>

## NOTE 9—BANK INDEBTEDNESS

### *Long-term debt*

Long-term debt consists of a 5 year mortgage agreement entered into during December 2005 with a Canadian chartered bank. The principal amount of the mortgage is Canadian Dollars (“CDN”) \$15.0 million. The mortgage has a fixed term of five years, maturing on January 1, 2011, and is secured by a lien on the Company’s building in Waterloo, Ontario. Interest is to be paid monthly at a fixed rate of 5.25% per annum. Principal and interest are payable in monthly installments of CDN \$101,000 with a final lump sum principal payment of CDN \$12.6 million due on maturity. The mortgage may not be prepaid in whole or in part at anytime prior to the maturity date.

As of June 30, 2006, the carrying values of the building and mortgage were \$16.4 million and \$13.4 million, respectively.

### *Credit facility*

On February 2, 2006, the Company secured a new demand operating facility of CDN \$40.0 million from a Canadian chartered bank. Borrowings under this facility bear interest at varying rates depending upon the nature of the borrowings. The Company has pledged certain of its assets as collateral for this credit facility. There are no stand-by fees for this facility. As of June 30, 2006 there were no borrowings outstanding under this facility.

## NOTE 10—ACCOUNTS PAYABLE AND ACCRUED LIABILITIES

### **Current liabilities**

Accounts payable and accrued liabilities are comprised of the following:

	As of June 30, 2006	As of June 30, 2005
Accounts payable—trade .....	\$ 6,077	\$11,182
Accrued salaries and commissions .....	15,020	20,081
Accrued liabilities .....	26,827	39,958
Amounts payable in respect of restructuring (note 20) .....	6,148	920
Amounts payable in respect of acquisitions and acquisition related accruals .....	8,463	8,327
	<u>\$62,535</u>	<u>\$80,468</u>

### **Long-term accrued liabilities**

	As of June 30, 2006	As of June 30, 2005
Pension liabilities .....	\$ 582	\$ 625
Amounts payable in respect of restructuring (note 20) .....	1,851	1,125
Amounts payable in respect of acquisitions and acquisition related accruals .....	14,224	18,694
Other accrued liabilities .....	568	239
Asset retirement obligations .....	3,896	4,896
	<u>\$21,121</u>	<u>\$25,579</u>

#### *Pension liabilities*

IXOS, in which the Company acquired a controlling interest in March 2004, has pension commitments to employees as well as to current and previous members of its executive board. The actuarial cost method used in determining the net periodic pension cost, with respect to the IXOS employees, is the projected unit credit method. The liabilities and annual income or expense of the Company's pension plan are determined using methodologies that involve various actuarial assumptions, the most significant of which are the discount rate and the long-term rate of return on assets. The Company's policy is to deposit amounts with an insurance company to cover the actuarial present value of the expected retirement benefits. The total held in short-term investments as of June 30, 2006 was \$2.6 million (June 30, 2005 – \$2.3 million), while the fair value of the pension obligation as of June 30, 2006 was \$3.0 million (June 30, 2005 – \$2.9 million).

#### *Asset retirement obligations*

The Company is required to return certain of its leased facilities to their original state at the conclusion of the lease. The Company has accounted for such obligations in accordance with SFAS 143. At June 30, 2006, the present value of this obligation was \$3.9 million (June 30, 2005 – \$4.9 million) with an undiscounted value of \$4.8 million (June 30, 2005 – \$6.8 million). These leases were primarily assumed in connection with the IXOS acquisition.

#### *Excess facility obligations and accruals relating to acquisitions*

The Company has accrued for the cost of excess facilities both in connection with its Fiscal 2004 and Fiscal 2006 restructuring, as well as with a number of its acquisitions. These accruals represent the Company's best estimate in respect of future sub-lease income and costs incurred to achieve sub-tenancy. These liabilities have been recorded using present value discounting techniques and will be discharged over the term of the respective leases. The difference between the present value and actual cash paid for the excess facility will be charged to other income over the terms of the leases ranging between several months to 17 years.

Transaction-related costs include amounts provided for certain pre-acquisition contingencies.

The following table summarizes the activity with respect to the Company's acquisition accruals during the year ended June 30, 2006.

	Balance June 30, 2005	Initial Accruals	Usage/ Foreign Exchange/ Other Adjustments	Subsequent Adjustments to Goodwill	Balance June 30, 2006
<b>IXOS</b>					
Employee termination costs	\$ 338	\$—	\$ (252)	\$ (64)	\$ 22
Excess facilities	17,274	—	337	(210)	17,401
Transaction-related costs	2,167	—	(2,571)	1,020	616
	<u>19,779</u>	<u>—</u>	<u>(2,486)</u>	<u>746</u>	<u>18,039</u>
<b>Gauss</b>					
Excess facilities	260	—	(189)	(71)	—
Transaction-related costs	298	—	(838)	574	34
	<u>558</u>	<u>—</u>	<u>(1,027)</u>	<u>503</u>	<u>34</u>
<b>Eloquent</b>					
Transaction-related costs	487	—	6	(250)	243
	<u>487</u>	<u>—</u>	<u>6</u>	<u>(250)</u>	<u>243</u>
<b>Centrinity</b>					
Excess facilities	3,928	—	274	(873)	3,329
Transaction-related costs	651	—	(234)	(196)	221
	<u>4,579</u>	<u>—</u>	<u>40</u>	<u>(1,069)</u>	<u>3,550</u>
<b>Open Image</b>					
Transaction-related costs	135	—	3	(138)	—
	<u>135</u>	<u>—</u>	<u>3</u>	<u>(138)</u>	<u>—</u>
<b>Artesia</b>					
Employee termination costs	50	—	(48)	(2)	—
Excess facilities	821	—	(161)	101	761
Transaction-related costs	79	—	(46)	(21)	12
	<u>950</u>	<u>—</u>	<u>(255)</u>	<u>78</u>	<u>773</u>
<b>Vista</b>					
Transaction-related costs	121	—	(13)	(102)	6
	<u>121</u>	<u>—</u>	<u>(13)</u>	<u>(102)</u>	<u>6</u>
<b>Optura</b>					
Excess facilities	172	—	(91)	(51)	30
Transaction-related costs	240	—	(78)	(150)	12
	<u>412</u>	<u>—</u>	<u>(169)</u>	<u>(201)</u>	<u>42</u>
<b>Totals</b>					
Employee termination costs	388	—	(300)	(66)	22
Excess facilities	22,455	—	170	(1,104)	21,521
Transaction-related costs	4,178	—	(3,771)	737	1,144
	<u>\$27,021</u>	<u>\$—</u>	<u>\$(3,901)</u>	<u>\$ (433)</u>	<u>\$22,687</u>

The adjustments to goodwill relate to employee termination costs and excess facilities primarily to adjustments accounted for in accordance with Emerging Issues Task Force 95-3, "Recognition of Liabilities in Connection With a Purchase Business Combination" ("EITF 95-3"). The adjustments to goodwill relating to transaction costs are accounted for in accordance with SFAS 141.

## FISCAL 2005

The following table summarizes the activity with respect to the Company's acquisition accruals during the year ended June 30, 2005.

	Balance June 30, 2004	Additions	Usage/Foreign Exchange Adjustments	Adjustments to Goodwill	Balance June 30, 2005
<b>IXOS</b>					
Employee termination costs	\$ 7,438	\$ —	\$ (6,850)	\$ (250)	\$ 338
Excess facilities	19,930	—	(655)	(2,001)	17,274
Transaction-related costs	3,438	—	(1,586)	315	2,167
	<u>30,806</u>	<u>—</u>	<u>(9,091)</u>	<u>(1,936)</u>	<u>19,779</u>
<b>Gauss</b>					
Employee termination costs	214	—	(135)	(79)	—
Excess facilities	498	—	74	(312)	260
Transaction-related costs	—	500	(202)	—	298
	<u>712</u>	<u>500</u>	<u>(263)</u>	<u>(391)</u>	<u>558</u>
<b>Domea</b>					
Transaction-related costs	15	25	(40)	—	—
	<u>15</u>	<u>25</u>	<u>(40)</u>	<u>—</u>	<u>—</u>
<b>Corechange</b>					
Excess facilities	551	—	(285)	(266)	—
Transaction-related costs	125	—	(31)	(94)	—
	<u>676</u>	<u>—</u>	<u>(316)</u>	<u>(360)</u>	<u>—</u>
<b>Eloquent</b>					
Transaction-related costs	500	—	(13)	—	487
	<u>500</u>	<u>—</u>	<u>(13)</u>	<u>—</u>	<u>487</u>
<b>Centrinity</b>					
Excess facilities	5,483	—	(1,555)	—	3,928
Transaction-related costs	500	—	99	52	651
	<u>5,983</u>	<u>—</u>	<u>(1,456)</u>	<u>52</u>	<u>4,579</u>
<b>Open Image</b>					
Transaction-related costs	116	—	19	—	135
	<u>116</u>	<u>—</u>	<u>19</u>	<u>—</u>	<u>135</u>
<b>Artesia</b>					
Employee termination costs	—	270	—	(220)	50
Excess facilities	—	1,098	(178)	(99)	821
Transaction-related costs	—	380	(301)	—	79
	<u>—</u>	<u>1,748</u>	<u>(479)</u>	<u>(319)</u>	<u>950</u>
<b>Vista</b>					
Transaction-related costs	—	480	(359)	—	121
	<u>—</u>	<u>480</u>	<u>(359)</u>	<u>—</u>	<u>121</u>
<b>Optura</b>					
Employee termination costs	—	100	—	(100)	—
Excess facilities	—	138	—	34	172
Transaction-related costs	—	206	(115)	149	240
	<u>—</u>	<u>444</u>	<u>(115)</u>	<u>83</u>	<u>412</u>
<b>Totals</b>					
Employee termination costs	7,652	370	(6,985)	(649)	388
Excess facilities	26,462	1,236	(2,599)	(2,644)	22,455
Transaction-related costs	4,694	1,591	(2,529)	422	4,178
	<u>\$38,808</u>	<u>\$3,197</u>	<u>\$(12,113)</u>	<u>\$(2,871)</u>	<u>\$27,021</u>

#### **NOTE 11—SHARE CAPITAL**

The authorized share capital of the Company includes an unlimited number of Common Shares and an unlimited number of first preference shares. No preference shares have been issued.

On May 19, 2006, the Company commenced a repurchase program (“Repurchase Program”) that provided for the repurchase of up to a maximum of 2,444,104 Common Shares. Purchase and payment for the Company’s Common Shares, under the Repurchase Program, will be determined by the Board of Directors of Open Text and will be made in accordance with rules and policies of the NASDAQ.

During Fiscal 2006, the Company did not repurchase any Common Shares for cancellation.

The Repurchase Program will terminate on May 18, 2007.

During Fiscal 2005, the Company repurchased for cancellation 3,558,700 Common Shares at a cost of \$63.8 million, under a previous repurchase program, of which \$29.9 million has been charged to share capital and \$33.9 million has been charged to accumulated deficit.

During Fiscal 2004, the Company did not repurchase any Common Shares for cancellation. On October 8, 2003, the Company declared a two-for-one split of the Company’s Common Shares effected by means of a stock dividend. All of the share and per share information presented in the consolidated financial statements reflects the stock dividend on a retroactive basis.

#### **NOTE 12—SHARE BASED PAYMENTS AND OPTION PLANS**

##### ***Option Plans***

A summary of the Company’s various Stock Option Plans is set forth below. All numbers shown in the chart below have been adjusted to account for the two-for-one stock split that occurred on October 22, 2003.



# OPEN TEXT CORPORATION

	1995 “Restated” Flexible Stock Incentive Plan	1995 Replacement Stock Option Plan	1995 Supplementary Stock Option Plan (2)	1995 Directors Stock Option Plan (2)	1998 Stock Option Plan	Centrinity Stock Option Plan	Gauss Stock Option Plan	IXOS Stock Option Plan	2004 Stock Option Plan	Vista Stock Option Plan	Artesia Stock Option Plan
Date of inception	Jun-95	Oct-95	Oct-95	Oct-95	Jun-98	Jan-03	Jan-04	Mar-04	Oct-04	Sep-04	Sep-04
Eligibility	Employees, officers, directors, and consultants	Employees, officers, directors, and consultants of Odesta	Former employees and directors of Odesta	Eligible non-employee directors (1)	Eligible employees and directors, as determined by the Board of Directors	Eligible employees, consultants and directors, as determined by the Board of Directors	Eligible employees as determined by the Board of Directors	Eligible employees as determined by the Board of Directors	Eligible employees, as determined by the Board of Directors	Former employees, and consultants of Quest Software Inc.	Eligible employees, and consultants of Artesia Technologies Inc.
Options granted to date	12,778,750	1,096,498	715,000	1,048,000	7,770,290	414,968	51,000	210,000	1,255,500	43,500	20,000
Options cancelled to date	(3,897,869)	(2,418)	(192,750)	(286,000)	(2,371,260)	(11,125)	(10,000)	(143,000)	(109,000)	(14,125)	(10,000)
Options exercised to date	(8,462,357)	(1,094,080)	(502,250)	(511,500)	(2,398,824)	(50,432)	—	—	(2,500)	—	—
Options outstanding	418,524	—	20,000	250,500	3,000,206	353,411	41,000	67,000	1,144,000	29,375	10,000
Termination grace periods	Immediately “for cause”; 90 days for any other reason	Immediately “for cause”; 90 days for any other reason	1 year due to death; 90 days for any other reason	Immediately “for cause”; 3 months for any other reason	Immediately “for cause”; 90 days for any other reason	Immediately “for cause”; 90 days for any other reason; 180 days due to death	Immediately “for cause”; 90 days for any other reason; 180 days due to death	Immediately “for cause”; 90 days for any other reason; 180 days due to death	Immediately “for cause”; 90 days for any other reason; 180 days due to death	Immediately “for cause”; 90 days for any other reason; 180 days due to death	Immediately “for cause”; 90 days for any other reason; 180 days due to death
Vesting schedule	Over a 4 or 5 year period; options exercisable up to 10 years from grant date	Vest over a 3 year period; options exercisable up to 10 years from grant date	Vest over a 2 year period; options exercisable up to 10 years from grant date	Determined by Plan Administrator (1)	Determined by Plan Administrator (1)	Over a 4 year period, unless otherwise specified	Over a 4 year period, unless otherwise specified	Over a 4 year period, unless otherwise specified	Determined by the Company. If not specified it is 25% per year	Determined by the Company. If not specified it is 25% per year	Determined by the Company. If not specified it is 25% per year
Exercise price range (average)	\$2.13 – \$5.94 (\$4.31)	n/a	\$2.13 – \$2.13 (\$2.13)	\$6.45 – \$7.41 (\$7.07)	\$6.09 – \$24.77 (\$12.02)	\$12.09 – \$13.50 (\$12.30)	\$26.24 – \$26.24 (\$26.24)	\$26.24 – \$26.24 (\$26.24)	\$14.02 – \$20.71 (\$15.55)	\$17.99 – \$17.99 (\$17.99)	\$17.99 – \$17.99 (\$17.99)
Expiration dates	10/30/2006 to 1/27/2008	n/a	9/17/2006	9/17/2007 to 3/5/2008	8/14/2008 to 02/3/2016	11/1/2012 to 1/28/2013	1/27/2014	1/27/2014	12/9/2011 to 6/1/2012	9/30/2010 to 9/3/2013	9/30/2010 to 9/3/2013

(1) The Plan Administrator determined the non-employee directors of the Company to whom options are granted, the number of Common Shares subject to each option, the exercise price and vesting schedule of each option.

(2) Representing the Board of Directors of the Company or, if established and duly authorized to act, the Executive Committee of the Board of Directors of the Company.

A summary of option activity from June 30, 2003 is set forth below:

	Options Outstanding	
	Number of shares	Weighted Average Exercise Price
Options outstanding as of June 30, 2003	6,453,796	\$ 8.54
Granted during Fiscal 2004	809,000	20.89
Cancelled	(127,330)	12.07
Exercised	(1,986,485)	7.54
Options outstanding as of June 30, 2004	5,148,981	10.77
Granted during Fiscal 2005	965,500	16.67
Cancelled	(240,919)	14.81
Exercised	(343,288)	5.71
Options outstanding as of June 30, 2005	5,530,274	11.93
Granted during Fiscal 2006	629,500	15.40
Cancelled	(355,322)	18.81
Exercised	(470,436)	7.75
Options outstanding as of June 30, 2006	<u>5,334,016</u>	<u>\$12.25</u>

As of June 30, 2006, there were exercisable options outstanding to purchase 3,782,649 (June 30, 2005 – 3,697,790) Common Shares with a weighted average exercise price of \$10.69 (June 30, 2005 – \$9.60).

The following table summarizes information regarding stock options outstanding at June 30, 2006:

Range of Exercise Prices	Options Outstanding			Options Exercisable	
	Number of options Outstanding as of June 30, 2005	Weighted Average Remaining Contractual Life (years)	Weighted Average Exercise Price	Number of options Exercisable as of June 30, 2005	Weighted Average Exercise Price
\$ 2.13 – \$ 6.45	554,274	1.07	\$ 4.63	554,274	\$ 4.63
6.72 – 6.88	724,236	2.33	6.86	724,236	6.86
7.41 – 10.39	652,750	3.97	9.30	602,750	9.21
10.53 – 12.09	801,350	4.96	11.39	713,850	11.31
12.16 – 14.10	676,261	6.09	13.89	406,144	13.84
14.56 – 15.47	547,770	5.63	14.88	141,020	14.93
15.66 – 16.92	571,000	5.21	16.72	283,375	16.51
17.04 – 19.14	576,375	7.26	17.73	286,250	17.86
20.00 – 26.24	230,000	7.97	23.09	70,750	24.98
\$ 2.13 – \$26.24	<u>5,334,016</u>	<u>4.70</u>	<u>\$12.25</u>	<u>3,782,649</u>	<u>\$10.69</u>

### Share-Based Payments

#### Summary of Outstanding Stock Options

As of June 30, 2006, options to purchase an aggregate of 5,334,016 Common Shares are outstanding under all of the Company's stock option plans. In addition, 654,470 Common Shares are available for issuance under the 1998 Stock Option Plan and the 2004 Stock Option Plan, which are the only plans under which the Company may issue further options. The Company's stock options generally vest over four to five years and expire ten years from the date of the grant and the exercise price of options granted is equivalent to the fair market value of the stock at the date of grant except as noted hereinafter in the case of non-employee members of the Board of Directors only.

Options granted to non-employee members of the Board of Directors vest as of the date of the Company's Annual General Meeting of shareholders immediately following the date of the grant of the options. The exercise price of options granted is usually equivalent to the fair market value of the stock at the date of grant but in no event is the exercise price less than the market price at the date of grant, as defined in the relevant stock option plan. During the year ended June 30, 2006, the exercise price of options granted to non-employee members of the Board of Directors, was \$20.00 which was higher than the fair market value of the stock at the date of grant.

A summary of option activity under the Company's stock option plans for the year ended and as at June 30, 2006 is as follows:

	<b>Number of Options</b>	<b>Weighted- Average Exercise Price</b>	<b>Weighted- Average Remaining Contractual Term</b>	<b>Aggregate Intrinsic Value (\$'000s)</b>
Outstanding at July 1, 2005 . . . . .	5,530,274	\$11.93		
Granted . . . . .	629,500	15.40		
Exercised . . . . .	(470,436)	7.75		
Forfeited or expired . . . . .	(355,322)	18.81		
Outstanding at June 30, 2006 . . . . .	<u>5,334,016</u>	<u>\$12.25</u>	<u>4.70</u>	<u>\$11,681</u>
Exercisable at June 30, 2006 . . . . .	<u>3,782,649</u>	<u>\$10.69</u>	<u>3.91</u>	<u>\$14,185</u>

The Company estimates the fair value of stock options using the Black-Scholes option pricing model, consistent with the provisions of SFAS 123R and United States Securities and Exchange Commission ("SEC") Staff Accounting Bulletin No. 107. The Black-Scholes option-pricing model was developed for use in estimating the fair value of traded options that have no vesting restrictions and are fully transferable, while the options issued by the Company are subject to both vesting and restrictions on transfer. In addition, option-pricing models require input of subjective assumptions including the estimated life of the option and the expected volatility of the underlying stock over the estimated life of the option. The Company uses historical volatility as a basis for projecting the expected volatility of the underlying stock and estimates the expected life of its stock options based upon historical data.

The Company believes that the valuation technique and the approach utilized to develop the underlying assumptions are appropriate in calculating the fair value of the Company's stock option grants. Estimates of fair value are not intended, however, to predict actual future events or the value ultimately realized by employees who receive equity awards.

For the year ended June 30, 2006, the weighted-average fair value of options granted, as of the grant date, was \$7.68, using the following weighted average assumptions: expected volatility of 52%; risk-free interest rate of 4.6%; expected dividend yield of 0%; and expected life of 5.2 years. A forfeiture rate of 5%, based on historical employee turnover rates, was used to determine the net amount of compensation expense recognized.

For the year ended June 30, 2005, the weighted-average fair value of options granted, as of the grant date, during the periods was \$8.35, using the following weighted-average assumptions: expected volatility of 61%; risk-free interest rate of 3.2%; expected dividend yield of 0%; and expected life of 4.3 years.

For the year ended June 30, 2004, the weighted-average fair value of options granted, as of the grant date, during the periods was \$10.33, using the following weighted-average assumptions: expected volatility of 60%; risk-free interest rate of 3.0%; expected dividend yield of 0%; and expected life of 3.5 years.

In each of the above periods, no cash was used by the Company to settle equity instruments granted under share-based compensation arrangements.

The fair value of awards granted prior to July 1, 2005 is not adjusted to be consistent with the provision of SFAS 123R from the amounts disclosed previously, on a pro forma basis, in the audited Notes to the Consolidated Financial Statements in the Company's Form 10-Ks or in the notes to the unaudited Condensed Consolidated Financial Statements in the Company's Form 10-Qs except that the unvested portion at the date of adoption is adjusted to reflect the Company's estimate of forfeitures. As of June 30, 2006, the total compensation cost related to unvested stock awards not yet recognized in the statement of income was \$9.2 million, which will be recognized over a weighted average period of approximately 2 years.

Share-based compensation cost included in the statement of income for the year ended June 30, 2006 was approximately \$5.2 million. Deferred tax assets of \$622,000 were recorded, as of June 30, 2006 in relation to the tax effect of certain stock options that are eligible for a tax deduction when exercised. The Company has not capitalized any share-based compensation costs as part of the cost of an asset. The impact of adoption of SFAS 123R, for the year ended June 30, 2006 was a decrease in net income of \$4.6 million, net of related tax effects, and a decrease to net income per share of \$0.09 on both a basic and diluted share basis.

For the year ended June 30, 2006, cash in the amount of \$3.7 million was received as the result of the exercise of options granted under share-based payment arrangements. The tax benefit realized by the Company, during the year ended June 30, 2006 from the exercise of options eligible for a tax deduction was \$865,000 which was recorded as additional paid-in capital.

#### *Employee Share Purchase Plan ("ESPP")*

Prior to July 1, 2005, the Company offered its employees the opportunity to buy its Common Shares, through an employee stock purchase plan ("ESPP") at a purchase price equal to the lesser of 85% of the weighted-average trading price of the Common Shares based on the Toronto Stock Exchange ("TSX") or NASDAQ in the period of five trading days immediately preceding the first business day of the purchase period and 85% of the weighted average trading price of the Common Shares in the period of five trading days immediately preceding the last business day of the purchase period. The ESPP, under its original terms, qualified as a non-compensatory plan under APB 25 and as such no compensation cost was recorded in relation to the discount offered to employees for purchases made under the ESPP.

The original terms of the ESPP would have resulted in it being treated as a compensatory plan under the fair value-based method. Effective July 1, 2005, the Company amended the terms of its ESPP to set the amount at which Common Shares may be purchased by employees to 95% of the average market price based on the TSX or NASDAQ on the last day of the purchase period. The choice of the appropriate market for determining the average market price is based upon the market that had the greatest volume of trading of Common Shares in that period. As a result of the amendments, the ESPP is no longer considered a compensatory plan under the provisions of SFAS 123R, and as a result no compensation cost has been recorded in relation to the ESPP for the year ended June 30, 2006.

During the year ended June 30, 2006, 281,093 Common Shares were issued under the ESPP for cash collected from employees totaling \$3.4 million. In addition, cash in the amount of \$660,000 was received from employees that will be used to purchase Common Shares in future periods.

During the year ended June 30, 2005, 260,000 Common Shares were issued under the ESPP for cash collected from employees totaling \$4.4 million.

During the year ended June 30, 2004, 305,000 Common Shares were issued under the ESPP for cash collected from employees totaling \$3.4 million.

## NOTE 13—COMMITMENTS AND CONTINGENCIES

The Company has entered into the following contractual obligations with minimum annual payments for the indicated fiscal periods as follows:

	Payments due by Fiscal year ended June 30,				
	Total	2007	2008 to 2009	2010-2011	2012 and beyond
Long-term debt obligations . . . . .	\$ 16,322	\$ 1,089	\$ 2,178	\$13,055	\$ —
Operating lease obligations * . . . . .	93,663	19,185	35,280	27,467	11,731
Purchase obligations . . . . .	4,584	2,370	1,776	438	—
	<u>\$114,569</u>	<u>\$22,644</u>	<u>\$39,234</u>	<u>\$40,960</u>	<u>\$11,731</u>

\* Net of \$6.2 million of non-cancelable sublease income to be received by the Company from properties which the Company has subleased to other parties.

Rental expense of \$11.3 million, \$15.5 million and \$14.3 million was recorded during the fiscal years ended June 30, 2006, 2005 and 2004, respectively.

The long-term debt obligations are comprised of interest and principal payments on the 5 year mortgage on the Company's recently constructed building in Waterloo, Ontario. See "Note 9 Bank Indebtedness" under the Notes to Consolidated Financial Statements.

The Company does not enter into off-balance sheet financing arrangements as a matter of practice except for the use of operating leases for office space, computer equipment and vehicles. In accordance with U.S. GAAP, neither the lease liability nor the underlying asset is carried on the balance sheet, as the terms of the leases do not meet the criteria for capitalization.

### *Domination agreements*

#### *IXOS domination agreements*

On December 1, 2004, the Company announced that it had entered into a domination and profit transfer agreement (the "IXOS DA") with IXOS. The IXOS DA came into force in August 2005 when it was registered in the commercial register at the local court in Munich. Under the terms of the IXOS DA, Open Text acquired authority to issue directives to the management of IXOS. Also within the terms of the IXOS DA, Open Text offered to purchase the remaining Common Shares of IXOS for a cash purchase price of Euro 9.38 per share ("Purchase Price") which was the weighted average fair value of the IXOS Common Shares as of December 1, 2004. Additionally, Open Text has guaranteed a payment by IXOS to the minority shareholders of IXOS of an annual compensation of Euro 0.42 per share ("Annual Compensation").

The IXOS DA was registered on August 23, 2005. In the quarter ended September 30, 2005, the Company commenced accruing the amount payable to minority shareholders of IXOS on account of Annual Compensation. This amount has been accounted for as a "guaranteed dividend", payable to the minority shareholders, and is recorded as a charge to minority interest in the statements of income for the year ended June 30, 2006.

Based on the number of minority IXOS shareholders as of June 30, 2006, the estimated amount of Annual Compensation was approximately \$504,000 for the fiscal year ended June 30, 2006. Because the Company is unable to predict, with reasonable accuracy, the number of IXOS minority shareholders in future periods, the Company is unable to predict the amount of Annual Compensation that will be payable in future years.

Certain IXOS shareholders have filed for a procedure granted under German law at the district court of Munich, Germany, asking the court to reassess the amount of the Annual Compensation and the Purchase Price

(the “IXOS Appraisal Procedures”) for the amounts offered under the IXOS DA. It cannot be predicted at this stage, whether the court will increase the Annual Compensation and/or the Purchase Price in the IXOS Appraisal Procedures. The purchase offer made under the IXOS DA will expire at the end of the IXOS Appraisal Procedures.

These disputes are a normal and probable part of the process of acquiring minority shares in Germany. The costs associated with the above mentioned shareholder objections to the fair value of the Annual Compensation and the Purchase Price are direct incremental costs associated with the ongoing step acquisitions of shares held by the minority shareholders and have been deferred within Goodwill pending the outcome of the objections. The Company is unable to predict the future costs associated with these activities that will be payable in future periods.

### ***Gauss domination agreements***

Pursuant to a domination agreement dated November 4, 2003 (the “Gauss DA”) between Open Text and Gauss, Open Text has offered to purchase the remaining outstanding shares of Gauss at a price of Euro 1.06 per share (the “Gauss Purchase Price I”). As a result of certain shareholders having filed for a special court procedure to reassess the amount of the Gauss Purchase Price I that must be payable to minority shareholders as a result of the Gauss DA (the “Gauss Appraisal Procedure I”), the acceptance period has been extended pursuant to German law until the end of such proceedings. In addition, in April 2004 Gauss announced that effective July 1, 2004 the shares of Gauss would cease to be listed on a stock exchange. In connection with this delisting, on July 2, 2004, a second offer by Open Text to purchase the remaining outstanding shares of Gauss at a price of Euro 1.06 per share (“Gauss Purchase Price II”), commenced. This acceptance period has also been extended pursuant to German law until the end of proceedings to reassess the amount of the consideration offered under German law in the delisting process (the “Gauss Appraisal Procedure II”). The shareholders’ resolution on the Gauss DA and on the delisting was subject to a court procedure in which certain shareholders of Gauss claimed that the resolution by which the shareholders of Gauss approved of the entering into the Gauss DA and the authorization to the management board of Gauss to file for a delisting are null and void. As a result of an out of court settlement, the complaints have been withdrawn and it has been agreed between Open Text and the minority Gauss shareholders that an amount of Euro 0.05 per share per annum (the “Gauss Annual Compensation”) will be payable as compensation to certain shareholders of Gauss under certain circumstances, but only after registration of the Squeeze Out as defined hereafter. The Gauss Appraisal Procedures I and II are still pending. It cannot be predicted at this stage, whether the court will increase the Gauss Purchase Price and/or the Gauss Annual Compensation.

In Germany, once ownership of 95% of the shares of a company is obtained, an acquirer can go through a “Squeeze-Out” process which is very similar to the Domination Agreement process. The only difference is if the Squeeze Out is registered, the shares of minority shareholders are transferred automatically—by virtue of the law—to the acquirer. On August 25, 2005, at the shareholders meeting of Gauss, upon a motion of Open Text, it was decided to transfer the shares of the minority shareholders, which at the time of the shareholders’ meeting held less than 5% of the shares of Gauss, to Open Text (“Squeeze Out”). The resolutions will become effective when registered in the commercial register at the local court of Hamburg. Registration of these resolutions is currently pending. Certain shareholders of Gauss have filed suits to oppose all or some of the resolutions of the shareholders’ meeting of August 25, 2005. Additionally, a “fast track” motion has been commenced by Gauss to apply for registration, which is still pending in the Court of Appeals in Hamburg. The First Instance Court of Hamburg ruled on February 13, 2006 that the resolution on the Squeeze Out was void; Gauss has appealed the judgment and believes that the decision of the First Instance Court of Hamburg will be overturned, but the outcome of the appeal is uncertain at this time. On July 14, 2006, the shareholders meeting of Gauss confirmed the Squeeze Out resolution; however, registration is still pending.

The Company believes that the registration of these resolutions is a reasonable certainty. Accordingly, the Company has recorded its best estimate of the amount payable to the minority shareholders of Gauss under the



Squeeze Out. As of June 30, 2006, the Company accrued \$75,000 for such payments. The Company is not currently able to determine the final amount payable and it is unable to predict the date on which the resolutions will be registered in the commercial register.

The Company continues to incur direct and incremental costs in connection with the Squeeze Out procedures and registration thereof and have been deferred within Goodwill pending the outcome of the Squeeze Out procedures. The Company is unable to predict the future costs associated with these activities that will be payable in future periods.

### ***Guarantees and indemnifications***

The Company has entered into license agreements with customers that include limited intellectual property indemnification clauses. Generally, the Company agrees to indemnify its customers against legal claims that the Company's software products infringe certain third party intellectual property rights. In the event of such a claim, the Company is generally obligated to defend its customers against the claim and either settle the claim at the Company's expense or pay damages that its customers are legally required to pay to the third-party claimant. These intellectual property infringement indemnification clauses generally are subject to limits based upon the amount of the license sale. The Company has not made any indemnification payments in relation to these indemnification clauses.

In connection with certain facility leases, the Company has guaranteed payments on behalf of its subsidiaries either by providing a security deposit with the landlord or through unsecured bank guarantees obtained from local banks. Additionally, the Company's current end-user license agreement contains a limited software warranty.

The Company has not recorded a liability for guarantees, indemnities or warranties described above in the accompanying consolidated balance sheet since the maximum amount of potential future payments under such guarantees, indemnities and warranties is not determinable.

### ***Litigation***

The Company is subject from time to time to legal proceedings and claims, either asserted or unasserted, that arise in the ordinary course of business. While the outcome of these proceedings and claims cannot be predicted with certainty, the Company's management does not believe that the outcome of any of these legal matters will have a material adverse effect on its consolidated financial position, results of operations and cash flows.

### **NOTE 14—OTHER INCOME (EXPENSE)**

Included in other income (expense) for the year ended June 30, 2006 are primarily foreign exchange losses of \$4.8 million.

Included in other income (expense) for the year ended June 30, 2005 are primarily foreign exchange losses of \$1.8 million and an amount of \$754,000 relating to interest charges and legal costs incurred on the settlement of the action brought against the Company by the Harold L. Tilbury and Yolanda O. Tilbury, Trustees of the Harold L. Tilbury Jr. and Yolanda O. Tilbury Family Trust.

Included in other income (expense) for the year ended June 30, 2004 is a loss on the disposition of a small equity investment in the amount of \$74,000 and foreign exchange gains of \$291,000.

### **NOTE 15—INCOME TAXES**

The Company operates in several tax jurisdictions. Its income is subject to varying rates of tax and losses incurred in one jurisdiction cannot be used to offset income taxes payable in another.



The income before income taxes consisted of the following:

	Year Ended June 30,		
	2006	2005	2004
Domestic income	\$15,206	\$20,255	\$15,457
Foreign income (loss)	(5,556)	7,314	16,439
Income before income taxes	<u>\$ 9,650</u>	<u>\$27,569</u>	<u>\$31,896</u>

A reconciliation of the combined Canadian federal and provincial income tax rate with the Company's effective income tax rate is as follows:

	Year Ended June 30,		
	2006	2005	2004
Expected statutory rate	36.12%	36.10%	36.40%
Expected provision for income taxes	\$ 3,486	\$ 9,952	\$11,610
Effect of permanent differences	2,314	534	(151)
Effect of foreign tax rate differences	(569)	(3,456)	(491)
Effect of change in tax rates	298	—	(855)
Tax incentive for research and development	(428)	—	(506)
Benefit of losses	(3,018)	(3,977)	(2,004)
Change in valuation allowance	4,892	5,132	236
Difference in tax filings from provision	(2,792)	(2,522)	—
Other items	(90)	1,295	(569)
	<u>\$ 4,093</u>	<u>\$ 6,958</u>	<u>\$ 7,270</u>

The subsequent recognition of a benefit related to the realization of tax loss carry forwards or deductible temporary differences acquired in a business combination where a valuation allowance had been established for these assets at the date of acquisition are applied to reduce goodwill and are not included in income. During Fiscal 2006, the recognition of \$19.3 million (June 30, 2005—\$3.5 million) in pre-acquisition tax benefits of acquired companies was recorded as an adjustment (reduction) to goodwill.

As at June 30, 2006, a valuation allowance of \$94.3 million (June 30, 2005—\$113.6 million) has been recorded on acquired deferred tax assets in business combinations where the Company had concluded that it is more likely than not that all or a portion of the acquired tax benefits would not be realized in the future. Subsequent recognition of these tax benefits will be applied as a reduction in goodwill.

The provision for income taxes consisted of the following:

	Year Ended June 30,		
	2006	2005	2004
Domestic:			
Current income taxes	\$ —	\$ —	\$ —
Deferred income taxes	<u>2,730</u>	<u>2,173</u>	<u>1,265</u>
	<u>2,730</u>	<u>2,173</u>	<u>1,265</u>
Foreign:			
Current income taxes	8,407	8,126	9,514
Deferred income taxes	<u>(7,044)</u>	<u>(3,341)</u>	<u>(3,509)</u>
	<u>1,363</u>	<u>4,785</u>	<u>6,005</u>
Provision for income taxes	<u>\$ 4,093</u>	<u>\$ 6,958</u>	<u>\$ 7,270</u>

The Company has approximately \$22.1 million of domestic non-capital loss carryforwards which expire between 2007 and 2016 and \$10.2 million of domestic capital loss carryforwards that have no expiry date. In addition, the Company has \$379.8 million of foreign non-capital loss carry forwards of which \$240.3 million have no expiry date. \$28.1 million of these are U.S. losses that are restricted and can only be used against the profits of a previously acquired company in accordance with a statutory formula. The remainder of the foreign losses expire between 2007 and 2025. The Company also has \$1.9 million of foreign capital loss carryforwards that have no expiry date. In addition, investment tax credits of \$8.4 million will expire between 2014 and 2016.

The primary temporary differences which gave rise to net deferred tax assets at June 30, 2006 and 2005 are:

	<b>Year Ended June 30,</b>	
	<b>2006</b>	<b>2005</b>
<b>Deferred tax assets</b>		
Non-capital loss carryforwards . . . . .	\$ 140,740	\$ 143,445
Capital loss carryforwards . . . . .	2,204	2,203
Employee stock options . . . . .	782	436
Undeducted scientific research and development expenses . . . . .	9,033	4,956
Depreciation and amortization . . . . .	8,826	5,818
Financing fees . . . . .	371	133
Restructuring costs and other reserves . . . . .	23,764	11,540
Other . . . . .	7,679	5,877
Total deferred tax asset . . . . .	193,399	174,408
Valuation allowance . . . . .	(127,490)	(127,634)
Net deferred tax asset . . . . .	65,909	46,774
<b>Deferred tax liabilities</b>		
Scientific research and development tax credits . . . . .	1,359	579
Deferred credits . . . . .	4,151	4,356
Acquired intangibles . . . . .	23,009	31,636
Other . . . . .	3,154	2,802
Deferred tax liabilities . . . . .	31,673	39,373
	<u>\$ 34,236</u>	<u>\$ 7,401</u>
<b>Comprised of:</b>		
Current assets . . . . .	\$ 28,724	\$ 10,275
Long-term assets . . . . .	37,185	36,499
Current liabilities . . . . .	(12,183)	(10,128)
Long-term liabilities . . . . .	(19,490)	(29,245)
	<u>\$ 34,236</u>	<u>\$ 7,401</u>

The Company believes that sufficient uncertainty exists regarding the realization of certain deferred tax assets that a valuation allowance is required. The Company continues to evaluate its taxable position quarterly and considers factors by taxing jurisdiction, such as estimated taxable income, the history of losses for tax purposes and the growth of the Company, among others.

#### **NOTE 16—SEGMENT INFORMATION**

SFAS No. 131, “Disclosures about Segments of an Enterprise and Related Information” establishes standards for the reporting by public business enterprises of information about operating segments, products and services, geographic areas, and major customers. The method of determining what information to report is based on the way that management organizes the operating segments within the Company for making operational decisions and assessments of financial performance.

The Company's operations fall into one dominant industry segment, being enterprise content management software. The Company manages its operations, and accordingly determines its operating segments, on a geographic basis. The Company has two reportable segments: North America and Europe. The Company evaluates operating segment performance based on revenues and direct operating expenses of the segment, based on the location of the respective customers. The accounting policies of the operating segments are the same as those described in the summary of accounting policies. No segments have been aggregated.

Included in the following operating results are allocations of certain operating costs that are incurred in one reporting segment but which relate to all reporting segments. The allocations of these common operating costs are consistent with the manner in which they are allocated for the chief operating decision maker ("CODM") of the Company's analysis. For the years ended June 30, 2006, 2005 and 2004, the "Other" category consists of geographic regions other than North America and Europe. Revenues from transactions that both emanate and conclude within operating segments are not considered for the purpose of this disclosure since such transactions are not reviewed by the CODM.

Adjusted operating margin from operating segments does not include amortization of acquired intangible assets, provision for (recovery of) restructuring charges, other income (expense), share-based compensation and provision for income taxes. Goodwill and other acquired intangible assets have been assigned to segment assets based on the relative benefit that the reporting units are expected to receive from the assets, or the location of the acquired business operations to which they relate. These allocations have been made on a consistent basis.

Information about reportable segments is as follows:

	<u>Year ended June 30, 2006</u>	<u>Year ended June 30, 2005</u>	<u>Year ended June 30, 2004</u>
<b>Revenue</b>			
North America . . . . .	\$197,852	\$173,767	\$136,346
Europe . . . . .	189,260	215,401	138,192
Other . . . . .	22,450	25,660	16,520
Total revenue . . . . .	<u>\$409,562</u>	<u>\$414,828</u>	<u>\$291,058</u>
<b>Adjusted operating margin</b>			
North America . . . . .	\$ 38,569	\$ 23,686	\$ 21,768
Europe . . . . .	29,796	26,646	27,511
Other . . . . .	4,971	2,786	2,383
Total adjusted operating margin . . . . .	<u>73,336</u>	<u>53,118</u>	<u>51,662</u>
Less:			
Amortization of acquired intangible assets . . . . .	28,099	24,409	11,306
Special charges (recoveries) . . . . .	26,182	(1,724)	10,005
Share-based compensation . . . . .	5,196	—	—
Other expense (income) . . . . .	4,788	3,116	(217)
Provision for income taxes . . . . .	4,093	6,958	7,270
Net income . . . . .	<u>\$ 4,978</u>	<u>\$ 20,359</u>	<u>\$ 23,298</u>
<b>Segment assets</b>			
North America . . . . .	\$268,231	\$251,133	
Europe . . . . .	331,139	343,421	
Other . . . . .	38,550	41,786	
Total segment assets . . . . .	<u>\$637,920</u>	<u>\$636,340</u>	

A reconciliation of the totals reported for the operating segments to the applicable line items in the consolidated financial statements for the years ended June 30, 2006 and 2005.

	As of June 30,	
	2006	2005
Segment assets .....	\$637,920	\$636,340
Investments in marketable securities .....	21,025	—
Cash and cash equivalents (corporate) .....	12,148	4,596
Total assets .....	<u>\$671,093</u>	<u>\$640,936</u>

The following table sets forth the distribution of revenues determined by location of customer and identifiable assets, by significant geographic area for the years ended June 30, 2006, 2005 and 2004:

	Year Ended June 30,		
	2006	2005	2004
Total revenues:			
Canada .....	\$ 31,111	\$ 20,279	\$ 16,662
United States .....	166,741	153,488	119,684
United Kingdom .....	37,528	50,103	35,547
Germany .....	71,494	79,086	43,447
Rest of Europe .....	80,238	86,212	59,198
Other .....	22,450	25,660	16,520
Total revenues .....	<u>\$409,562</u>	<u>\$414,828</u>	<u>\$291,058</u>

	As of June 30,	
	2006	2005
Segment assets:		
Canada .....	\$ 97,421	\$ 79,244
United States .....	170,810	171,889
United Kingdom .....	53,501	28,854
Germany .....	177,651	132,806
Rest of Europe .....	99,987	181,761
Other .....	38,550	41,786
Total segment assets .....	<u>\$637,920</u>	<u>\$636,340</u>

The Company's goodwill has been allocated as follows to the Company's operating segments:

	As of June 30,	
	2006	2005
North America .....	\$ 89,499	\$ 92,375
Europe .....	124,827	128,838
Other .....	21,197	21,878
	<u>\$235,523</u>	<u>\$243,091</u>

## NOTE 17—SUPPLEMENTAL CASH FLOW DISCLOSURES

	Year Ended June 30,		
	2006	2005	2004
Supplemental disclosure of cash flow information:			
Cash paid during the year for interest	\$ 397	\$ 248	\$ 46
Cash received during the year for interest	1,884	1,625	1,256
Cash paid during the year for income taxes	2,953	6,658	6,277

During the year ended June 30, 2006, the Company acquired capital assets in the amount of \$1.9 million which were not paid for at the end of the fiscal year (June 30, 2005 – \$3.8 million, June 30, 2004 – nil). Additionally, during the year ended June 30, 2006 the Company issued approximately 47,000 Common Shares in the amount of \$813,000 representing the fair value of the Company's commitment to issue Common Shares to the former shareholders of SER Solutions Software GmbH and SER eGovernment Deutschland GmbH (together "DOMEA eGovernment"). Refer to Note 18 "Acquisitions" in these Notes to Consolidated Financial Statements for details relating to this transaction.

During the year ended June 30, 2006, the Company acquired investments in marketable securities in the amount of \$829,000 which were not paid for at the end of the fiscal year (June 30, 2005 and June 30, 2004 – nil).

## NOTE 18—ACQUISITIONS

### Fiscal 2005

#### *Optura*

On February 11, 2005, Open Text entered into an agreement to acquire all of the issued and outstanding shares of Optura Inc. ("Optura"). In accordance with FASB SFAS No. 141 "Business Combinations" ("SFAS 141") this acquisition has been accounted for as a business combination. Optura offers products and integration services that optimize business processes so that companies can collaborate across separate organizational functions, dissimilar systems and business partners. Optura products and services will enable Open Text customers, who use a SAP-based Enterprise Resource Planning ("ERP") system, to improve the efficiencies of their document-based ERP processes. The results of operations of Optura have been consolidated with those of Open Text beginning February 12, 2005.

Consideration for this acquisition consisted of \$3.7 million in cash, of which \$2.7 million was paid at closing and \$1.0 million was paid into escrow, as provided for in the share purchase agreement. During Fiscal 2006, \$864,000 was paid in cash, with a reminder of \$136,000 left in escrow. This remainder in escrow is expected to be paid within Fiscal 2007.

The purchase price allocation set forth below represents management's best estimate of the allocation of the purchase price and the fair value of net assets acquired.

Current assets, including cash acquired of \$315	\$ 1,537
Long-term assets	114
Customer assets	700
Technology assets	1,300
Goodwill	2,151
Total assets acquired	5,802
Total liabilities assumed	(2,140)
Net assets acquired	<u>\$ 3,662</u>

The customer assets of \$700,000 have been assigned a useful life of five years. The technology assets of \$1.3 million have been assigned a useful life of five years.

The portion of the purchase price allocated to goodwill was assigned to the Company's North America reportable segment. No amount of the goodwill is expected to be deductible for tax purposes.

As part of the purchase price allocation, the Company originally recognized liabilities in connection with this acquisition of \$444,000. The liabilities related to severance charges, transaction costs, and costs relating to excess facilities. The purchase price was subsequently adjusted to reduce acquisition related liabilities by \$118,000 due to the refinement of management's original estimates. Approximately \$42,000 remains accrued at June 30, 2006. Liabilities related to transaction-related charges are expected to be paid within Fiscal 2007. Liabilities related to excess facilities will be paid over the term of the lease which expires in September 2006.

During Fiscal 2005, a director of the Company received approximately \$47,000 in consulting fees for assistance with the acquisition of Optura. These fees are included in the purchase price allocation. The director abstained from voting on the transaction.

### **Artesia**

On August 19, 2004, Open Text entered into an agreement to acquire all of the issued and outstanding shares of Artesia Technologies, Inc. ("Artesia"). In accordance with SFAS 141 this acquisition has been accounted for as a business combination. Artesia designs and distributes Digital Asset Management software. It has a customer base of over 120 companies and provides these customers and their marketing and distribution partners the ability to easily access and collaborate around a centrally managed collection of digital media elements. The results of operations of Artesia have been consolidated with those of Open Text beginning September 1, 2004.

This acquisition expands Open Text's media integration and management capabilities as part of its Enterprise Content Management ("ECM") suite, and provides a platform from which Open Text can address the content management needs of media and marketing professionals worldwide.

Consideration for this acquisition consisted of \$5.2 million in cash, of which \$3.2 million was paid at closing and \$2.0 million was paid into escrow, and released during Fiscal 2006.

The purchase price allocation set forth below represents management's best estimate of the allocation of the purchase price and the fair value of net assets acquired.

Current assets, including cash acquired of \$773 .....	\$ 2,165
Long-term assets .....	3,936
Customer assets .....	1,700
Technology assets .....	3,300
Goodwill .....	<u>330</u>
Total assets acquired .....	11,431
Total liabilities assumed .....	<u>(6,183)</u>
Net assets acquired .....	<u>\$ 5,248</u>

The customer assets of \$1.7 million have been assigned a useful life of five years. The technology assets of \$3.3 million have been assigned useful lives of three to five years.

The portion of the purchase price allocated to goodwill was assigned to the Company's North America reportable segment. No amount of the goodwill is expected to be deductible for tax purposes.

As part of the purchase price allocation, the Company originally recognized liabilities in connection with this acquisition of \$1.8 million. The liabilities related to severance charges, transaction costs, and costs relating to

facilities. The purchase price was subsequently adjusted to reduce acquisition-related liabilities by \$241,000 due to the refinement of management's estimates. Liabilities related to severance charges were fully paid as of June 30, 2006 and those relating to transaction costs are expected to be paid in Fiscal 2007. Liabilities related to excess facilities will be paid over the term of the lease which expires in May 2010.

During Fiscal 2005, a director of the Company received \$112,000 in consulting fees for assistance with the acquisition of Artesia. These fees are included in the purchase price allocation. The director abstained from voting on the transaction.

### *Vista*

On August 31, 2004, Open Text entered into an agreement to acquire the Vista Plus ("Vista") suite of products and related assets from Quest Software Inc. ("Quest"). In accordance with SFAS 141 this acquisition has been accounted for as a business combination. As part of this transaction certain Quest employees that developed, sold and supported Vista have been employed by Open Text. The revenues and costs related to the Vista product suite have been consolidated with those of Open Text beginning September 16, 2004.

Vista is a technology that captures and stores business critical information from ERP applications. This acquisition expands Open Text's integration and report management capabilities as part of its ECM suite, and provides a platform from which Open Text can address report content found in ERP applications, and business intelligence software.

Consideration for this acquisition consisted of \$23.7 million in cash, of which \$21.7 million was paid at closing and \$2.0 million was held in escrow and released on November 30, 2005, as provided for in the purchase agreement.

The purchase price allocation set forth below represents management's best estimate of the allocation of the purchase price and the fair value of net assets acquired.

Current assets .....	\$ 264
Long-term assets .....	63
Customer assets .....	10,900
Technology assets .....	8,430
Goodwill .....	<u>9,535</u>
Total assets acquired .....	29,192
Total liabilities assumed .....	<u>(5,502)</u>
Net assets acquired .....	<u><u>\$23,690</u></u>

The customer assets of \$10.9 million and the technology assets of \$8.4 million have been assigned useful lives of five years.

The portion of the purchase price allocated to goodwill was assigned to the Company's North America reportable segment. The goodwill is expected to be deductible for tax purposes.

As part of the purchase price allocation, the Company originally recognized transaction costs in connection with this acquisition of \$480,000. The purchase price was subsequently adjusted to reduce acquisition-related liabilities by \$102,000 due to the refinement of management's estimates. Approximately \$6,000 remains accrued at June 30, 2006. These costs are expected to be paid within Fiscal 2007.

A director of the Company received \$126,000 in consulting fees for assistance with the acquisition of Vista. These fees are included in the purchase price allocation. The director abstained from voting on the transaction.



## Fiscal 2004

### IXOS

On October 21, 2003, Open Text announced that it had entered into a business combination agreement with IXOS. The transaction was consummated via a tender offer to purchase all of the issued and outstanding shares of common stock of IXOS for either cash or a combination of Common Shares and Common Share purchase warrants (the “Alternative Consideration”) of Open Text.

On February 19, 2004, Open Text closed the tender offer, pursuant to which, a wholly owned subsidiary, 2016091 Ontario, acquired a total of 19,157,428 IXOS shares or approximately 88% of the ordinary share capital and voting rights of IXOS, including shares acquired in the open market. Of these IXOS shares, 17,792,529 shares (approximately 93% of the tendered shares) were tendered for the Alternative Consideration (as described below), with the balance, including shares purchased on the open market, acquired for approximately \$15.3 million in cash. The Alternative Consideration for each IXOS share consisted of 0.5220 of an Open Text Common Share and 0.1484 of a warrant. Each whole warrant was exercisable to purchase one Open Text Common Share and could be exercised at any time prior to February 19, 2005 at a strike price of \$20.75 per share. Between the closing date of the tender offer and June 30, 2004, Open Text acquired an additional 203,647 Common Shares of IXOS for \$2.3 million in cash. As a result of the additional purchase, 2016091 Ontario obtained a total of 19,361,075 IXOS shares or approximately 89% ownership of IXOS.

Approximately 9.3 million Open Text shares were issued in conjunction with the tender offer for IXOS. These shares were valued using the average share price two days before and two days after the acquisition was agreed to and announced. Accordingly, the fair value of these shares was approximately \$191 million.

Approximately 2.6 million warrants were issued in conjunction with the Alternative Consideration. The fair value of each warrant was estimated using the Black-Scholes option-pricing model with the following weighted average assumptions:

Volatility . . . . .	60%
Risk-free interest rate . . . . .	3.5%
Dividend yield . . . . .	—
Expected life . . . . .	1 year

Based on this methodology, the warrants were valued at \$9.40 each, resulting in a total value of approximately \$25 million. As at June 30, 2004, 224,572 warrants were exercised. In the third quarter of Fiscal 2005, all of the outstanding warrants expired unexercised. The carrying value of the unexercised warrants of \$22.3 million was reclassified as additional paid in capital at the time of expiry.

The results of operations of IXOS have been included in Open Text’s consolidated results from March 1, 2004.

IXOS is a leading vendor of solutions for ECM. IXOS enterprise solutions help businesses achieve efficient management and display of web information, optimization of business processes, and secure, long-term archiving of all business documents in a highly-scalable document repository.

The following table summarizes the impact of step acquisitions and adjustments to the purchase price and the amount assigned to assets acquired and liabilities assumed at June 30, 2005 and 2006:

	As of June 30, 2005	Step Acquisitions and Purchase Price Adjustments (a)(b)	As of June 30, 2006
Current assets .....	\$ 87,498	\$ 210	\$ 87,708
Long-term assets .....	37,889	12,757	50,646
Customer assets .....	37,500	537	38,037
Technology assets .....	61,927	1,124	63,051
Goodwill .....	165,478	(9,802)	155,676
Total assets acquired .....	390,292		395,118
Current liabilities .....	(55,921)	(120)	(56,041)
Long-term liabilities .....	(34,125)	225	(33,900)
Liabilities recognized in connection with the business combination .....	(46,873)	(746)	(47,619)
Total liabilities assumed .....	(136,919)		(137,560)
Minority interest .....	(2,633)	638	(1,995)
Net assets acquired .....	<u>\$ 250,740</u>		<u>\$ 255,563</u>

- (a) Adjustments made to the IXOS purchase price equation relate primarily to incremental shares purchased within Fiscal 2006 and certain purchase price adjustments made within the allocation period as defined by SFAS 141.

Other adjustments to the purchase price equation in the current fiscal year relate to:

- The recognition of certain deferred tax assets in respect of pre-acquisition tax attributes of IXOS in accordance with SFAS 109 ;
  - Adjustments to goodwill relating to employee termination costs and excess facilities in accordance with EITF 95-3;
  - Adjustments to goodwill relating to transaction costs accounted for in accordance with SFAS 141.
- (b) The Company increased its ownership of IXOS to approximately 96% during the year ended June 30, 2006. This was done by way of purchases of IXOS shares. Prior to these purchases, Open Text held, as of June 30, 2005, approximately 94% of the outstanding shares of IXOS. Total consideration of \$5.1 million was paid for the purchase of IXOS shares during the year ended June 30, 2006. The Company stepped up its share of the fair value increments of the assets acquired and the liabilities assumed of IXOS to the extent of the increased ownership of IXOS. The minority interest in IXOS has been reduced to reflect the appropriate lower minority interest ownership in IXOS. The impact of these step purchases has been reflected in the purchase allocation table above.

The portion of the purchase price allocated to goodwill of \$155.7 million was assigned to the Company's reportable geographic segments as follows:

	As of June 30, 2006
North America .....	\$ 59,157
Europe .....	82,508
Other .....	14,011
	<u>\$155,676</u>

Customer assets of \$38.0 million were assigned a useful life of 10 years, while the technology assets of \$63.1 million, had an estimated useful life of between five years and seven years.

As part of the purchase price allocation, the Company recognized liabilities in connection with the acquisition of IXOS totaling approximately \$47.6 million. The liabilities recognized include severance and related charges in connection with a worldwide reduction in the IXOS workforce, in addition to transaction costs and costs relating to provisioning for excessive facilities. Of the approximately \$47.6 million in total liabilities recognized in connection with the acquisition, approximately \$18.0 million remains accrued at June 30, 2006. This amount is primarily attributable to excess facilities which will be paid over the term of the respective leases.

IXOS had approximately \$146.1 million (Fiscal 2005 – \$123.5 million) of net operating loss carry forwards and other future deductions at June 30, 2006. As of June 30, 2005, the Company had recorded \$4.1 million of deferred tax assets in the purchase price allocation related to these operating loss carryforwards and other future deductions since it was considered unlikely that the Company would be able to utilize most of the loss carry forwards and other future deductions. As of June 30, 2006, the gross deferred tax asset related to these loss carry forwards and other future deductions was \$26.5 million and was offset by a valuation allowance and deferred tax liabilities totaling \$23.8 million. During Fiscal 2006, the Company utilized \$16.5 million of these acquired tax losses with regard to future loss utilizations resulting in a reduction of goodwill of \$3.2 million. The Company will continue to review and evaluate these net operating loss carry forwards and other future deductions. If the Company determines that it is more likely than not that it will realize the tax attributes related to IXOS in the future, the related decrease in the valuation allowance will reduce goodwill instead of the provision for taxes.

During Fiscal 2005, a Director of the Company received \$220,000 in consulting fees for assistance with the acquisition of IXOS. These fees are included in the acquisition costs. The Director abstained from voting on this transaction.

### ***Gauss***

On October 16, 2003, 2016090 Ontario Inc. (“Ontario”), a wholly owned subsidiary of Open Text, acquired approximately 75% of the shares of Gauss Interprise AG (“Gauss”) pursuant to several sale and purchase agreements with major shareholders. The results of Gauss’ operations have been included in the consolidated financial statements of Open Text since that date. As of June 30, 2006, Open Text had acquired approximately 95% of the common shares of Gauss as a result of these agreements, as well as through the purchase of common shares on the open market and through a public tender offer. Total cash consideration paid for the Company’s interest in Gauss is \$10.3 million.

The following table summarizes the estimated fair values of the assets acquired and liabilities assumed as of the date of the Gauss acquisition.

Current assets . . . . .	\$ 3,712
Long-term assets . . . . .	1,737
Customer assets . . . . .	4,508
Technology assets . . . . .	5,244
Goodwill . . . . .	16,913
Total assets acquired . . . . .	32,114
Current liabilities . . . . .	(13,071)
Long-term liabilities . . . . .	(5,039)
Liabilities recognized in connection with the business combination . . . . .	(4,240)
Total liabilities assumed . . . . .	(22,350)
Net assets acquired . . . . .	<u>\$ 9,764</u>

The portion of the purchase price allocated to goodwill of \$17.0 million was assigned to the Company's reportable geographic segments as follows:

	<u>As of June 30, 2006</u>
North America .....	\$11,501
Europe .....	<u>5,412</u>
	<u>\$16,913</u>

No minority interest was recorded as part of the purchase price as the net book value of Gauss' assets and liabilities was in a deficit position. To the extent Gauss incurs losses subsequent to the acquisition date; the Company will recognize the full amount of those losses. If Gauss generates income subsequent to the acquisition date, the Company will account for that income as follows:

- i) Credit the full amount into income to the extent of post-acquisition losses charged against income;
- ii) Credit the minority's share in the income against goodwill or additional-paid-in capital to the extent that those amounts adjust the basis of the acquired minority interest to zero; and
- iii) Credit any excess of the minority interests' share in the income of the acquired enterprise to the minority interests.

The customer assets of \$4.5 million and the technology assets of \$5.2 million have estimated useful lives of five years.

As part of the purchase price allocation, the Company recognized liabilities in connection with the acquisition of Gauss totaling \$4.2 million. The liabilities recognized include severance and related charges in connection with a worldwide reduction in the Gauss workforce, transaction costs and costs relating to provisioning for excess facilities. Of the total liabilities recognized in connection with the acquisition, \$34,000 remains accrued at June 30, 2006. Liabilities related to transaction-related charges are expected to be paid in Fiscal 2007. Liabilities related to facilities will be paid over the term of the lease.

During Fiscal 2005, a Director of the Company received \$170,000 in consulting fees for assistance with the acquisition of Gauss. These fees are included in the acquisition costs. The Director abstained from voting on this transaction.

### ***Domea eGovernment***

On October 23, 2003, Open Text acquired all the common shares of DOMEA eGovernment for total consideration of up to \$11.4 million, subject to meeting certain revenue performance and certain adjustments based on the Company's assets and liabilities. The results of DOMEA eGovernment's operations have been included in the consolidated financial statements of Open Text since that date. DOMEA eGovernment develops and markets the DOMEA eGovernment® software solution. The purchase price included contingent consideration of up to \$3.8 million that could be earned by the former shareholders of DOMEA eGovernment based on the achievement of certain revenue targets through December 31, 2004. Amounts earned under this arrangement were to be paid in the form of 50% cash and 50% in Open Text Common Shares. The revenue targets were achieved and accordingly \$813,000 was recorded in the year ended June 30, 2005, as due and payable to the former shareholders of Domea eGovernment, and \$813,000 was recorded within shareholders' equity representing the fair value of the Company's commitment to issue Common Shares. Based on the share purchase agreement, \$813,000 of cash was paid on July 5, 2005 and the shares were issued on September 1, 2005.

The following table summarizes the purchase price allocation.

Current assets .....	\$ 2,537
Long-term assets .....	249
Customer assets .....	2,091
Technology assets .....	2,829
Goodwill .....	<u>5,264</u>
Total assets acquired .....	12,970
Current liabilities .....	(2,080)
Long-term liabilities .....	(1,336)
Liabilities recognized in connection with the business combination .....	<u>(350)</u>
Total liabilities assumed .....	(3,766)
Net assets acquired .....	<u>\$ 9,204</u>

The portion of the purchase price allocated to goodwill of \$5.3 million was assigned entirely to the Company's European operating segment.

Customer assets of \$2.1 million and technology assets of \$2.8 million were assigned a useful life of five years.

As part of the purchase price allocation, the Company recognized liabilities in connection with the acquisition of DOMEA eGovernment totaling \$400,000. The liabilities recognized relate to transaction costs related to this acquisition. This liability has been fully paid as of June 30, 2005.

During Fiscal 2005, a Director of the Company received \$90,000 in consulting fees for assistance with the acquisition of DOMEA eGovernment. These fees are included in the acquisition costs. The Director abstained from voting on this transaction.

### **Asset Acquisitions**

During Fiscal 2004, the Company acquired the assets of two companies through share purchases for total consideration of \$2.2 million. The principal assets acquired for these acquisitions were both technology and tax assets. The tax assets had fair values of \$6.8 million and \$3.7 million, respectively. As the benefit of the tax losses exceeded the purchase price after allocating estimated fair values to the assets acquired and liabilities assumed, the Company recorded a deferred tax asset of \$12.0 million and a deferred credit of \$10.1 million in respect of these acquisitions. As the losses are utilized the deferred tax asset and deferred credit will decrease proportionately and the Company will recognize the net benefit of the losses in its income tax expense for the period.

## NOTE 19—NET INCOME PER SHARE

Basic earnings per share are computed by dividing net income by the weighted average number of common shares outstanding during the period. Diluted earnings per share are computed by dividing net income by the shares used in the calculation of basic net income per share plus the dilutive effect of common share equivalents, such as stock options, using the treasury stock method. Common share equivalents are excluded from the computation of diluted net income per share if their effect is anti-dilutive.

	Year Ended June 30,		
	2006	2005	2004
<b>Basic earnings per share</b>			
Net income .....	\$ 4,978	\$ 20,359	\$ 23,298
Basic earnings per share .....	\$ 0.10	\$ 0.41	\$ 0.53
<b>Diluted earnings per share</b>			
Net income .....	\$ 4,978	\$ 20,359	\$ 23,298
Diluted earnings per share .....	\$ 0.10	\$ 0.39	\$ 0.49
<b>Weighted average number of shares outstanding</b>			
Basic .....	48,666	49,919	43,744
Effect of dilutive securities .....	1,284	2,173	3,528
Diluted .....	49,950	52,092	47,272
Excluded as anti-dilutive * .....	1,947	621,691	127,442

\* Represents options to purchase Common Shares excluded from the calculation of diluted net income per share because the exercise price of the stock options was greater than or equal to the average price of the Common Shares during the fiscal year.

## NOTE 20—SPECIAL CHARGES (RECOVERIES)

In the year ended June 30, 2006, the Company recorded special charges of \$26.2 million. This charge is primarily comprised of \$21.6 million, relating to the fiscal 2006 restructuring, \$3.8 million related to the impairment of capital assets and \$1.0 million related to the impairment of intangible assets. This charge was offset by a recovery of \$306,000 related to the fiscal 2004 restructuring. Details of each component of special charges are discussed below.

### *Restructuring charges*

#### *Fiscal 2006 Restructuring*

In the first quarter of Fiscal 2006, the Board approved, and the Company began to implement restructuring activities to streamline its operations and consolidate its excess facilities (“Fiscal 2006 restructuring plan”). Total costs to be incurred in conjunction with the Fiscal 2006 restructuring plan are expected to be approximately \$22.0 million, of which \$21.6 million has been recorded as of June 30, 2006. These charges relate to work force reductions, abandonment of excess facilities and other miscellaneous direct costs. On a quarterly basis the Company conducts an evaluation of these balances and revises its assumptions and estimates, as appropriate. The provision related to workforce reduction is expected to be substantially paid by December 31, 2006 and the provisions relating to the abandonment of excess facilities, such as contract settlements and lease costs, are expected to be paid by January 2014.

A reconciliation of the beginning and ending liability is shown below:

<b>Fiscal 2006 Restructuring Plan</b>	<b>Work force reduction</b>	<b>Facility costs</b>	<b>Other</b>	<b>Total</b>
Balance as of June 30, 2005 .....	\$ —	\$ —	\$ —	\$ —
Accruals .....	13,982	6,708	933	21,623
Cash payments .....	(11,788)	(2,770)	(924)	(15,482)
Foreign exchange and other adjustments .....	491	197	—	688
Balance as of June 30, 2006 .....	<u>\$ 2,685</u>	<u>\$ 4,135</u>	<u>\$ 9</u>	<u>\$ 6,829</u>

The following table outlines restructuring charges incurred under the Fiscal 2006 restructuring plan, by segment, for the year ended June 30, 2006.

<b>Fiscal 2006 Restructuring Plan – by Segment</b>	<b>Work force reduction</b>	<b>Facility costs</b>	<b>Other</b>	<b>Total</b>
North America .....	\$ 7,798	\$2,983	\$415	\$11,196
Europe .....	5,706	3,533	446	9,685
Other .....	478	192	72	742
Total charge for year ended June 30, 2006 .....	<u>\$13,982</u>	<u>\$6,708</u>	<u>\$933</u>	<u>\$21,623</u>

### ***Fiscal 2004 Restructuring***

In the three months ended March 31, 2004, the Company recorded a restructuring charge of approximately \$10 million relating primarily to its North America segment. The charge consisted primarily of costs associated with a workforce reduction, excess facilities associated with the integration of the IXOS acquisition, write downs of capital assets and legal costs related to the termination of facilities. On a quarterly basis the Company conducts an evaluation of these balances and revises its assumptions and estimates, as appropriate. As a result of these evaluations, the Company recorded a recovery to this restructuring charge of \$306,000 during the year ended June 30, 2006. This recovery represents primarily reductions to previous charges for estimated employee termination costs and recoveries in estimates relating to accruals for abandoned facilities. All actions relating to employer workforce reduction were completed as of March 31, 2006. The provision for facility costs is expected to be expended by 2011. The activity of the Company's provision for the 2004 restructuring charge is as follows for each period presented below:

<b>Fiscal 2004 Restructuring Plan</b>	<b>Work force reduction</b>	<b>Facility costs</b>	<b>Total</b>
Balance as of June 30, 2005 .....	\$ 167	\$1,878	\$2,045
Revisions to prior accruals .....	(167)	(139)	(306)
Cash payments .....	—	(659)	(659)
Foreign exchange and other adjustments .....	—	90	90
Balance as of June 30, 2006 .....	<u>\$ —</u>	<u>\$1,170</u>	<u>\$1,170</u>

<b>Fiscal 2004 Restructuring Plan</b>	<b>Work force reduction</b>	<b>Facility costs</b>	<b>Other</b>	<b>Total</b>
Balance as of June 30, 2004 .....	\$ 3,290	\$2,538	\$ 90	\$ 5,918
Revisions to prior accruals .....	(1,423)	(301)	—	(1,724)
Cash payments .....	(1,700)	(359)	(90)	(2,149)
Foreign exchange and other adjustments .....	—	—	—	—
Balance as of June 30, 2005 .....	<u>\$ 167</u>	<u>\$1,878</u>	<u>—</u>	<u>\$ 2,045</u>



<b>Fiscal 2004 Restructuring Plan</b>	<b>Work force reduction</b>	<b>Facility costs</b>	<b>Other</b>	<b>Total</b>
Balance as of June 30, 2003 .....	\$ —	\$ —	\$ —	\$ —
Revisions to prior accruals .....	5,656	3,317	1,032	10,005
Cash payments .....	(2,366)	(779)	(942)	(4,087)
Foreign exchange and other adjustments .....	—	—	—	—
Balance as of June 30, 2004 .....	<u>\$ 3,290</u>	<u>\$2,538</u>	<u>\$ 90</u>	<u>\$ 5,918</u>

### ***Impairment Charges***

#### ***Impairment of capital assets***

During the year ended June 30, 2006, impairment charges of \$3.8 million were recorded against capital assets that were written down to fair value, including various leasehold improvements at vacated premises and redundant office equipment. Fair value was determined based on the Company's estimates of disposal proceeds, net of anticipated costs to sell.

#### ***Impairment of intangible assets***

During the year ended June 30, 2006, impairment charges of \$1.0 million were recorded relating to a write-down of intellectual property in North America. The intellectual property represents the fair value of acquired technology from the Corechange acquisition which closed in the 2003 fiscal year. The triggering event that gave rise to the impairment was a shift in the marketing and development strategy associated with this acquired technology and an assessment of where the technology is in terms of the Company's assessment of the product lifecycle. In addition, the Company has changed its estimate of the remaining useful life of the intellectual property from four to two years. The change in estimate will be accounted for on a prospective basis. The impairment was measured as the excess of the carrying amount over the discounted projected future net cash flows.

### **NOTE 21—RELATED PARTY TRANSACTIONS**

During Fiscal 2006, Mr. Stephen Sadler, a director of the Company, earned \$37,000 (Fiscal 2005 – \$315,970, Fiscal 2004 – \$480,000) in consulting fees for assistance with acquisition activities.

### **NOTE 22—SUBSEQUENT EVENTS**

On July 5, 2006, the Company announced its intention to make an offer to purchase all of the outstanding common shares of Hummingbird. On August 4, 2006, the Company entered into a definitive agreement with Hummingbird under which the Company will acquire all of Hummingbird's outstanding common shares for cash valued at \$27.85 per share or approximately \$489.0 million.

**Item 9. Changes in and Disagreements with Accountants on Accounting and Financial Disclosure**

None

**Item 9A. Controls and Procedures****(A) Evaluation of Disclosure Controls and Procedures**

As of the end of the period covered by this Annual Report on Form 10-K, our management, with the participation of the Chief Executive Officer and Chief Financial Officer, performed an evaluation of the effectiveness of the design and operation of our disclosure controls and procedures as defined in Rule 13a-15 (e) promulgated under the Securities Exchange Act of 1934, as amended (the “Exchange Act”). Based upon that evaluation, the Chief Executive Officer and Chief Financial Officer concluded that as of the end of the period covered by this Annual Report on Form 10-K, our disclosure controls and procedures were effective to provide reasonable assurance that information required to be disclosed in our reports filed or submitted under the Exchange Act is recorded, processed, summarized and reported within the time periods specified in the Securities and Exchange Commission’s rules and forms, and that material information is accumulated and communicated to our management, including the Chief Executive Officer and Chief Financial Officer, as appropriate to allow timely decisions regarding required disclosure.

**(B) Management’s Annual Report on Internal Control over Financial Reporting**

Our management is responsible for establishing and maintaining adequate internal control over financial reporting, as such term is defined in Exchange Act Rule 13a-15(f), to provide reasonable assurance regarding the reliability of our financial reporting and the preparation of our financial statements for external purposes in accordance with generally accepted accounting principles. Internal control over financial reporting includes those policies and procedures that (i) pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the company; (ii) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with generally accepted accounting principles, and that our receipts and expenditures of are being made only in accordance with the authorizations of our management and our directors; and (iii) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of our assets that could have a material effect on our financial statements.

Our management assessed our internal control over financial reporting as of June 30, 2006, the end of our fiscal year. In making our assessment, our management used the criteria established in *Internal Control—Integrated Framework* issued by the Committee of Sponsoring Organizations of the Treadway Commission. Based on our assessment, our management concluded that our internal control over financial reporting was effective as of June 30, 2006.

Our management, including the Chief Executive Officer and Chief Financial Officer, do not expect our Disclosure Controls or our internal control over financial reporting will prevent or detect all error and all fraud. A control system, no matter how well designed and operated, can provide only reasonable, not absolute, assurance that the control system’s objectives will be met. The design of a control system must reflect the fact that there are resource constraints, and the benefits of controls must be considered relative to their costs. Further, because of the inherent limitations in all control systems, no evaluation of controls can provide absolute assurance that misstatements due to error or fraud will not occur or that all control issues and instances of fraud, if any, have been detected. These inherent limitations include the realities that judgments in decision-making can be faulty and that breakdowns can occur because of simple error or mistake. Controls can also be circumvented by the individual acts of some persons, by collusion of two or more people, or by management override of the controls. The design of any system of controls is based in part on certain assumptions about the likelihood of future events, and there can be no assurance that any design will succeed in achieving its stated goals under all potential future conditions. Projections of any evaluation of control effectiveness to future periods are subject to risks. Over time, controls may become inadequate because of changes in conditions or deterioration in the degree of compliance with policies or procedures.

Our management's assessment of the effectiveness of our internal control over financial reporting as of June 30, 2006 has been audited by KPMG LLP, an independent registered public accounting firm, as stated in their report, which appears under Item 8 of this Annual Report on Form 10-K. KPMG LLP has issued an attestation report concurring with our management's assessment, which is included at the beginning of Part II, Item 8 of this Form 10-K.

**(C) Attestation Report of the Independent Registered Public Accounting Firm**

See Report at the beginning of Part II, Item 8 of this Form 10-K.

**(D) Changes in Internal Controls over Financial Reporting**

As a result of the evaluation completed by management, in which our Chief Executive Officer and Chief Financial Officer participated, management has concluded that there were no changes in our internal control over financial reporting during our fourth fiscal quarter ended June 30, 2006 that has materially affected, or is reasonably likely to materially affect, our internal control over financial reporting.

**Item 9B. Other Information**

Effective, June 30, 2006, the Company and Mr. Kirk Roberts, the Company's Executive Vice President Product Solutions and Marketing, entered into an amended employment agreement. The amended employment agreement provides that, if Mr. Roberts' employment is terminated within six months following a change of control, other than for just cause, disability, or death, or if Mr. Roberts terminates his employment with the Company within six months following a change of control and within sixty days following a "parachute event" Mr. Roberts will be entitled to:

- payments on account of severance equivalent to twelve months base salary and any performance bonus that has been earned on a pro rata basis to the date of termination; and
- all stock options granted to Mr. Roberts by the Company shall, following the giving of any notice by the Company or Mr. Roberts in this regard, be deemed to vest immediately and shall be exercisable by Mr. Roberts for a period of 90 days following the giving of such notice.

A "parachute event" is defined for this purpose as being a material change position or duties, or a material reduction in salary or benefits, a failure to provide the same benefits after a change of control, or other material breach of the agreement by the Company.

Additionally, the amended agreement provides that, in the event that Mr. Roberts' employment is terminated by the Company, other than for just cause, Mr. Roberts will be entitled to payments on account of severance equivalent to twelve months base salary and any performance bonus that has been earned on a pro rata basis to the date of termination. For more information please refer to the "Employment agreement between Kirk Roberts and the Company", attached as an exhibit in this document, filed under Item 15 in this Annual Report on Form 10-K.

Effective, June 30, 2006, the Company and Mr. Tony Preston, the Company's Vice President Global Human Resources, entered into an amended employment agreement. The amended agreement provides that, if Mr. Preston's employment is terminated within six months following a change of control, other than for just cause, disability, or death or if Mr. Preston terminates his employment with the Company within six months following a change of control and within sixty days following a "parachute event" Mr. Preston will be entitled to:

- payments on account of severance equivalent to six months base salary and any performance bonus that has been earned on a pro rata basis to the date of termination; and
- all stock options granted to Mr. Preston by the Company shall, following the giving of any notice by the Company or Mr. Preston in this regard, be deemed to vest immediately and shall be exercisable by Mr. Preston for a period of 90 days following the giving of such notice.

Additionally, the amended agreement provides that, in the event that Mr. Preston's employment is terminated by the Company, other than for just cause, Mr. Preston will be entitled to payments on account of severance equivalent to six months base salary and any performance bonus that has been earned on a pro rata basis to the date of termination. In the event that Mr. Preston completes ten years of service with the Company, such severance shall be increased to twelve months base salary and any performance bonus that has been earned on a pro rata basis to the date of termination.

The amended agreement also provides that Mr. Preston's position with the Company now be Senior Vice President Global Human Resources. For more information please refer to the "Employment agreement between Tony Preston and the Company", attached as an exhibit in this document, filed under Item 15 in this Annual Report on Form 10-K.

Effective June 1, 2006 the Company appointed Paul McFeeters as its Chief Financial Officer ("CFO").

Mr. McFeeters' prior positions included that of CFO at Platform Computing Inc. (a grid computing software vendor), Kintana, Inc. (a privately-held IT governance software provider), as well as President and Chief Executive Officer ("CEO") positions at MD Private Trust and Municipal Financial Corporation. He holds a Certified Management Accountant designation and attained a B.B.A (Honours) from Wilfrid Laurier University and an MBA from York University, Canada.

Effective July 5, 2006, the Company announced the appointment of John Wilkerson as Executive Vice President, Global Sales and Service. Mr. Wilkerson's appointment was effective August 1, 2006. Mr. Wilkerson's prior experience includes executive positions at Microsoft Corporation, Electronic Data Systems Corporation, Baan Corporation and Oracle Corporation.

On July 5, 2006, we announced our intention to make an offer for all of the common shares of Hummingbird Limited. ("Hummingbird"), in cash, representing a premium of approximately 20% over the closing price of the Hummingbird shares as traded on the NASDAQ on May 25, 2006.

On September 7, 2006, we entered into indemnification agreements with each member of the Board of Directors and certain of our employees. These indemnification agreements are applicable to the decisions made and the actions taken by the relevant covered person in the ordinary course of business, and will not be applicable to any decision or activity that is contradictory to the applicable Securities laws, or demonstrates negligence in the performance of the applicable person's assigned duties. A "form of" the indemnification agreement is attached as Exhibit to this document.

## PART III

### Item 10. Directors and Executive Officers of the Registrant

The following table sets forth certain information as to our directors and executive officers as of September 1, 2006.

<u>Name</u>	<u>Age</u>	<u>Position with Company</u>	<u>Principal Occupation</u>
P. Thomas Jenkins . . . . . Ontario, Canada	46	Director, Executive Chairman and Chief Strategy Officer	Executive Chairman and Chief Strategy Officer
John Shackleton . . . . . Illinois, USA	59	Director, President and Chief Executive Officer	President and Chief Executive Officer
Randy Fowlie (2)(3) . . . . . Ontario, Canada	46	Director	Retired
Carol Coghlan Gavin (1)(3) . . . . . Illinois, USA	50	Director	President, Winston Advisors Ltd.
Peter Hoult (1) . . . . . North Carolina, USA	62	Director	Strategic Business Consultant, Peter Hoult Management Consultants
Brian Jackman (2) . . . . . Illinois, USA	65	Director	President, the Jackman Group, Inc.
Ken Olisa (1)(3) . . . . . London, UK	54	Director	Chairman of Restoration Partners
Stephen J. Sadler . . . . . Ontario, Canada	55	Director	Chairman and Chief Executive Officer, Enghouse Systems Limited
Michael Slaunwhite (2) . . . . . Ontario, Canada	45	Director	Executive Chairman, Halogen Software Inc.
Paul McFeeters . . . . . Ontario, Canada	52	Chief Financial Officer	Chief Financial Officer
Bill Forquer . . . . . Ohio, USA	48	Executive Vice President, ECM Business Development	Executive Vice President, ECM Business Development
Kirk Roberts . . . . . Ontario, Canada	45	Executive Vice President, Product Solutions and Marketing	Executive Vice President, Product Solutions and Marketing
Tony Preston . . . . . Illinois, USA	52	Senior Vice President, Global Human Resources	Senior Vice President, Global Human Resources
John Wilkerson . . . . . Illinois, USA	50	Executive Vice President, Global Sales and Services	Executive Vice President, Global Sales and Services

(1) Member of the Compensation Committee.

(2) Member of the Audit Committee.

(3) Member of the Corporate Governance and Nominating Committee.

**P. Thomas Jenkins** has served as a director of the Company since December 1994 and as Executive Chairman of the Company since June 30, 2005. Mr. Jenkins was appointed Chief Strategy Officer of the Company in August 2005. From 1997 until July 2005, Mr. Jenkins served as Chief Executive Officer of the Company. Mr. Jenkins is currently a member of the board of BMC Software, Inc. From December 1994 to July 1997, Mr. Jenkins held progressive executive positions within the Company. From December 1989 until June 1994, he held several executive positions with DALSA Inc., an electronic imaging manufacturer. Mr. Jenkins

received an M.B.A. in technology management from York University, a M.A. Sc. in electrical engineering from the University of Toronto and a B. Eng. Mgt. in technology and commerce from McMaster University.

**John Shackleton** has served as director of the Company since January 1999 and as the President and Chief Executive Officer of the Company since July 2005. From November 1998 to July 2005, Mr. Shackleton served as President of the Company. From July 1996 to 1998, Mr. Shackleton served as President of the Platinum Solution division for Platinum Technology Inc. Prior to that he served as Vice President of Professional Services for the Central U.S. and South America at Sybase, Inc., as Vice President of Worldwide Consulting at View Star Corp., a document management imaging company, and he directed several consulting practices for Oracle Systems Corp. Mr. Shackleton is also currently a director of OmniViz, Inc.

**Randy Fowlie** has served as a director of the Company since March 1998. From January 2005 until July 14, 2006, Mr. Fowlie held the position of Vice President and General Manager, Digital Media of Leitch Business Unit (of Harris Broadcast Communications Division), a public software and hardware company, which acquired Inscribe Technology Corporation in January 2005. From June 1999 to January 2005, Mr. Fowlie held the position of Chief Operating Officer and Chief Financial Officer of Inscribe Technology Corporation, a computer software company, and from February 1998 to June 1999, Mr. Fowlie was the Chief Financial Officer thereof. Prior thereto, Mr. Fowlie worked with KPMG Chartered Accountants from 1984 and was a partner at the firm from 1995 to 1998. Mr. Fowlie received a B.B.A. (Honours) from Wilfrid Laurier University and he is a Chartered Accountant.

**Carol Coghlan Gavin** has served as a director of the Company since December 2004. Ms. Gavin is the President of Winston Advisors Ltd., a private consulting firm she founded in 2005. Ms. Gavin serves as a director of Tellabs Foundation and is also a member of the board of visitors for the University of Illinois College of Law. From 1988 until June 2001, Ms. Gavin held various positions with Tellabs, Inc., a U.S. based manufacturer of telecommunications equipment, most recently as Senior Vice President, General Counsel and Secretary. Ms. Gavin received a bachelor's degree from the University of Illinois and graduated from the University of Illinois College of Law. Ms. Gavin was admitted to the Illinois State Bar in 1980.

**Peter Hoult** has served as a director of the Company since December 2002. Mr. Hoult is a strategic business consultant with Peter Hoult Management Consultants, a private consulting firm he founded in 1993. Mr. Hoult acts as a director of Halogen Software Inc. From 1996 to 2000, Mr. Hoult was a Visiting Professor of Strategic Marketing at Babcock (Wake Forest University) and Fuqua (Duke University) Post-Graduate Business Schools. From 1972 to 1990, Mr. Hoult held various senior executive management positions with RJ Reynolds Industries. Mr. Hoult received a B.A. (Honours) in psychology from the University of Reading and he pursued graduate research at the London School of Economics.

**Brian J. Jackman** has served as a director of the Company since December 2002. Mr. Jackman is the President of the Jackman Group, Inc., a private consulting firm he founded in 2005. Mr. Jackman also serves as a director of PCTEL, Inc. and Keithley Instruments. From 1982 until his retirement in September 2001, Mr. Jackman held various positions with Tellabs, Inc., a U.S. based manufacturer of telecommunications equipment, most recently as Executive Vice-President, President, Global Systems and Technologies and as a member of the board of directors of the company. Mr. Jackman received a B.A. from Gannon University and an M.B.A. from The Pennsylvania State University.

**Ken Olisa** has served as a director of the Company since January 1998. Mr. Olisa is the Founder and Chairman of Restoration Partners, a boutique technology merchant bank, which was launched in 2006. Prior thereto Mr. Olisa was Chairman & CEO of Interregnum Plc., a publicly traded UK technology merchant bank, which he founded in 1992. After working for IBM from 1974 to 1981, Mr. Olisa held various positions with Wang Laboratories Inc. between 1981 and 1992, most recently as Senior Vice President and General Manager, Europe, Africa and Middle East. Mr. Olisa is a director of Reuters Group Plc and of several other private information technology companies in the UK. Mr. Olisa is a Liveryman of the Worshipful Company of



Information Technologists; a Freeman of the City of London; a Director of the Reuters Foundation; Chairman of Thames Reach Bondway, a charity working to shelter and resettle the homeless in London; and a Governor of the Peabody Trust. Mr. Olisa holds an MA from Cambridge University in Natural, Social, Political and Management Science.

**Stephen J. Sadler** has served as a director of the Company since September 1997. From April 2000 to present, Mr. Sadler has served as the Chairman and CEO of Enghouse Systems Limited, a software engineering company that develops geographic information systems as well as interactive voice response systems. Mr. Sadler was previously the Executive Vice President and Chief Financial Officer of GEAC from 1987 to 1990, was President and Chief Executive Officer of GEAC from 1990 to 1996, was Vice Chairman thereof from 1996 to 1998, and was a Senior Advisor to GEAC on acquisitions until May 1999. Prior to Mr. Sadler's involvement with GEAC, he held executive positions with Phillips Electronics Limited and Loblaw's Companies Limited. Mr. Sadler is Chairman of Helix Investments (Canada) Inc., a position he has held since early 1998. Mr. Sadler is also currently a director of Enghouse Systems Limited, and Belzberg Technologies Ltd. Mr. Sadler holds a B.A. Sc. (Honours) in industrial engineering and an M.B.A. (Dean's List) and he is a Chartered Accountant.

**Michael Slaunwhite** has served as a director of the Company since March 1998. Mr. Slaunwhite is presently Executive Chairman of Halogen Software Inc. Mr. Slaunwhite had served as CEO and Chairman of Halogen Software Inc., a leading provider of employee performance management software, from 2000 to August 2006, and as President and Chairman from 1995 to 2000. From 1994 to 1995, Mr. Slaunwhite was an independent consultant to a number of companies assisting them with strategic and financing plans. Mr. Slaunwhite was Chief Financial Officer of Corel Corporation from 1988 to 1993. Mr. Slaunwhite holds a B.A. Commerce (Honours) from Carleton University.

**Paul McFeeters** was appointed Chief Financial Officer of the Company on June 1, 2006. Mr. McFeeters has more than 20 years of business experience, including previous employment as Chief Financial Officer of Platform Computing Inc. (a grid computing software vendor), Kintana, Inc. (a privately-held IT governance software provider), as well as President and CEO positions at both MD Private Trust and Municipal Financial Corporation. He holds a Certified Management Accountant designation and attained a B.B.A (Honours) from Wilfrid Laurier University and an MBA from York University, Canada.

**Bill Forquer** was appointed Executive Vice President, ECM Business Development in October 2005. From 2003 to 2005, he served as Executive Vice President, Marketing. Prior to that, he held the position of Senior Vice President, Business Development of the Company. Mr. Forquer has been involved with knowledge management systems his entire career. He has been with Open Text since June 1998, when the Company acquired Information Dimensions, Inc. (IDI) where Mr. Forquer was President. Mr. Forquer began his career in 1981 at Battelle Laboratories developing the software that subsequently was acquired by IDI. Mr. Forquer has a B.S. in Mathematics Education and a M.S. in Computer and Information Science, both from The Ohio State University.

**Kirk Roberts** was appointed Executive Vice President, Product Solutions and Marketing in October 2005. From 2003 to 2005, he served as Executive Vice President, Services. Mr. Roberts has been in the online services and software industry for over 20 years. Prior to joining the Company in 1996 Mr. Roberts founded NirvCentre, one of Canada's first online service providers, where he served as the senior executive for ten years. In 1996, as a result of a strategic acquisition, Mr. Roberts joined Open Text, and designed and launched the Livelink Online Service—a global Livelink application hosting service for large corporations.

**Tony Preston** was appointed Executive Vice President, Global Human Resources in October 2005. Mr. Preston has over 25 years of leadership experience in direct and indirect management, organizational change, executive development, cultural diversity, and a wealth of experience in international human resources within the technology industry. He has lived and worked both in London, England as Vice President—Human Resources EMEA and Hong Kong, SAR, as Vice President—Human Resources Asia-Pacific. He has held senior and executive human resource management positions with Nortel Networks Corporation and most recently with the Andrew Corporation.



**John Wilkerson** was appointed Senior Vice President, Global Sales and Services in August 2006. Mr. Wilkerson has over 25 years of experience working in the hi-technology industry. From 2003 to 2006, Mr. Wilkerson served as Executive Vice President of Global Sales, Business Development, Technical Services and Customer Support at Bocada Corporation. From 2002 to 2003, Mr. Wilkerson served as Vice President of United States Services for Microsoft Corporation, where Mr. Wilkerson was responsible for the operating plan and execution of Microsoft Consulting services and Premier Support services for the U.S. From 1999 to 2002, Mr. Wilkerson served as Vice President and President of Global Alliances at Electronic Data Systems Corporation. Mr. Wilkerson has also had other executive and management positions at Oracle Corporation and IBM Corporation. Currently Mr. Wilkerson is a director on the Advisory Board for Bocada Corporation and Tide Line Capital, both privately held, venture-backed companies. Mr. Wilkerson has a Bachelor of Science degree in Business Management from Seattle Pacific University, as well as a number of other post-graduate degrees in marketing, management, and technical studies at several universities across the United States.

### **Audit Committee**

The Audit Committee currently consists of three directors Messrs Fowlie, Jackman, and Slaunwhite, with Mr. Fowlie serving as Chairman, all of whom have been determined by the Board of Directors to be independent as that term is defined in NASDAQ Rule 4200(a)(15) and in Rule 10A-3 promulgated by the SEC under the Exchange Act, and within the meaning of our director independence standards and those of any exchange, quotation system or market upon which our securities are traded.

The Board of Directors has determined that Mr. Fowlie qualifies as an “audit committee financial expert” as such term is defined in SEC Regulation S-K, Item 401(h) and NASD Rule 4350.

The Audit Committee has adopted an Audit Committee Charter which is attached hereto as Appendix A.

### **Code of Business Conduct and Ethics**

We have adopted a Code of Business Conduct and Ethics that applies to all of our directors, officers and employees, including the principal executive officer, principal financial officer, principal accounting officer and controller, or persons performing similar functions. The Code of Business Conduct and Ethics incorporates our guidelines designed to deter wrongdoing and to promote honest and ethical conduct, including the ethical handling of actual or apparent conflicts of interest between personal and professional relationships, and compliance with all applicable laws and regulations. The Code also incorporates our expectations of our employees that enable us to provide fair, accurate, timely and understandable disclosure in our filings with the Securities and Exchange Commission and other public commissions.

The full text of our Code of Business Conduct and Ethics is published on our web site at [www.opentext.com](http://www.opentext.com) under the Company/Investors section. We intend to disclose future amendments to certain provisions of our Code of Business Conduct and Ethics, or waivers of such provisions that apply or are granted to directors and executive officers, on this web site within four business days following the date of such amendment or waiver.

## Item 11. Executive Compensation

### EXECUTIVE COMPENSATION

#### Summary Compensation Table

The following table sets forth summary information concerning the annual and long-term compensation of our Named Executive Officers (“NEOs”). All numbers are rounded to the nearest dollar or whole share.

Name and Principal Position	Fiscal Year	Annual Compensation			Long Term Compensation (2)
		Salary (\$)	Bonus (\$)	Other Annual Compensation (1) (\$)	Awards Securities Underlying Options (#)
John Shackleton . . . . . President and Chief Executive Officer	2006	400,000	320,000	17,103	—
	2005	368,740	106,800	31,480	75,000
	2004	368,740	231,133	20,763	80,000
P. Thomas Jenkins . . . . . Executive Chairman and Chief Strategy Officer	2006	424,065	376,138	13,192	—
	2005	387,918	143,765	15,494	100,000
	2004	328,735	214,624	11,033	—
John Kirkham . . . . . Executive Vice President, Worldwide Sales	2006	301,380	180,421	37,835	—
	2005	294,139	211,100	16,789	180,000
	2004	193,296	45,425	10,148	20,000
Kirk Roberts . . . . . Executive Vice President, Product Solutions & Marketing	2006	293,168	120,068	2,387	50,000
	2005	238,391	62,551	653	10,000
	2004	161,144	53,761	1,455	20,000
Alan Hoverd . . . . . Executive Vice President, Strategic Initiatives	2006	266,123	126,659	736	—
	2005	233,319	89,286	625	20,000
	2004	185,936	66,970	558	20,000
Anik Ganguly . . . . . Former, Executive Vice President, Operations (3)	2006	381,250	77,750	11,304	—
	2005	290,000	45,000	2,515	20,000
	2004	242,500	86,005	1,625	20,000

#### Notes:

- (1) The amounts in “Other Annual Compensation” include health benefits, car allowances paid and club memberships reimbursed, but do not include medical and group life insurance or other benefits received by the NEOs which are available generally to all our salaried employees.
- (2) We have not granted restricted shares or stock appreciation rights to the NEOs and have no long-term incentive plan.
- (3) Mr. Ganguly served as our Executive Vice President, Operations from October 2004 until his resignation on December 16, 2005.

#### Stock Option Information

##### Option Grants in Last Fiscal Year

The following table sets forth the options granted to the NEOs in the fiscal year ended June 30, 2006. The exercise price per share of each option was equal to the fair market value of the Common Shares on the grant date as determined by our Board of Directors, and each option becomes exercisable at the rate of 25% of the total option grant at the end of each of four annual periods from the date the options begin to vest. We did not grant any stock appreciation rights during Fiscal 2006. The percentage of total options granted to our employees in

Fiscal 2006 is based on options granted during that period to purchase an aggregate of 629,500 shares. The potential realizable value represents amounts that may be realized upon exercise of the options immediately prior to the expiration of their term assuming the specified compounded rates of appreciation on the Common Shares over the term of the options. These numbers are calculated based on the requirements of the Securities and Exchange Commission and do not reflect our estimate of future stock price growth. Actual gains, if any, on stock option exercises will depend on the future performance of the Common Shares and the date on which the options are exercised. There can be no assurance that the rates of appreciation assumed in the table can be achieved or that the amounts reflected will be received by the NEOs.

Name	Individual Grants				Potential realizable value at assumed annual rates of stock price appreciation for option term	
	Number of securities underlying options granted (#)	Percent of total options granted to employees in fiscal year	Exercise or base price (\$/sh)	Expiration Date	5% (\$)	10% (\$)
P. Thomas Jenkins	—	N/A	N/A	N/A	N/A	N/A
John Shackleton	—	N/A	N/A	N/A	N/A	N/A
John Kirkham	—	N/A	N/A	N/A	N/A	N/A
Kirk Roberts	50,000	7.94%	14.940	11/7/2012	304,104	708,500
Alan Hoverd	—	N/A	N/A	N/A	N/A	N/A
Anik Ganguly	—	N/A	N/A	N/A	N/A	N/A

#### Aggregated Option Exercises in Last Fiscal Year and Fiscal Year-End Option Values

The following table sets forth options exercised and the values of outstanding options for Common Shares held by each of the NEOs:

Name	Shares acquired on exercise (#)	Value Realized (\$)	Number of Common Shares underlying unexercised Options at June 30, 2006		Value of unexercised in-the-money options at June 30, 2006 (1) (\$)	
			Exercisable	Unexercisable	Exercisable	Unexercisable
P. Thomas Jenkins	—	—	599,000	125,000	8,288,560	722,000
John Shackleton	—	—	671,612	96,250	8,849,727	—
John Kirkham	—	—	55,000	145,000	—	—
Kirk Roberts	—	—	75,600	67,500	622,364	—
Alan Hoverd	—	—	215,000	25,000	2,166,000	—
Anik Ganguly	—	—	—	—	—	—

*Note:*

(1) Based on the closing price of our Common Shares on NASDAQ.

#### Director Compensation

Directors who are salaried officers or employees receive no compensation for serving as directors. Our non-employee directors receive an annual retainer fee of \$15,000 and an additional \$1,250 for each meeting attended, including committee meetings, except for Audit Committee members who receive \$1,875 for each Audit Committee meeting attended. Each committee chairman receives an annual retainer fee of \$5,000, except for the Audit Committee Chairman who receives a \$7,500 annual retainer fee. In Fiscal 2006, our non-employee directors each received 12,000 options to acquire our Common Shares. The independent lead director in addition to fees received as described above, receives an annual retainer of \$5,000. We reimburse all directors for all reasonable expenses incurred by them in their capacity as directors.

## Executive Officer Employment Agreements

Refer to Item 9B under this Form 10-K for further details relating to employment agreements and amended employment agreements entered into by us with our executive officers.

## Compensation Committee Interlocks and Insider Participation

The members of Open Text Corporation's Compensation Committee are Messrs. Ken Olisa, and Peter Hoult and Ms. Carol Gavin. None of the members of the Compensation Committee have been or are an officer or employee of Open Text Corporation, or any of our subsidiaries, or had any relationship requiring disclosure herein. None of our executive officers served as a member of the compensation committee of another entity (or other committee of the board of directors performing equivalent functions, or in the absence of any such committee, the entire board) one of whose executive officers served as a director of ours.

## Item 12. Security Ownership of Certain Beneficial Owners and Management and Related Stockholder Matters

The following table sets forth certain information as of July 31, 2006 regarding Common Shares beneficially owned by the following persons or companies: (i) each person or company known by us to be the beneficial owner of more than 5% of the outstanding Common Shares, (ii) each director and proposed director of our company, (iii) each Named Executive Officer, and (iv) all directors and executive officers as a group. Except as otherwise indicated, we believe that the beneficial owners of the Common Shares listed below have sole investment and voting power with respect to such Common Shares, subject to community property laws where applicable.

The number and percentage of shares beneficially owned is determined in accordance with the rules of the SEC, and is not necessarily indicative of beneficial ownership for any other purpose. Under these rules, beneficial ownership includes any shares as to which a person has sole or shared voting on investment power and also any shares of Common Shares underlying options or warrants that are exercisable by that person within 60 days of July 31, 2006. However, these shares underlying options and warrants are not treated as outstanding for the purposes of computing the percentage ownership of any other person or entity. Unless otherwise indicated, the address of each person or entity named in the table is "care of" Open Text Corporation, 275 Frank Tompa Drive, Waterloo Ontario, Canada, N2L-0A1.

<u>Name and Address of Beneficial Owner</u>	<u>Amount and Nature of Beneficial Ownership</u>	<u>Percent of Common Shares Outstanding</u>
Caisse de depot et placement du Quebec (1)(a) . . . . . 1000 place Jean-Paul-Riopelle Montreal Quebec CA H2Z 2B3	5,276,302	10.80%
Phillips, Hager & North Investment Management Ltd. (1)(b) . . . . . 200 Burrard Street, 21 <sup>st</sup> floor Vancouver, British Columbia CA V6C 3N5	3,490,200	7.20%
AMVESCAP PLC (1)(c) . . . . . 30 Finsbury Square London, England UK EC2A-1AG	5,046,304	10.35%
Franklin Resources (1)(d) . . . . . 1 Franklin Parkway San Mateo, California USA 94403-1906	3,346,800	6.90%
TAL Global Asset Management Inc (1)(e) . . . . . 1000 de la Gaucheterie West, Suite 3100 Montreal Quebec CA H3B 4W5	2,876,225	5.80%

<u>Name and Address of Beneficial Owner</u>	<u>Amount and Nature of Beneficial Ownership</u>	<u>Percent of Common Shares Outstanding</u>
RBC Asset Management Inc (1)(f) . . . . . Royal Trust Tower, Suite 3800 77 King Street West, 6 <sup>th</sup> floor Toronto, Ontario CA M5K 1H1	2,703,883	5.58%
The Royal Trust Company (1)(g) . . . . . Royal Trust Tower, P.O Box 7500 Station A 77 King Street West, 6 <sup>th</sup> floor Toronto, Ontario CA M5W 1P9	2,659,333	5.49%
Beutel, Goodman & Company (1)(h) . . . . . 20 Eglinton Avenue West, Suite 2000 Toronto, Ontario, M4R 1K8	6,202,762	12.80%
P. Thomas Jenkins (2) . . . . .	1,670,100	3.24%
John Shackleton (3) . . . . .	720,822	1.40%
Stephen J. Sadler (4) . . . . .	658,600	1.28%
Michael Slaunwhite (5) . . . . .	148,000	*
Randy Fowlie (6) . . . . .	126,000	*
Peter Hoult (7) . . . . .	38,000	*
Brian Jackman (8) . . . . .	36,000	*
Ken Olisa (9) . . . . .	24,000	*
Carol Coghlan Gavin (10) . . . . .	15,000	*
Bill Forquer (11) . . . . .	69,964	*
John Kirkham (12) . . . . .	62,957	*
Kirk Roberts (13) . . . . .	93,558	*
John Trent (14) . . . . .	5,464	*
Alan Hoverd (15) . . . . .	220,000	*
Tony Preston . . . . .	—	*
Paul McFeeters . . . . .	—	*
All executive officers and directors as a group (16 Persons) (16) . . . . .	3,888,465	7.54%

\* Less than 1%

- (1) Based on information filed in Schedule 13G or Schedule 13G/A with the SEC.
- (a) Sole voting power and sole dispositive power for 5,276,302 Common Shares.
  - (b) Sole voting power and sole dispositive power for 3,490,200 Common Shares.
  - (c) Sole voting power and sole dispositive power for 5,046,304 Common Shares.
  - (d) Sole voting power and sole dispositive power for 3,346,800 Common Shares.
  - (e) Sole voting power for 2,836,500 Common Shares and sole dispositive power for 2,876,225 Common Shares.
  - (f) Shared voting power and shared dispositive power for 2,703,883 Common Shares.
  - (g) Shared voting power and shared dispositive power for 2,659,333 Common Shares.
  - (h) Sole voting power for 5,334,262 Common Shares and sole dispositive power for 6,202,762 Common Shares.
- (2) Includes 1,021,100 Common Shares owned and options for 599,000 Common Shares which are vested and options for 50,000 Common Shares which will vest within 60 days of July 31, 2006.
- (3) Includes 29,210 Common Shares owned and options for 671,612 Common Shares which are vested and options for 20,000 Common Shares which will vest within 60 days of July 31, 2006.
- (4) Includes 182,600 Common Shares owned and options for 476,000 Common Shares which are vested.
- (5) Includes 6,000 Common Shares owned and options for 142,000 which are vested.
- (6) Includes 3,500 Common Shares owned and options for 122,500 Common Shares which are vested.
- (7) Includes 2,000 Common Shares owned and options for 36,000 Common Shares which are vested.

- (8) Includes 12,000 Common Shares owned and options for 24,000 Common Shares which are vested.
- (9) Includes options for 24,000 Common Shares which are vested.
- (10) Includes 3,000 Common Shares owned and options for 12,000 Common Shares which are vested.
- (11) Includes 7,464 Common Shares owned and options for 57,500 Common Shares which are vested and options for 5,000 Common Shares which will vest within 60 days of July 31, 2006.
- (12) Includes 957 Common Shares owned, options for 55,000 Common Shares which are vested and options for 7,000 Common Shares which will vest within 60 days of July 31, 2006.
- (13) Includes options for 12,958 Common Shares owned, options for 75,600 Common Shares which are vested and options for 5,000 Common Shares which will vest within 60 days of July 31, 2006.
- (14) Includes options for 5,000 Common Shares which are vested and options for 464 Common Shares which will vest within 60 days of July 31, 2006.
- (15) Includes options for 215,000 which are vested and options for 5,000 Common Shares which will vest within 60 days of July 31, 2006.
- (16) See notes (2)—(15)

### Securities Authorized for Issuance under Equity Compensation Plans

The following table sets forth summary information relating to our various stock option plans as of June 30, 2006:

<u>Plan Category</u>	<u>Number of securities to be issued upon exercise of outstanding options, warrants, and rights</u>	<u>Weighted average exercise price of outstanding options, warrants, and rights</u>	<u>Number of securities remaining available for future issuance under equity compensation plans (excluding securities reflected in column a)</u>
	(a)	(b)	(c)
Equity compensation plans approved by security holders .....	3,782,649	\$10.69	654,470
Equity compensation plans not approved by security holders .....	—	—	—
Total .....	<u>3,782,649</u>	<u>\$10.69</u>	<u>654,470</u>

### Item 13. Certain Relationships and Related Transactions

During Fiscal 2006, Mr. Stephen Sadler, a director, earned \$37,000 (Fiscal 2005 – \$315,970, Fiscal 2004 – \$480,000) in consulting fees for assistance with acquisition activities. Mr. Sadler abstained from voting on all transactions from which he would potentially derive consulting fees.

We have adopted a policy that all transactions between us and our officers, directors and affiliates will be approved by a majority of the “independent” members of our Board of Directors, as defined in NASDAQ Rule 4200.

### Item 14. Principal Accountant Fees and Services

Aggregate fees for professional services rendered to the Company by KPMG LLP for Fiscal 2006 and Fiscal 2005:

#### *Audit Fees*

Audit fees were approximately \$1,962,665 for Fiscal 2006 and \$3,298,477 for Fiscal 2005. Such fees were for professional services rendered for (a) the annual audits of the Company’s consolidated financial statements,

including statutory audits of foreign subsidiaries and the accompanying attestation report regarding the Company's internal control over financial reporting contained in the Company's Annual Report on Form 10-K, (b) the review of quarterly financial information included in the Company's Quarterly Reports on Form 10-Q and (c) fees related to filings with the Securities and Exchange Commission and accounting consultations.

#### *Audit-Related Fees*

Audit-related fees that were not reported as audit fees were approximately \$597,065 for Fiscal 2006 and \$165,691 for Fiscal 2005.

#### *Tax Fees*

The total fees for tax services were approximately \$151,645 for Fiscal 2006 and \$206,376 for Fiscal 2005. The fees were for services related to: tax compliance, including the preparation of tax returns, tax planning and tax advice, advice related to mergers and acquisitions, and requests for rulings or technical advice from tax authorities.

#### *All Other Fees*

There were no fees for other services for Fiscal years 2006 and 2005.

The Audit Committee of the Board of Directors has determined that the provision of the services as set out above is compatible with maintaining KPMG LLP's independence.

#### *Pre-Approval Policy*

The Audit Committee has established a policy of reviewing, in advance, and either approving or disapproving, all audit, audit-related, tax and other non-audit service that any independent public or certified public accountant proposes to provide to us. This policy requires that all services received from our independent accountants be approved in advance by either the Audit Committee or a delegate of the Audit Committee. The Audit Committee has delegated the pre-approval responsibility to the Chairperson of the Audit Committee. Every audit, audit-related, tax and all other services that KPMG provided us in Fiscal 2006 was pre-approved. All non-audit services provided in Fiscal 2005 were reviewed with the Audit Committee, which concluded that the provision of such services by KPMG was compatible with the maintenance of KPMG's independence in the conduct of its auditing functions.

The Audit Committee of the Board of Directors has adopted an Audit Committee Charter which is attached hereto as *Appendix A*.



## PART IV

### Item 15. Exhibits and Financial Statement Schedules

a) The following documents are filed as a part of this report:

1) Consolidated Financial Statements and Reports of Independent Accountants and the related notes thereto are included under Item 8, in Part II.

2) See Note 8 in the Consolidated Financial Statements included under Item 8, Part II.

3) Exhibits: The following exhibits are filed as part of this Annual Report on Form 10-K.

<b><u>Exhibit Number</u></b>	<b><u>Description of Exhibit</u></b>
3.1	Articles of Incorporation of the Company. (1)
3.2	Articles of Amalgamation of the Company. (1)
3.3	Articles of Amendment of the Company. (1)
3.4	By-law No. 1 of the Company. (1)
3.5	Articles of Amendment of the Company. (1)
3.6	By-law No. 2 of the Company. (1)
3.7	By-law No. 3 of the Company. (1)
3.8	Articles of Amalgamation of the Company. (1)
3.9	Articles of Amalgamation of the Company, dated July 1, 2001. (4)
3.10	Articles of Amalgamation of the Company, dated July 1, 2002. (5)
3.11	Articles of Amalgamation of the Company, dated July 1, 2003. (6)
3.12	Articles of Amalgamation of the Company, dated July 1, 2004. (7)
3.13	Articles of Amalgamation of the Company, dated July 1, 2005. (8)
3.14	Open Text Corporation By-law, dated December 15, 2005. (10)
3.15	Articles of Continuance of the Company , dated December 29, 2005. (10)
4.1	Form of Common Share Certificate. (1)
10.1	Restated 1995 Flexible Stock Incentive Plan. (3)
10.2	1995 Replacement Stock Option Plan. (1)
10.3	1995 Supplementary Stock Option Plan. (1)
10.43	1995 Directors Stock Option Plan. (1)
10.5	Amendment to Agreement, dated June 27, 1997 between INSO Corporation and the Company. (2)
10.6	1998 Stock Option Plan. (3)
10.7	Indemnity Agreement with Robert Hoog dated April 30, 2004. (7)
10.8	Indemnity Agreement with Hartmut Schaper dated April 30, 2004. (7)
10.9	Indemnity Agreement with Walter Koehler dated August 8, 2005. (8)
10.10	Indemnity Agreement with Peter Lipps dated August 19, 2005. (8)

<b>Exhibit Number</b>	<b>Description of Exhibit</b>
10.11	2004 Employee Stock Option Plan. (8)
10.12	Artesia Stock Option Plan. (8)
10.13	Vista Stock Option Plan. (8)
10.14	Employment Agreement, dated September 23, 2005 between P. Thomas Jenkins and the Company. (8)
10.15	Employment Agreement, dated September 23, 2005 between John Shackleton and the Company. (8)
10.16	Employment Agreement, dated September 23, 2005 between Alan Hoverd and the Company. (8)
10.17	Employment Agreement, dated November 30, 1997 between Anik Ganguly and the Company. (8)
10.18	Employment Agreement, dated October 23, 2003 between John Kirkham and the Company. (8)
10.19	Employment Agreement, dated November 4, 2004 between John Kirkham and the Company. (9)
10.20	Demand operating credit facility between the Company and Royal Bank of Canada, dated February 2, 2006. (10)
10.21	Employment Agreement, dated May 3, 2006 between Paul J McFeeters and the Company. (11)
10.22	Employment Agreement, dated June 30, 2006 between Kirk Roberts and the Company.
10.23	Employment Agreement, dated June 30, 2006 between Tony Preston and the Company.
10.24	Employment Agreement, dated July 17, 2006 between John Wilkerson and the Company.
10.25	Arrangement Agreement between the Company, 6575064 Canada Inc., and Hummingbird Ltd., dated August 4, 2006.
10.26	“Form of” Indemnity Agreement between the Company and certain of its officers dated September 7, 2006.
21.2	List of the Company’s Subsidiaries as of August 16, 2005.
24.1	Power of Attorney (contained on Signature Page).
31.1	Certification of the Chief Executive Officer, pursuant to Rule 13a-14(a) of the Exchange Act, as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.
31.2	Certification of the Chief Financial Officer pursuant to Rule 13a-14(a) of the Exchange Act, as adopted pursuant to Section 302 of the Sarbanes-Oxley Act of 2002.
32.1	Certification of the Chief Executive Officer pursuant to 18 U.S.C Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.
32.2	Certification of the Chief Financial Officer pursuant to 18 U.S.C Section 1350, as adopted pursuant to Section 906 of the Sarbanes-Oxley Act of 2002.

- 
- (1) Filed as an Exhibit to the Company’s Registration Statement on Form F-1 (Registration Number 33-98858) as filed with the Securities and Exchange Commission (the “SEC”) on November 1, 1995 or Amendments 1, 2 or 3 thereto (filed on December 28, 1995, January 22, 1996 and January 23, 1996 respectively), and incorporated herein by reference.
- (2) Filed as an Exhibit to the Company’s Report on Form 8-K, as filed with the SEC on June 16, 1998 and incorporated herein by reference.
- (3) Filed as an Exhibit to the Company’s Annual Report on Form 10-K, as filed with the SEC on August 20, 1999 and incorporated herein by reference.

- (4) Filed as an Exhibit to the Company's Annual Report on Form 10-K, as filed with the SEC on September 28, 2001 and incorporated herein by reference.
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- (8) Filed as an Exhibit to the Company's Annual Report on Form 10-K, as filed with the SEC on September 27, 2005 and incorporated herein by reference.
- (9) Filed as an Exhibit to the Company's Quarterly Report on Form 10-Q, as filed with the SEC on November 9, 2005 and incorporated herein by reference.
- (10) Filed as an Exhibit to the Company's Quarterly Report on Form 10-Q, as filed with the SEC on February 3, 2006 and incorporated herein by reference.
- (11) Filed as an Exhibit to the Company's Quarterly Report on Form 10-Q, as filed with the SEC on May 5, 2006 and incorporated herein by reference.

4) Appendix: The following appendix is filed as part of this Annual Report on Form 10-K.

<u>Appendix</u>	<u>Description of Appendix</u>
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A	Audit Committee Charter.
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b) Exhibits

We hereby file as part of this Annual Report on Form 10-K the exhibits listed in 15(a)(3) above. Exhibits which are incorporated by reference can be inspected and copied at the public reference facilities maintained by the Commission at 100 F Street, N.E., 1<sup>st</sup> Floor, Washington D.C. Copies of such materials can also be obtained from the Public Reference Section of the Commission, 100 F Street, N.E., 1<sup>st</sup> Floor, Washington D.C. 20549 at prescribed rates.

## SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, as amended, the registrant has duly caused this report to be signed on its behalf by the undersigned thereunto duly authorized.

### OPEN TEXT CORPORATION

Date: September 12, 2006

By: /s/ JOHN SHACKLETON  
**John Shackleton**  
**President and Chief Executive Officer**

/s/ PAUL McFEETERS  
**Paul McFeeters**  
**Chief Financial Officer**

## POWER OF ATTORNEY AND SIGNATURES

The undersigned officers and directors of Open Text Corporation hereby constitute and appoint John Shackleton and Paul McFeeters, and each of them singly, with full power of substitution, our true and lawful attorneys-in-fact and agents to sign for us in our names in the capacities indicated below any and all amendments to this Annual Report on Form 10-K and to file same, with exhibits thereto and other documents in connection therewith, with the Securities and Exchange Commission, hereby ratifying and confirming all that each of the said attorneys-in-fact, or his substitute(s), may do or cause to be done by virtue hereof.

Pursuant to the requirements of the Securities Exchange Act of 1934, this report has been signed below by the following persons on behalf of the registrant and in the capacities and on the date indicated.

<u>Signature</u>	<u>Title</u>	<u>Date</u>
<u>/s/ JOHN SHACKLETON</u> <b>John Shackleton</b>	Director, President and Chief Executive Officer (Principal Executive Officer)	September 12, 2006
<u>/s/ PAUL McFEETERS</u> <b>Paul McFeeters</b>	Chief Financial Officer (Principal Financial Officer and Principal Accounting Officer)	September 12, 2006
<u>/s/ P. THOMAS JENKINS</u> <b>P. Thomas Jenkins</b>	Director, Executive Chairman and Chief Strategy Officer	September 12, 2006
<u>/s/ RANDY FOWLIE</u> <b>Randy Fowlie</b>	Director	September 12, 2006
<u>/s/ CAROL COGHLAN GAVIN</u> <b>Carol Coghlan Gavin</b>	Director	September 12, 2006
<u>/s/ PETER HOULT</u> <b>Peter Hout</b>	Director	September 12, 2006
<u>/s/ BRIAN JACKMAN</u> <b>Brian Jackman</b>	Director	September 12, 2006
<u>/s/ KEN OLISA</u> <b>Ken Olisa</b>	Director	September 12, 2006
<u>/s/ STEPHEN J. SADLER</u> <b>Stephen J. Sadler</b>	Director	September 12, 2006
<u>/s/ MICHAEL SLAUNWHITE</u> <b>Michael Slaunwhite</b>	Director	September 12, 2006

## OPEN TEXT CORPORATION

### INDEX TO EXHIBITS

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(9) Filed as an Exhibit to the Company’s Quarterly Report on Form 10-Q, as filed with the SEC on November 9, 2005 and incorporated herein by reference.

(10) Filed as an Exhibit to the Company’s Quarterly Report on Form 10-Q, as filed with the SEC on February 3, 2006 and incorporated herein by reference.

(11) Filed as an Exhibit to the Company’s Quarterly Report on Form 10-Q, as filed with the SEC on May 5, 2006 and incorporated herein by reference.

**Open Text Corporation (the “Company”)  
Audit Committee Charter  
As amended by the Board of Directors  
on July 27, 2005.**

**A. PURPOSE AND SCOPE**

The primary function of the Audit Committee (the “Committee”) is to:

- a) assist the Board of Directors in fulfilling its responsibilities by reviewing:
  - i) the financial reports provided by the Company to the Securities and Exchange Commission (“SEC”), other Regulatory Bodies (as defined below), the Company’s stockholders and to the general public, and
  - ii) the Company’s internal financial and accounting controls;
- b) appoint, compensate and retain the Company’s independent public accountants,
- c) oversee the work performed by any independent public accountants, including their conduct of the annual audit and engagement for any other services,
- d) oversee the accounting and financial reporting processes of the Company as established by the Company’s management and the audits of the financial statements of the Company conducted by the Company’s independent public accountants,
- e) recommend, establish and monitor procedures, including without limitation those relating to risk management and those designed to improve the quality and reliability of the disclosure of the Company’s financial condition and results of operations,
- f) establish procedures designed to facilitate:
  - i) the receipt, retention and treatment of complaints relating to accounting, internal accounting controls or auditing matters and
  - ii) the receipt of confidential or anonymous submissions by employees of concerns regarding questionable accounting or auditing matters,
- g) engage advisors as necessary, and
- h) distribute relevant funding provided by the Company regarding the payment of outside auditors and advisors engaged by the Committee.

**B. COMPOSITION AND MEETINGS**

The Committee shall be comprised of a minimum of three directors as appointed by the Board of Directors, each of who shall:

- a) meet the independence and audit committee composition requirements promulgated by the SEC, the National Association of Securities Dealers, any exchange upon which securities of the Company are traded, and any governmental or regulatory body exercising authority over the Company (each a “Regulatory Body” and collectively, the “Regulatory Bodies”), as in effect from time to time,
- b) not have participated in the preparation of the financial statements of the Company at any time during the past three years, and
- c) be free from any relationship that, in the opinion of the Board of Directors, would interfere with the exercise of his or her independent judgment as a member of the Committee.



A majority of the members of the Committee shall constitute a quorum at any meeting of the Committee, but in no case shall a quorum be comprised of less than two members of the Committee.

All members of the Committee shall be “financially literate”, which is defined as having a basic understanding of finance and accounting and having the ability to read and understand fundamental financial statements, including a balance sheet, cash flow statement and income statement. At least one member of the Committee shall have employment experience in finance or accounting, requisite professional certification in accounting, or other comparable experience or background which results in the individual’s financial sophistication, including being or having been a chief executive officer, chief financial officer or other senior officer with financial oversight responsibilities. Further, at least one member of the Committee shall qualify as an “audit committee financial expert” (as such term is defined by the SEC).

The Committee shall ensure that all necessary and proper disclosures shall be made in all applicable filings with the SEC and other Regulatory Bodies as to composition of the Committee. Committee members may enhance their familiarity with finance and accounting by participating in education programs conducted by the Company or an outside consultant at the Company’s expense. Independence and financial literacy are to be determined by the Board of Directors in accordance with applicable laws, rules and regulations.

The members of the Committee shall be appointed by the Board of Directors at the meeting of the Board of Directors following each annual meeting of stockholders and shall serve until their successors shall be duly elected and qualified or until their earlier death, resignation or removal. Unless a Chair is elected by the full Board of Directors, the members of the Committee may designate a Chair by majority vote of the full Committee membership. In the absence of the Chairman at a duly convened meeting, the Committee shall select a temporary substitute from among its members.

The Committee shall meet on a regularly-scheduled basis at least four times per year or more frequently as circumstances dictate. The Committee shall meet at least quarterly with the independent auditor in separate executive sessions or provide the opportunity for full and frank discussion without members of senior management present.

Ordinarily, meetings of the Committee should be convened with no less than seven (7) days notice having been given. In exceptional circumstances the requirement for notice can be waived subject to the formal consent of no less than the number of Committee members that constitutes a quorum of the Committee or instruction by a resolution of the Company’s Board of Directors.

The Committee shall report its actions to the members of the Board and the Secretary of the Company and keep written minutes of its meetings which shall be recorded and filed with the books and records of the Company. Minutes of each meeting will be made available to the members of the Board and the Secretary of the Company.

## **C. RESPONSIBILITIES AND DUTIES**

To fulfill its responsibilities and duties the Committee shall:

### *Document Review*

1. Review and assess the adequacy of this Charter periodically as conditions dictate, but at least annually (and update this Charter if and when appropriate).

2. Review with representatives of management and representatives of the Company’s independent accounting firm the Company’s audited annual financial statements prior to their filing as part of the Annual Report on Form 10-K. After such review and discussion, the Committee shall recommend to the Board of Directors whether such audited financial statements should be included in the Company’s Annual Report on Form 10-K. The Committee shall also review the Company’s quarterly financial statements and shall recommend to the Board of Directors whether such financial statements should be included in the Company’s quarterly SEC

filings on Form 10-Q. The Committee shall also review any other financial reports and filings as may be required by any other Regulatory Body and shall recommend to the Board of Directors whether such other financial reports or filings should be included in any external filing.

3. Take steps designed to ensure that the independent accounting firm reviews the Company's interim financial statements prior to their inclusion in the Company's quarterly reports on Form 10-Q and such other financial reports and filings as may be required by any other Regulatory Body.

#### *Independent Accounting Firm*

4. Have sole authority and be directly responsible for the appointment, compensation, retention (including the authority not to retain or to terminate) and oversight of any independent public accounting firms engaged for the purpose of preparing or issuing an audit report or performing other audit, review or attest services for the Company, and each such independent public accounting firm must report directly to the Committee. The authority of the Committee shall include ultimate authority to approve all audit engagement fees and terms.

5. Approve in advance any and all audit services and permissible non-audit services to be performed by the independent accounting firm and adopt and implement policies for such pre-approval.

6. Determine funding necessary for compensation of any independent accounting firms and notify the Company of anticipated funding needs of the Committee.

7. Resolve any disagreements between management and the independent accounting firm as to financial reporting matters.

8. Instruct the independent accounting firm that it should report directly to the Committee on matters pertaining to the work performed during its engagement and on matters required by the rules and regulations of any applicable Regulatory Body.

9. On an annual basis, receive from the independent accounting firm a formal written statement identifying all relationships between the independent accounting firm and the Company consistent with Independence Standards Board ("ISB") Standard 1, as it may be modified or supplemented. The Committee shall actively engage in a dialogue with the independent accounting firm as to any disclosed relationships or services that may impact its independence. The Committee shall take appropriate action to oversee the independence of the independent accounting firm.

10. On an annual basis, discuss with representatives of the independent accounting firm the matters required to be discussed by Statement on Auditing Standards ("SAS") 61, as it may be modified or supplemented.

11. Evaluate the performance of the independent accounting firm and consider the discharge of the independent accounting firm when circumstances warrant.

#### *Financial Reporting Processes*

12. In consultation with the Company's management and the independent accounting firm, review annually the adequacy of the Company's internal control over financial reporting.

13. Require the Company's Chief Executive Officer and Chief Financial Officer to submit a report to the Committee prior to the filing of the Annual Report on Form 10-K or a Form 10-Q, which is based on their evaluation of internal control over financial reporting, and which discloses:

- a) any and all significant deficiencies and material weaknesses in the design and operation of the internal control over financial reporting which are reasonably likely to adversely affect the Company's ability to record, process, summarize, and report financial data; and

b) any fraud, whether or not material, that involves management or other employees who have a significant role in the Company's internal control over financial reporting.

The Committee shall direct the actions to be taken and/or make recommendations to the Board of Directors of actions to be taken, to the extent such report indicates the finding of any significant deficiencies in internal control over financial reporting or fraud.

14. Regularly review the Company's critical accounting policies and accounting estimates resulting from the application of these policies and inquire at least annually of both the Company's management, accounting group and the independent accounting firm as to whether either has any concerns relative to the quality or aggressiveness of management's accounting policies.

#### *Compliance*

15. Establish procedures in compliance with applicable law for:

a) the receipt, retention, and treatment of complaints received by the Company regarding accounting, internal accounting controls, or auditing matters; and

b) the confidential, anonymous submission by employees of the Company of concerns regarding questionable accounting or auditing matters.

Investigate any allegations that any officer or director of the Company, or any other person acting under the direction of any such person, took any action to fraudulently influence, coerce, manipulate, or mislead any independent public or certified accountant engaged in the performance of an audit of the financial statements of the Company for the purpose of rendering such financial statements materially misleading and, if such allegations prove to be correct, take or recommend to the Board of Directors appropriate disciplinary action.

#### *Reporting*

16. Prepare, in accordance with the rules of any Regulatory Body, a written report of the Audit Committee to be included in the Company's annual proxy statement for each annual meeting of stockholders.

17. Instruct the Company's management to disclose in its Annual Report on Form 10-K and its Quarterly Reports on Form 10-Q, the approval by the Committee of any non-audit services performed by the independent accounting firm, and review the substance of any such disclosure and the considerations relating to the compatibility of such services with maintaining the independence of the accounting firm.

#### *Conflicts of Interest*

18. Review and approve all payments to be made pursuant to any related party transactions involving executive officers and members of the Board, as required by any Regulatory Body.

#### *Independent Advice*

19. The Committee may conduct or authorize investigations into or studies of matters within the Committee's scope of responsibilities and duties as described above, and may seek, retain and terminate accounting, legal, consulting or other expert advice from a source independent of management, at the expense of the Company, with notice to either the Lead Director, the Executive Chairman or the Chief Executive Officer of the Company, as deemed appropriate by the Committee. In furtherance of the foregoing, the Committee shall have the sole authority to retain and terminate any such consultant or advisor to be used to assist in the evaluation of such matters and shall have the sole authority to approve the consultant or advisor's fees and other retention terms.

While the Audit Committee has the responsibilities and powers set forth in this Charter, it is not the duty of the Audit Committee to plan or conduct audits, to establish the Company's accounting and financial reporting systems, or to determine that the Company's financial statements are complete and accurate and are in accordance with generally accepted accounting principles.

*This Charter is intended as a component of the flexible governance framework within which the Board of Directors, assisted by its committees, directs the affairs of the Company. While it should be interpreted in the context of all applicable laws, regulations and listing requirements, as well as in the context of the Company's Articles and By-Laws, it is not intended to establish any legally binding obligations.*

**EMPLOYMENT AGREEMENT**

THIS AGREEMENT made as of the 30 day of June, 2006

AMONG

**OPEN TEXT CORPORATION,**  
a corporation amalgamated under the laws of  
Ontario (hereinafter referred to as the  
“Corporation”)

OF THE FIRST PART

- and -

**KIRK ROBERTS**  
(hereinafter referred to as the “Executive”)

OF THE SECOND PART

WHEREAS the Corporation is desirous of retaining the services of the Executive as an employee of the Corporation and as its Executive;

AND WHEREAS the Executive has agreed to enter into and deliver this Agreement on the terms and conditions contained herein.

AND WHEREAS the Executive has agreed to enter into and deliver this Agreement in consideration of receiving certain additional benefits and other additional compensation as provided for pursuant to the terms of this Agreement;

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the parties agree as follows:

**1. DEFINITIONS**

For the purposes of this Agreement, the following terms shall have the following meanings, respectively:

- a. “**Act**” means the *Business Corporations Act* (Ontario), as amended from time to time;

- b. **“Agreement”** means this Agreement as may be amended or supplemented from time to time, including any and all schedules annexed hereto;
- c. **“Annual Base Salary”** has the meaning ascribed to that term in Section 5(a) hereof;
- d. **“Audit Committee”** means the audit committee of the Board of Directors of the Corporation as may be constituted from time to time;
- e. **“Board of Directors”** means the board of directors of the Corporation as may be constituted from time to time and **“Directors”** means the directors of the Corporation;
- f. **“Change of Control”** means either of the following events:
  - i. the sale of all or substantially all of the assets of the Corporation; or
  - ii. any transaction whereby any person, together with Affiliates and Associates of such person, or any group of persons acting in concert (collectively, “Acquiror” or “Acquirors”), acquires beneficial ownership of more than 50% of the issued common shares of the Corporation on a fully diluted basis, or any transaction as a result of which beneficial ownership of common shares constituting more than 50% in the aggregate of the issued common shares of the Corporation on a fully diluted basis cease to be held by persons who are shareholders of the Corporation as at the date hereof or by Affiliates or Associates of such present shareholders;

(for the purposes of this definition and this Agreement, whether persons are affiliated or associated shall be determined in accordance with the definitions of “**Affiliate**” and “**Associate**” in the provisions of the Act as such provisions may be amended, supplemented or replaced from time to time and for purposes of this definition the terms “**group**” and “**beneficial ownership**” shall have the meanings ascribed thereto under Section 14(d)(2) of the *Securities Act* and Rule 13d-3 of the General Rules of the *Securities Act*, respectively);

- g. **“Compensation Committee”** means the compensation committee of the Board of Directors of the Corporation as may be constituted from time to time;
- h. **“Date of Termination”** shall mean the date of termination of the Executive’s employment, whether by death of the Executive, by the Executive or by the Corporation pursuant to the terms of this Agreement;

- i. **“Disability”** has the meaning ascribed to that term in Section 11(b) hereof;
- j. **“Incumbent Director”** shall mean any member of the Board of Directors who was a member of the Board of Directors immediately prior to a Change of Control and any successor to an Incumbent Director who was recommended or appointed to succeed any Incumbent Director by the affirmative vote of the Directors when that affirmative vote includes the affirmative vote of a majority of the Incumbent Directors then on the Board of Directors;
- k. **“Just Cause”** shall mean:
  - i. the failure by the Executive to perform his duties according to the terms of his employment (other than those (A): that follow a demotion in his position or duties; or (B) resulting from the Executive’s Disability) after the Corporation has given the Executive reasonable notice of such failure and a reasonable opportunity to correct it;
  - ii. the engaging by the Executive in any act that is materially injurious to the Corporation, monetarily or otherwise, but not including, following a Change of Control, the expression of opinions contrary to those directors of the Corporation who are not Incumbent Directors or those of the Acquirors;
  - iii. the engaging by the Executive in any act of dishonesty resulting or intended to result directly or indirectly in personal gain of the Executive at the Corporation’s expense, including the failure by the Executive to honour his fiduciary duties to the Corporation and his duty to act in the best interests of the Corporation;
  - iv. the failure by the Executive to comply with the provisions of Section 11(c) where the Executive elects to terminate his employment with the Corporation unless notice of such termination of employment is properly given in accordance with the terms of Section 14(b) hereof;
  - v. the failure of the Executive to abide by the terms of any resolution passed by the Board of Directors; or
  - vi. the failure by the Executive to abide by the policies, procedures and codes of conduct of the Corporation.
- l. **“Person”** or **“persons”** includes an individual, sole proprietorship, partnership, unincorporated association, unincorporated syndicate,



unincorporated organization, trust, body corporate, and a natural person in his capacity as trustee, executor, administrator or other legal representative;

- m. **“Parachute Event”** means the occurrence of the following without the Executive’s written consent (except in connection with the termination of the employment of the Executive for Just Cause or Disability or termination of the Executive’s employment because of the death of the Executive):
  - i. a material change (other than those that are consistent with a promotion) in the Executive’s position or duties, responsibilities, title or office in effect immediately prior to the Change of Control (except for a change in any position or duties as a director of the Corporation), which includes any removal of the Executive from or any failure to re-elect or re-appoint the Executive to any such positions or offices.
  - ii. a material reduction by the Corporation or any of its subsidiaries of the Executive’s salary, benefits or any other form of remuneration payable by the Corporation or its subsidiaries; or
  - iii. any material failure by the Corporation or its subsidiaries to provide any benefit, bonus, profit sharing, incentive, remuneration or compensation plan, stock ownership or purchase plan, pension plan or retirement plan in which the Executive is participating or entitled to participate immediately prior to a Change of Control, or the Corporation or its subsidiaries taking any action or failing to take any action that would materially adversely affect the Executive’s participation in or materially reduce his rights or benefits under or pursuant to any such plan;
  - iv. any other material breach by the Corporation of this Agreement;
- n. **“Securities Act”** means the *Securities Exchange Act* of 1934, as amended from time to time;
- o. **“Voluntary Termination”** means the termination of the Executive’s employment with the Corporation by the Executive at his discretion in accordance with the provisions of Section 11(c) of this Agreement.

## 2. TERM

The Corporation shall employ the Executive for an indefinite period commencing on the date of this Agreement, subject, however, to earlier termination as hereinafter provided.

### 3. DUTIES

The Executive shall serve the Corporation and any subsidiaries of the Corporation in such capacity or capacities and shall perform such duties and exercise such powers pertaining to the management and operation of the Corporation and any Subsidiaries and Associates of the Corporation (as those terms are defined in the Act) as may be determined from time to time by the Reporting Manager (as defined below) and the Chief Executive Officer (“CEO”) consistent with the office of the Executive. The Executive shall:

- i. devote his full time and attention and his best efforts to the business and affairs of the Corporation;
- ii. perform those duties that may be assigned to the Executive diligently and faithfully to the best of the Executive’s abilities and in the best interests of the Corporation; and
- iii. use his best efforts to promote the interests and goodwill of the Corporation.

### 4. REPORTING PROCEDURES

The Executive shall report to the President/CEO (“**Reporting Manager**”). The Executive shall report fully on the management, operations and business affairs of the Corporation and advise to the best of his ability and in accordance with business standards on business matters that may arise from time to time during the term of this Agreement.

### 5. REMUNERATION AND BENEFITS

- a. The annual base salary (“**Annual Base Salary**”) payable to the Executive for his services hereunder for each year of the term of this Agreement shall be determined by the CEO (and the Compensation Committee, as may be required) upon recommendation by the Reporting Manager and set out in a separate document, subject to the provisions of Section 7, and exclusive of bonuses, benefits and other compensation as provided for herein. The Annual Base Salary payable to the Executive pursuant to the provisions of this section 5 shall be payable in such manner as other payments are made by the Corporation to senior executives or in such other manner as may be mutually agreed upon, less, in any case, all applicable deductions or withholdings as required by law. As of the date of this Agreement, the Annual Base Salary is **CDN\$350,000.00**.
- b. The Corporation shall provide the Executive with employee benefits comparable to those provided by the Corporation from time to time to other

senior executives of the Corporation. Benefits to be enjoyed by the Executive during the term of this Agreement shall be in accordance with Schedule "A", as amended from time to time, and shall include reimbursement of any properly incurred expenses as provided for in Section 10 hereof.

## **6. ANNUAL PERFORMANCE BONUS**

In addition to the Executive's Annual Base Salary, the Executive shall be entitled to earn a bonus (the **"Performance Bonus"**) which shall be based upon performance goals established by the Reporting Manager in conjunction with the CEO (and the Compensation Committee, as may be required) from time to time and set forth in a separate document. Any changes respecting the amount or other terms of the Performance Bonus payable to the Executive must be approved by the Reporting Manager in conjunction with the CEO (and the Compensation Committee, as may be required). As of the date of this Agreement, the Performance Bonus target is **CDN\$230,000.00**.

## **7. SALARY AND/OR BONUS ADJUSTMENTS**

Other than as herein provided, there shall be no cost-of-living increase or merit increase in the Annual Base Salary or increases in any bonuses payable to the Executive unless agreed to in writing by the Reporting Manager and the CEO. The Reporting Manager and the CEO shall review annually the Annual Base Salary and all other compensation to be received by the Executive under this Agreement.

## **8. OPTIONS**

The Corporation shall permit the Executive to participate in any share option plan, share purchase plan, retirement plan or similar plan offered by the Corporation from time to time to its senior executives in the manner and to the extent authorized by the Compensation Committee of the Board of Directors. The Compensation Committee may, in its absolute discretion, grant additional options, subject to approval by the Board of Directors, and it may review the advisability of additional option grants for the Executive.

## **9. VACATION**

The Executive shall be entitled to (5) Five weeks paid vacation per fiscal year of the Corporation at a time approved in advance by the Reporting Manager, which approval shall not be unreasonably withheld but shall take into account the staffing requirements of the Corporation and the need for the timely performance of the Executive's responsibilities. Any vacation entitlement hereunder shall be subject to the Corporation's policy respecting same in effect from time to time.

## **10. EXPENSES**

Subject to the terms of this section, the Executive shall be reimbursed for all reasonable travel and other out-of-pocket expenses actually and properly incurred by the Executive from time to time in connection with carrying out his duties hereunder. Determination of whether expenses are reasonable or not shall be made by the Reporting Manager. For all such expenses the Executive shall furnish to the Corporation originals of all invoices or statements in respect of which the Executive seeks reimbursement.

## **11. TERMINATION**

### **a. For Just Cause**

The Corporation may immediately terminate the employment of the Executive for Just Cause without notice or any payment in lieu of notice, and for purposes of greater certainty, the Corporation shall have no obligation to make any payments to the Executive on account of severance or bonuses or partial bonuses or any other amounts except as expressly stipulated in Section 12(a) hereof.

### **b. For Disability/Death**

This Agreement may be immediately terminated by the Corporation by notice to the Executive if the Executive is determined to suffer from disability. The Executive shall be deemed to suffer from disability (hereinafter referred to as "Disability") if in any year during the employment period, because of ill health, physical or mental disability, or for other causes beyond the control of the Executive, the Executive has been continuously unable or unwilling or has failed to perform the Executive's duties for 120 consecutive days, or if, during any year of the employment period, the Executive has been unable or unwilling or has failed to perform his duties for a total of 180 days, consecutive or not. The CEO, acting reasonably, shall (subject to paragraph 31 herein), finally determine if the Executive is suffering from ill health, physical or mental disability or other causes beyond his control during the time periods as hereinbefore set forth in the event of any dispute between the Executive and the Corporation concerning the occurrence of Disability for purposes of this Section.

Notwithstanding any short term or long term corporate benefits or insurance policies relating to disability maintained by the Corporation at the relevant time, if during any period of ill health, physical or mental disability or for other causes beyond the control of the Executive, the Executive has been continuously unable or unwilling or has failed to perform the Executive's duties less than 120 consecutive days (the "Short-Term Illness"), the Executive shall continue to receive all amounts of remuneration and benefits otherwise payable to and enjoyed by the Executive under this Agreement less any and all amounts received by and/or payable to the Executive in connection with benefits paid and/or payable as a result of such Short-Term Illness (i.e. no duplicate payments as a result of short term disability payments and the Executive's salary payments that are due during the Short-Term

Illness time period). Upon termination of this Agreement as a result of Disability, the Corporation shall pay to the Executive the severance payment provided for in Subsection 12(b) hereof less any and all amounts received by and/or payable to the Executive in connection with benefits paid and/or payable as a result of the Disability. Upon termination of this Agreement as a result of Disability, the Corporation shall permit the Executive to continue to participate in those employee benefits referred to in Section 5(b) hereof, to the extent enjoyed by the Executive prior to the occurrence of Disability, for the number of months of severance payments set forth in the chart on Exhibit 1. The term "any year of the employment period" means any period of 12 consecutive months during the employment period.

This Agreement shall terminate without notice or any payment in lieu thereof immediately upon the death of the Executive.

c. Voluntary Termination by Executive

If the Executive is desirous of voluntarily terminating his employment with the Corporation, the Executive agrees to give the Corporation 3 months advance written notice of such termination in which case the Executive shall not be entitled to any payment on account of severance under Section 12(b) hereof. The Reporting Manager and the CEO may waive such notice in writing after consulting with the Board of Directors, in their sole and absolute discretion, in which case the Executive's employment shall be deemed to terminate immediately, provided the Executive shall still be entitled to compensation due on account of Annual Base Salary and benefits earned up to the last date of the 3 month advance written notice period given by the Executive and any Performance Bonus earned and prorated during such 3 month notice period. Provided that the Executive gives the 3 month notice as required hereunder, any unvested options which would have otherwise vested during such advance written notice period shall be permitted to continue to vest during such period. The Executive shall have the right to exercise any options which are vested as at the Date of Termination for the period which is 90 days following such Date of Termination (the "90 Day Period"). For purposes of this Section 11(c), the term "Date of Termination" shall mean the actual day on which the Executive ceases to be employed plus the remainder of the 3 month notice period if and to the extent waived by the Reporting Manager and the CEO in consultation with the Board of Directors. Any termination properly given under Section 14(b) hereof and in accordance with the terms thereof shall not be considered a voluntary termination under this Section 11(c).

d. Termination by Corporation Other than For Just Cause, Disability or Death

The Corporation may terminate the employment of the Executive, notwithstanding any other provision of this Agreement, upon compliance with the terms of Section 12(b) hereof.

## 12. SEVERANCE PAYMENTS

- a. Upon termination of the Executive's employment for Just Cause, the Executive shall not be entitled to any severance or other payment other than Annual Base Salary earned by the Executive before the Date of Termination calculated pro rata up to and including the Date of Termination and all outstanding and accrued vacation pay to the Date of Termination. Upon termination of the Executive's employment: (i) for death; or (ii) by the voluntary termination of the employment of the Executive by the Executive pursuant to Section 11(c) hereof, the Executive shall not be entitled to any severance or other payment other than Annual Base Salary and any Performance Bonus earned by the Executive before the Date of Termination calculated pro rata up to and including the Date of Termination (which under Section 11(c) shall be as defined therein) and all outstanding and accrued vacation pay to the Date of Termination.

Notwithstanding anything to the contrary in Section 12(b) below, the Executive shall not be entitled to any Performance Bonus earned by the Executive before the Date of Termination unless the Executive gives the Corporation the advanced written notice required by Section 11(c) hereof.

- b. If the Executive's employment is terminated by the Corporation for any other reason other than the reasons set forth in Section 12(a), the Executive shall be entitled to receive, for the number of months of severance payments set forth in the chart on Exhibit 1, all of the health and dental benefits (other than disability benefits, accidental death and dismemberment benefits and life insurance benefits) that he received from the Corporation immediately prior to the termination, PLUS:
- (i) All outstanding base salary earned before the Date of Termination, less any amounts that the Executive received in connection with benefits paid or payable as a result of Disability if applicable;
  - (ii) Any Performance Bonus which has been earned by the Executive before the Date of Termination calculated on a pro rata basis based on the number of months in the current bonus period up to and including the Date of Termination ((pro rata Performance Bonus = annual Performance Bonus target / 12) x the number of months in the then-current bonus period up to and including the Date of Termination);
  - (iii) Additional payments based on the Executive's length of service with the Company, calculated as Executive's monthly base salary for the number of months set forth in the chart on Exhibit 1, less any amounts received by and/or payable to Executive in connection with benefits paid or payable as a result of the

Disability if applicable (for purposes of this section 12.b.(iii), and section 12.b.(iv) below, Executive's service start date is **July 1, 1992**);

- (iv) An amount equal to 1/12 of the Performance Bonus payments earned by Executive during the bonus year preceding the current bonus year times the number of months referred to in the chart on Exhibit 1, based on Executive's length of service with the Company; and
- (v) All outstanding and accrued vacation pay.

If, at the Date of Termination, there were any memberships in any clubs, social or athletic organizations paid for by the Corporation pursuant to Schedule A hereof at the Date of Termination, the Corporation will not take any action to terminate such memberships but will not renew any such membership that expires or reimburse the Executive for any further payments thereunder.

Any amounts due hereunder on account of severance in 12.b.(iii) and 12.b.(iv) above shall be paid by the Corporation to the Executive on a monthly basis commencing 30 days following the Date of Termination and not in a lump sum.

- c. Except as expressly stipulated in Sections 11(c) or 14 hereof or in this Section 12(c), any options which have not vested as of the Date of Termination (being in the case where the Corporation gives notice, the date specified by the Corporation as the date on which the Executive's employment will terminate) shall terminate and be of no further force and effect as of the Date of Termination and neither any period of notice nor any payment in lieu thereof upon termination of employment hereunder shall be considered as extending the period of employment for the purposes of vesting of options notwithstanding anything to the contrary in any other agreement between the Corporation and the Executive. Notwithstanding anything contained in this Section 12, in the event of termination by the Corporation other than for Just Cause, the Executive shall have the right to exercise any options which are vested as at the Date of Termination for the 90 Day Period (as defined in Section 11(c)). Any unvested options which would have otherwise vested during such 90 Day Period shall continue to vest during that period and to the extent any unvested options have vested during such 90 Day Period, the Executive shall also be entitled to exercise those options within a rolling 90 day period after the date of vesting of such options, which period will not exceed 180 days following the Date of Termination. In addition, notwithstanding anything contained in this Section 12 or elsewhere in this Agreement, in the event of termination due to death of



the Executive, the estate of the Executive shall be entitled, at any time during the period which is 12 months following the date of death of the Executive (the "12 Month Period"), to exercise any options which have vested as at the date of death of the Executive. In addition, any unvested options which would have otherwise vested during such 12 Month Period shall continue to vest during that period and to the extent of any unvested options have vested during such period, the Executive's estate shall be entitled to exercise those options within a period which starts on the day of vesting and ends 12 months from the date of death of the Executive.

For purposes of greater certainty, if the Executive is terminated for Just Cause, Death or if the Executive's employment hereunder is terminated by the Executive pursuant to Section 11(c) then no payment whatsoever shall be made to the Executive under Section 12 (b).

### **13. NO FURTHER ENTITLEMENTS**

Except as expressly provided in Sections 11 and 12 above and Section 14 below, where the Executive's employment has been terminated by the Executive or terminated or deemed to have been terminated by the Corporation for any reason, the Executive will not be entitled to receive any further payments, in lieu of notice or as damages for any reason whatsoever. Except as to any entitlement as expressly provided in this Agreement, the Executive hereby waives any claims the Executive may have against the Corporation for or in respect of termination pay, severance pay, or on account of loss of office or employment or notice in lieu thereof, or any other cause, including human rights legislation.

### **14. OPTION ACCELERATION AND SEVERANCE PAYMENTS ON CHANGE OF CONTROL**

#### **a. Termination by the Corporation**

If the Executive's employment is terminated by the Corporation upon the giving of written notice of such termination to the Executive at any time within the 6 month period following a Change of Control (other than for Just Cause, Disability or Death), then the Executive shall be entitled to the following:

- i. such payments on account of severance as provided for under Section 12(b) of this Agreement; and
- ii. notwithstanding anything to the contrary in Section 12 hereof or in this Agreement, all options granted by the Corporation to the Executive shall, following the giving of any notice by the Corporation under this Section 14(a), be deemed to vest immediately and shall be exercisable by the Executive for a period of 90 days following the giving of such notice by the Corporation hereunder.

**b. Termination by Executive**

If the Executive's employment is terminated by the Executive upon the giving of written notice of such termination to the Corporation within the 6 month period following a Change of Control, and within 60 days following the occurrence of a Parachute Event, which shall be described in detail by the Executive in the written notice of termination given to the Corporation, the Executive shall be entitled to the following:

- i. such payments on account of severance as provided for under Section 12(b) of this Agreement;
- ii. notwithstanding anything to the contrary in Section 12 hereof or in this Agreement, all options granted by the Corporation to the Executive shall, following the giving of proper notice by the Executive, under this Section 14(b), be deemed to vest immediately and shall be exercisable by the Executive for a period of 90 days following the giving of such notice.

**15. DISCLOSURE**

During the employment period, the Executive shall promptly disclose to the CEO full information concerning any interest, direct or indirect, of the Executive (as owner, shareholder, partner, lender or other investor, director, officer, employee, consultant or otherwise) or any member of his family in any business that is reasonably known to the Executive to purchase or otherwise obtain services or products from, or to sell or otherwise provide services or products to the Corporation or to any of its suppliers or customers.

**16. NON-COMPETITION/NON-SOLICITATION/PROPRIETARY RIGHTS AGREEMENT**

The Executive agrees to execute contemporaneously with his execution of this Agreement the confidentiality, non-solicitation, non-competition and inventions/proprietary rights agreement in substantially the form annexed hereto as Schedule "B".

## **17. RETURN OF MATERIALS**

All files, forms, brochures, books, materials, written correspondence, memoranda, documents, manuals, computer disks, software products and lists (including lists of customers, suppliers, products and prices) pertaining to the business of the Corporation or any of its subsidiaries and associates that may come into the possession or control of the Executive shall at all times remain the property of the Corporation or such Subsidiary or Associate, as the case may be. On termination of the Executive's employment for any reason, the Executive agrees to deliver promptly to the Corporation all such property of the Corporation in the possession of the Executive or directly or indirectly under the control of the Executive. The Executive agrees not to make for his personal or business use or that of any other party, reproductions or copies of any such property or other property of the Corporation.

## **18. GOVERNING LAW**

This agreement shall be governed by and construed in accordance with the laws of the Province of Ontario.

## **19. SEVERABILITY**

If any provision of this agreement, including the breadth or scope of such provision, shall be held by any court of competent jurisdiction to be invalid or unenforceable, in whole or in part, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining provisions, or part thereof, of this agreement and such remaining provisions, or part thereof, shall remain enforceable and binding.

## **20. ENFORCEABILITY**

The Executive hereby confirms and agrees that the covenants and restrictions pertaining to the Executive contained in this Agreement, are reasonable and valid and hereby further acknowledges and agrees that the Corporation would suffer irreparable injury in the event of any breach by the Executive of his obligations under any such covenant or restriction. Accordingly, the Executive hereby acknowledges and agrees that damages would be an inadequate remedy at law in connection with any such breach and that the Corporation shall therefore be entitled in lieu of any action for damages, temporary and permanent injunctive relief enjoining and restraining the Executive from any such breach.

## **21. NO ASSIGNMENT**

The Executive may not assign, pledge or encumber the Executive's interest in this agreement nor assign any of the rights or duties of the Executive under this agreement without the prior written consent of the Corporation.

## **22. SUCCESSORS**

This agreement shall be binding on and enure to the benefit of the successors and assigns of the Corporation and the heirs, executors, personal legal representatives and permitted assigns of the Executive.

## **23. NOTICES**

Any notice or other communication required or permitted to be given hereunder shall be in writing and either delivered by hand or mailed by prepaid registered mail. At any time other than during a general discontinuance of postal service due to strike, lock-out or otherwise, a notice so mailed shall be deemed to have been received three business days after the postmarked date thereof or, if delivered by hand, shall be deemed to have been received at the time it is delivered. If there is a general discontinuance of postal service due to strike, lock-out or otherwise, a notice sent by prepaid registered mail shall be deemed to have been received three business days after the resumption of postal service. Notices shall be addressed as follows:

- i. If to the Corporation:  
275 Frank Tompa Drive  
Waterloo, Ontario  
Canada N2L 0A1
- ii. If to the Executive:  
Kirk Roberts  
18 Gladstone Avenue  
Guelph, Ontario  
Canada N1E 1L6

## **24. LEGAL ADVICE**

The Executive hereby represents and warrants to the Corporation and acknowledges and agrees that he had the opportunity to seek and was not prevented nor discouraged by the Corporation from seeking independent legal advice prior to the execution and delivery of this agreement and that, in the event that he did not avail himself of that opportunity prior to signing this agreement, he did so voluntarily without any undue pressure and agrees that his failure to obtain independent legal advice shall not be used by him as a defence to the enforcement of his obligations under this agreement.

## **25. RESIGNATION OF DIRECTORSHIPS, ETC.**

The Executive agrees that after termination of his/her employment, he/she will, at the request of the CEO, tender his/her resignation from any position he/she may hold as an officer or director of the Corporation or any of its Affiliated or Associated companies, and the Executive further covenants and agrees, if so requested by the CEO, not to stand for re-election to any office of the Corporation or any of its Affiliated or Associated companies at any time following termination of the Executive's employment hereunder.

## **26. NO DEROGATION**

Nothing herein derogates from any rights the Executive may have under applicable law, except as set out in this section. The parties agree that the rights, entitlements and benefits set out in this Agreement to be paid to the Executive are in full satisfaction of any rights or entitlements the Executive may have as against subsidiaries of the Corporation as a result of the termination of his employment with such subsidiaries.

## **27. CURRENCY**

All dollars referenced herein are in Canadian dollars unless expressly provided to the contrary.

## **28. NON-DISPARAGEMENT**

The Executive covenants and agrees that he shall not engage in any pattern of conduct that involves the making or publishing of written or oral statements or remarks (including, without limitation, the repetition or distribution of derogatory rumours, allegations, negative reports or comments) which are disparaging, deleterious or damaging to the integrity, reputation or goodwill of the Corporation, its affiliates or its and their management.

## **29. PRIVACY**

The Executive acknowledges and agrees that the Corporation may collect, use and disclose his personal information for purposes relating to his employment with the Corporation. The purposes of such collection, use and disclosure include, but are not limited to:

- (a) ensuring that the Executive is paid for his services to the Corporation which includes disclosure to third party payroll providers;
- (b) administering and/or facilitating the provision of any benefits to which the Executive is or may become entitled to, including bonuses, medical, dental, disability and life insurance benefits, pension, group RRSP and/or stock options. This shall include the disclosure of the Executive's personal information to the Corporation's third party service providers and administrators;

(c) compliance by the Corporation with any regulatory reporting and withholding requirements relating to the Executive's employment;

(d) in the event of a sale or transfer of all or part of the shares or assets of the Corporation, disclosing to any potential acquiring organization the Executive's personal information solely for the purposes of determining the value of the Corporation and its assets and liabilities and to evaluate the Executive's position in the Corporation. If the Executive's personal information is disclosed to any potential acquiring organization, the Corporation will require the potential acquiring organization to agree to protect the privacy of the Executive's personal information in a manner that is consistent with any policy of the Corporation dealing with privacy that may be in effect from time to time and/or any applicable law that may be in effect from time to time;

(e) compliance by the Corporation of its obligations to report improper or illegal conduct by any of its directors, officers, employees or agents under any applicable securities, criminal or other law; and

(f) monitoring the Executive's access to the Corporation's electronic media services in order to ensure that the use of such services is in compliance with the Corporation's policies and procedures and is not in violation of any applicable laws.

If the Executive's specific consent to the collection, use or disclosure of his personal information is required in the future, the Executive hereby agrees to provide such consent, and if the Executive refuses to provide or withdraws his consent, the Executive acknowledges that his employment and/or his entitlement to certain employment benefits may be negatively affected.

### **30. ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, written or oral, among the parties relating to such subject matter, including any other employment agreement made between the Corporation and the Executive.

### **31. ARBITRATION**

If there is a disagreement or dispute between the parties with respect to this Agreement or the interpretation thereof, such disagreement or dispute will be referred to binding arbitration to be conducted by a single arbitrator, if Executive and the Corporation agree upon one, otherwise by three arbitrators appointed as hereinafter set out, pursuant to the provisions of the *Arbitrations Act* 1991 (Ontario) and any amendments thereto. A party who wishes to arbitrate shall give written notice of such intention to the other party (a "Notice of Intention"). The arbitrator shall be appointed by agreement by agreement of

Executive and the Corporation or, in default of agreement within ten (10) Business Days of service of the Notice of Intention, each of Executive and the Corporation shall within five (5) Business Days of the expiry of the aforesaid ten (10) Business Day period, select one arbitrator and notify the other of its selection, with the third arbitrator to be chosen by the first two named arbitrators within five (5) Business Days of the expiry of the aforesaid five (5) Business Day period. If one of the parties does not so notify the other of its selection within the prescribed time, then the arbitrator selected by the other party in accordance with the above procedure shall be the sole arbitrator. The arbitration shall be held in the City of Toronto. The procedure to be followed shall be as agreed by the parties or, in default of agreement, determined by the arbitrator(s), provided, however, that depositions or examinations for discovery will not be allowed but information may be exchanged by other means. The parties will use their best efforts to ensure that the arbitration hearing is conducted no later than sixty (60) days after the arbitrator is, or arbitrators are, selected. The final decision of the arbitrator or arbitrators or any two of the three arbitrators will be furnished to the parties in writing and will constitute a conclusive determination of the issue in question, binding upon the parties, without right of appeal. The fees and expenses of the arbitration shall be in the discretion of the arbitrator(s). Judgment upon the award may be entered in any court of competent jurisdiction.

### **32. NO CONFLICTING OBLIGATIONS**

The Executive represents and warrants that none of the negotiation, entering into or performance of this Agreement has resulted in or may result in a breach by the Executive of any agreement, duty or other obligation with or to any Person, including, without limitation, any agreement, duty or obligation not to compete with any Person or to keep confidential the confidential information of any Person, and there exists no agreement, duty or other obligation binding upon the Executive that conflicts with the Executive's obligations under this Agreement. The Executive agrees to indemnify and hold the Corporation, its officers, directors, employees, agents and consultants harmless against any and all claims, liabilities, damages or costs incurred by any of them by reason of an alleged violation by the Executive of the representations contained in this Section.

**IN WITNESS WHEREOF** the parties hereto have executed this agreement as of the date first above written.

#### **OPEN TEXT CORPORATION**

Per: \_\_\_\_\_

Authorized Signing Officer

#### **SIGNED, SEALED AND DELIVERED**

in the presence of:

)  
)  
)

\_\_\_\_\_  
**KIRK ROBERTS**



## **SCHEDULE “A”**

### **Remuneration – Benefits**

**Schedule “A”** to the Employment Agreement made as of the 30 day of June, 2006, by and between Open Text Corporation (the “Corporation”) and **KIRK ROBERTS** (the “Executive”).

Benefits to be enjoyed by the Executive during the term of this Agreement shall include:

- (i) reimbursement of reasonable cell phone expenses consistent with corporate policy;
- (ii) each fiscal year you will be entitled to a \$5,500 CDN perquisite allowance which may be used for reimbursement of the following types of services or fees:
  - Financial planning
  - Tax planning
  - Estate planning
  - Athletic/Health Club
- (iii) the services of Medisys Health Group Inc. have been retained to provide mandatory and regular Health Examinations to our senior executive team.

**SCHEDULE “B”**  
**CONFIDENTIALITY, NON-SOLICITATION AND NON-COMPETITION**  
**AGREEMENT**

See attached.

## Exhibit 1

### *Length of Service vs. Severance Payment*

Column "A"	Column "B"
Length of Service	Severance Payments
Less than 10 years	6 months
Greater than or equal to 10 years	12 months*

\* In the event that the severance period required by applicable Canadian statutory law, at the time that the Executive's employment is terminated (the "Statutory Severance Period"), exceeds the months indicated in Column "B" above for the applicable years of service for the Executive as stated in Column "A", then the months in Column "B" in the chart shall be increased to equal the Statutory Severance Period.

**EMPLOYMENT AGREEMENT**

THIS AGREEMENT made as of the 30th day of June, 2006  
(the “**Effective Date**”)

AMONG

**OPEN TEXT, INC.**

a corporation incorporated under the laws of  
the State of Illinois (hereinafter referred to as  
the “Corporation”)

OF THE FIRST PART

- and -

**TONY K. PRESTON,**

a resident of the State of Illinois,  
(hereinafter referred to as the “Executive”)

OF THE SECOND PART

WHEREAS the Corporation is a wholly-owned subsidiary of Open Text Corporation, a corporation amalgamated under the laws of Ontario, Canada (hereinafter “**Open Text Corporation**”);

WHEREAS the Executive has agreed to enter into and deliver this Agreement in consideration of receiving certain additional benefits and other additional compensation as provided for pursuant to the terms of this Agreement;

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the parties agree as follows:

**1. DEFINITIONS**

For the purposes of this Agreement, the following terms shall have the following meanings, respectively:

- a. “**Affiliate**” means, with respect to any Person, any other Person that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the Person specified. For the purposes of this definition and Agreement, the term “**Control**” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise;

- b. **“Agreement”** means this Employment Agreement as may be amended or supplemented from time to time, including any and all schedules annexed hereto;
- c. **“Annual Base Salary”** has the meaning ascribed to that term in Section 6(a) hereof;
- d. **“Board of Directors”** means the board of directors of Open Text Corporation as may be constituted from time to time, and **“Directors”** means the directors of Open Text Corporation;
- e. **“Change of Control”** means either of the following events:
  - i. the sale of all or substantially all of the assets of Open Text Corporation; or
  - ii. any transaction whereby any person, together with Affiliates and Associates of such person, or any group of persons acting in concert (collectively, “Acquiror” or “Acquirors”), acquires beneficial ownership of more than 50% of the issued common shares of Open Text Corporation on a fully diluted basis, or any transaction as a result of which beneficial ownership of common shares constituting more than 50% in the aggregate of the issued common shares of Open Text Corporation on a fully diluted basis cease to be held by persons who are shareholders of Open Text Corporation as at the date hereof or by Affiliates or Associates of such present shareholders;

(for the purposes of this definition and this Agreement, the terms **“Associate,” “group,”** and **“beneficial ownership”** shall have the meanings ascribed thereto under Rule 14a-1(a) of the General Rules of the Exchange Act, Section 14(d)(2) of the Exchange Act, and Rule 13d-3 of the General Rules of the Exchange Act, respectively);

- f. **“Compensation Committee”** means the compensation committee of the Board of Directors of Open Text Corporation as may be constituted from time to time;

- g. **“Date of Termination”** shall mean the date of termination of the Executive’s employment, whether by death of the Executive, by the Executive or by the Corporation pursuant to the terms of this Agreement;
- h. **“Disability”** has the meaning ascribed to that term in Section 12(b) hereof;
- i. **“Exchange Act”** means the *Securities Exchange Act* of 1934, as amended from time to time;
- j. **“Incumbent Director”** shall mean any member of the Board of Directors who was a member of the Board of Directors immediately prior to a Change of Control and any successor to an Incumbent Director who was recommended or appointed to succeed any Incumbent Director by the affirmative vote of the Directors when that affirmative vote includes the affirmative vote of a majority of the Incumbent Directors then on the Board of Directors;
- k. **“Just Cause”** shall mean:
  - i. the failure by the Executive to perform his duties according to the terms of his employment or in a manner satisfactory to the Board of Directors (other than those (A) that follow a demotion in his position or duties or (B) resulting from the Executive’s Disability) after the Corporation has given the Executive reasonable notice of such failure and a reasonable opportunity to correct it;
  - ii. the engaging by the Executive in any act that is materially injurious to the Corporation, monetarily or otherwise, but not including, following a Change of Control, the expression of opinions contrary to those directors of the Corporation who are not Incumbent Directors or those of the Acquirors;
  - iii. the engaging by the Executive in any illegal conduct or any act of dishonesty resulting or intended to result directly or indirectly in personal gain of the Executive at the Corporation’s expense, including the failure by the Executive to honor his fiduciary duties to the Corporation and his duty to act in the best interests of the Corporation;
  - iv. the failure by the Executive to comply with the provisions of Section 12(d) where the Executive elects to terminate his employment with the Corporation unless notice of such termination of employment is properly given in accordance with the terms of Section 15(b) hereof;

- v. the failure of the Executive to abide by the terms of any resolution passed by the Board of Directors; or
  - vi. the failure by the Executive to abide by the policies, procedures and codes of conduct of Open Text Corporation and the Corporation.
- l. **“Person”** or **“persons”** includes an individual, sole proprietorship, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate, and a natural person in his capacity as trustee, executor, administrator or other legal representative;
- m. **“Parachute Event”** means the occurrence of the following without the Executive’s written consent (except in connection with the termination of the employment of the Executive for Just Cause or Disability or termination of the Executive’s employment because of the death of the Executive):
- i. a material change (other than those that are consistent with a promotion) in the Executive’s position or duties, responsibilities, title or office in effect immediately prior to the Change of Control (except for a change in any position or duties as a director of the Corporation), which includes any removal of the Executive from or any failure to re-elect or re-appoint the Executive to any such positions or offices.
  - ii. a material reduction by the Corporation or any of its subsidiaries of the Executive’s salary, benefits or any other form of remuneration payable by the Corporation or its subsidiaries; or
  - iii. any material failure by the Corporation or its subsidiaries to provide any benefit, bonus, profit sharing, incentive, remuneration or compensation plan, stock ownership or purchase plan, pension plan or retirement plan in which the Executive is participating or entitled to participate immediately prior to a Change of Control, or the Corporation or its subsidiaries taking any action or failing to take any action that would materially adversely affect the Executive’s participation in or materially reduce his rights or benefits under or pursuant to any such plan;
  - iv. any other material breach by the Corporation of this Agreement;
- n. **“Voluntary Termination”** means the termination of the Executive’s employment with the Corporation by the Executive at his discretion in accordance with the provisions of Section 12(d) of this Agreement.

## 2. INTENTIONALLY DELETED

### 3. TERM

The initial term of this Agreement shall be one (1) year commencing on the Effective Date of this Agreement (“**Initial Term**”), subject to earlier termination as provided for in this Agreement. At the end of the Initial Term and each subsequent year thereafter, this Agreement shall be deemed to be extended automatically for an additional one-year term on the same terms and conditions unless either party gives contrary written notice to the other party no less than three (3) months prior to the date on which this Agreement would otherwise be extended.

### 4. DUTIES

The Executive is engaged and agrees to perform services for and on behalf of the Corporation as its **Senior Vice President, Global Human Resources** or in such other capacity to which the Executive may be assigned by the Corporation from time to time. The Executive shall perform such duties and exercise such powers pertaining to the management and operation of the Corporation and any subsidiaries and Affiliates of the Corporation as may be determined from time to time by the Chief Executive Officer (“**CEO**”) and the Reporting Manager (as defined below) consistent with the office of the Executive. The Executive shall:

- a. devote his full time, attention, and best efforts to the business, affairs, and goodwill of the Corporation;
- b. perform those duties that may be assigned to the Executive diligently and faithfully to the best of the Executive’s abilities and in the best interests of the Corporation; and
- c. use his best efforts to promote the interest and goodwill of the Corporation.

### 5. REPORTING PROCEDURES

The Executive shall report to the Chief Executive Officer. The Executive shall report fully on the management, operations, and business affairs of the Corporation and advise to the best of his ability and in accordance with business standards on business matters that may arise from time to time during the term of this Agreement.

### 6. REMUNERATION AND BENEFITS

- a. The Corporation shall pay to the Executive as compensation for his services provided hereunder an annual base salary (“**Annual Base Salary**”) for each year of the term of this Agreement, which shall be determined by the Reporting Manager and the CEO (and the Compensation Committee, as may



be required) and set out in a separate document, subject to the provisions of Section 8, and which shall be exclusive of bonuses, benefits and other compensation as provided for herein. The Annual Base Salary shall be payable in accordance with the Corporation's regular payroll practices for senior executives or in such other manner as may be mutually agreed upon, less, in any case, all applicable deductions or withholdings as required by law. As of the date of this Agreement, the Annual Base Salary is **USD \$215,000.00**.

- b. The Corporation shall provide the Executive with employee benefits comparable to those provided by the Corporation from time to time to other senior executives of the Corporation. Benefits to be enjoyed by the Executive during the term of this Agreement shall include, but not be limited to, those benefits set forth in Schedule "A", as amended from time to time, and shall include reimbursement of any properly incurred expenses as provided for in Section 11 hereof.

## **7. ANNUAL PERFORMANCE BONUS**

In addition to the Executive's Annual Base Salary, the Executive may be awarded an additional bonus (the "**Performance Bonus**"), which shall be based upon performance goals approved by the CEO (and the Compensation Committee, as may be required) from time to time and set forth in a separate document. Any changes respecting the amount or other terms of the Performance Bonus payable to the Executive must be approved by the CEO (and if required, the Board of Directors). As of the date of this Agreement, the Performance Bonus target is **USD \$50,000**.

## **8. SALARY AND/OR BONUS ADJUSTMENTS**

Other than as herein provided, there shall be no cost-of-living increase or merit increase in the Annual Base Salary or increases in any bonuses payable to the Executive unless approved by the CEO. The CEO shall review annually the Annual Base Salary and all other compensation to be received by the Executive under this Agreement.

## **9. OPTIONS**

The Corporation shall permit the Executive to participate in any share option plan, share purchase plan, retirement plan or similar plan offered by the Corporation from time to time to its senior executives in the manner and to the extent authorized by the Compensation Committee. The Compensation Committee may, in its absolute discretion, grant additional options, subject to approval by the Board of Directors, and it may review the advisability of additional option grants for the Executive.

## **10. VACATION**

The Executive shall be entitled to twenty (20) days paid vacation per fiscal year of the Corporation at a time approved in advance by the CEO, which approval shall not be unreasonably withheld but shall take into account the staffing requirements of the Corporation and the need for the timely performance of the Executive's responsibilities. Any vacation entitlement hereunder shall be subject to the Corporation's policy respecting same in effect from time to time.

## **11. EXPENSES**

Subject to the terms of this section, the Executive shall be reimbursed for all reasonable travel and other out-of-pocket expenses actually and properly incurred by the Executive from time to time in connection with carrying out his duties hereunder. Determination of whether expenses are reasonable or not shall be made by the CEO. For all such expenses the Executive shall furnish to the Corporation originals of all invoices or statements in respect of which the Executive seeks reimbursement.

## **12. TERMINATION**

### **a. For Just Cause**

The Corporation may immediately terminate the employment of the Executive for Just Cause without notice or any payment in lieu of notice, and for purposes of greater certainty, the Corporation shall have no obligation to make any payments to the Executive on account of severance or bonuses or partial bonuses or any other amounts except as expressly stipulated in Section 13(a) hereof.

### **b. For Disability**

- i. This Agreement may be immediately terminated by the Corporation by notice to the Executive if the Executive is determined to suffer from disability (hereinafter referred to as "Disability"). The Executive shall be deemed to suffer from Disability if in any year during the employment period, because of ill health, physical or mental disability, or for other causes beyond the control of the Executive, the Executive has been continuously unable or unwilling or has failed to perform the Executive's duties for 120 consecutive days, or if, during any year of the employment period, the Executive has been unable or unwilling or has failed to perform his duties for a total of 180 days, consecutive or not. The CEO, acting reasonably (subject to Section 33 below), shall finally determine if the Executive is suffering from ill health, physical or mental disability or other causes beyond his control during the time periods as hereinbefore set forth in the event of any dispute between the Executive and the Corporation concerning the occurrence of Disability for purposes of this Section.

- ii. Notwithstanding any short term or long term corporate benefits or insurance policies relating to disability maintained by the Corporation at the relevant time, if during any period of ill health, physical or mental disability or for other causes beyond the control of the Executive, the Executive has been continuously unable or unwilling or has failed to perform the Executive's duties less than 120 consecutive days (the "Short-Term Illness"), the Executive shall continue to receive all amounts of remuneration and benefits otherwise payable to and enjoyed by the Executive under this Agreement less any and all amounts received by and/or payable to the Executive in connection with benefits paid and/or payable as a result of such Short-Term Illness.
- iii. Upon termination of this Agreement as a result of Disability, the Corporation shall pay to the Executive the severance payment provided for in Subsection 13(b) hereof less any and all amounts received by and/or payable to the Executive in connection with benefits paid and/or payable as a result of the Disability.
- iv. The term "any year of the employment period" means any period of 12 consecutive months during the employment period.

**c. For Death**

This Agreement shall terminate immediately, without notice or any payment in lieu thereof, upon the death of the Executive.

**d. Voluntary Termination by Executive**

If the Executive is desirous of voluntarily terminating his employment with the Corporation at any time during the Agreement or in accordance with the terms for non-renewal under Section 3 hereof, the Executive agrees to give the Corporation 3 months advance written notice of such termination and further agrees that he shall not be entitled to any payment on account of severance under Section 13(b) hereof. The Reporting Manager or the CEO may waive such notice in writing after consulting with the Board of Directors, in their sole and absolute discretion, in which case the Executive's employment shall be deemed to terminate immediately, provided the Executive shall still be entitled to compensation due on account of Annual Base Salary and benefits earned up to the last date of the 3 month advance written notice period given by the Executive and any Performance Bonus earned and prorated during such 3 month notice period. Provided that the Executive gives the 3 month notice as required hereunder, any unvested options which would have otherwise vested during such advance written notice period shall be permitted to continue to

vest during such period. The Executive shall have the right to exercise any options which are vested as at the Date of Termination for the period which is 90 days following such Date of Termination (the "90 Day Period"). For purposes of this Section 12(d), the term "Date of Termination" shall mean the actual day on which the Executive ceases to be employed plus the remainder of the 3 month notice period if and to the extent waived by the Reporting Manager or the CEO in consultation with the Board of Directors. Any termination properly given under Section 15(b) hereof and in accordance with the terms thereof shall not be considered a voluntary termination under this Section 12(d).

**e. Termination by Corporation Other than For Just Cause, Disability or Death**

The Corporation may terminate the employment of the Executive for any reason other than Just Cause, Disability or death of the Executive, notwithstanding any other provision of this Agreement, upon compliance with the terms of Section 13(b) hereof. In the event of non-renewal of this Agreement by the Corporation in accordance with Section 3 hereof, the Corporation shall comply with the terms of Section 13(b) hereof.

**13. SEVERANCE PAYMENTS**

- a. Upon termination of the Executive's employment for Just Cause, the Executive shall not be entitled to any severance or other payment other than Annual Base Salary earned by the Executive before the Date of Termination calculated pro rata up to and including the Date of Termination and all outstanding and accrued vacation pay to the Date of Termination. Upon termination of the Executive's employment: (i) for death; or (ii) by the voluntary termination of employment by the Executive pursuant to Section 12(d) hereof, the Executive shall not be entitled to any severance or other payment other than Annual Base Salary and any Performance Bonus earned by the Executive before the Date of Termination calculated pro rata up to and including the Date of Termination (which under Section 12(d) shall be as defined therein) and all outstanding and accrued vacation pay to the Date of Termination.

Notwithstanding the foregoing, the Executive shall not be entitled to any Performance Bonus earned by the Executive before the Date of Termination unless the Executive gives the Corporation the advanced written notice required by Section 12(d) hereof.

- b. If the Executive's employment is terminated by the Corporation for any other reason other than the reasons set forth in Section 12(a) the Executive shall be entitled to an amount equal to the total of:
- (i) All outstanding base salary earned before the Date of Termination, less any amounts that the Executive received in connection with benefits paid or payable as a result of Disability if applicable;

- (ii) Any Performance Bonus which has been earned by the Executive before the Date of Termination calculated on a pro rata basis based on the number of months in the current bonus period up to and including the Date of Termination ((pro rata Performance Bonus = annual Performance Bonus target / 12) x the number of months in the then-current bonus period up to and including the Date of Termination);
- (iii) Additional payments based on the Executive's length of service with the Company, calculated as Executive's monthly base salary for the number of months set forth in the chart on Exhibit 1, less any amounts received by and/or payable to Executive in connection with benefits paid or payable as a result of the Disability if applicable (for purposes of this section 12.b.(iii), Executive's service start date is **October 1, 2005**);
- (iv) An amount equal to 1/12 of the Performance Bonus payments earned by Executive during the bonus year preceding the current bonus year times the number of months referred to in the chart on Exhibit 1, based on Executive's length of service with the Company.
- (v) All outstanding and accrued vacation pay;
- (vi) All properly incurred and reasonable business expenses owing to Executive as of the Date of Termination; and
- (vii) Executive's benefits provided for in Section 6(b) shall continue only through the Date of Termination. If Executive elects to continue his health and dental insurance coverage pursuant to COBRA, reimbursement for the COBRA premiums for Executive and his dependents for the number of months corresponding to the months of Executive's severance payments as set forth in the chart on Exhibit 1.

Any amounts due under Sections 3(c)(iii), 3(c)(iv) and 3(c)(vii) hereunder shall be paid by the Company to Executive on a monthly basis commencing 30 days following the Date of Termination and not in a lump sum. All salary, Performance Bonus, vacation and severance payments and COBRA reimbursements will be subject to applicable state and federal taxes and FICA withholding.

- c. Except as expressly stipulated in Sections 12(d) or 15 hereof or in this Section 13(c), any options which have not vested as of the Date of Termination (being in the case where the Corporation gives notice, the date specified by the Corporation as the date on which the Executive's employment will terminate) shall terminate and be of no further force and effect as of the Date of Termination and neither any period of notice nor any payment in lieu thereof upon termination of employment hereunder shall be considered as extending the period of employment for the purposes of vesting of options notwithstanding anything to the contrary in any other agreement between the Corporation and the Executive. Notwithstanding anything contained in this Section 13, in the event of termination by the Corporation other than for Just Cause, the Executive shall have the right to exercise any options which are vested as at the Date of Termination for the 90 Day Period as defined in Section 12(d). Any unvested options which would have otherwise vested during such 90 Day Period shall continue to vest during that period and to the extent any unvested options have vested during such 90 Day Period, the Executive shall also be entitled to exercise those options within a rolling 90 day period after the date of vesting of such options, which period will not exceed 180 days following the Date of Termination. In addition, notwithstanding anything contained in this Section 13 or elsewhere in this Agreement, in the event of termination due to death of the Executive, the estate of the Executive shall be entitled, at any time during the period which is 12 months following the date of death of the Executive (the "12 Month Period"), to exercise any options which have vested as at the date of death of the Executive. In addition, any unvested options which would have otherwise vested during such 12 Month Period shall continue to vest during that period and to the extent of any unvested options have vested during such period, the Executive's estate shall be entitled to exercise those options within a period which starts on the day of vesting and ends 12 months from the date of death of the Executive.

For purposes of greater certainty, if the Executive is terminated for Just Cause, Death or if the Executive's employment hereunder is terminated by the Executive pursuant to Section 12(d) then no payment whatsoever shall be made to the Executive under Sections 13(b).

#### **14. NO FURTHER ENTITLEMENTS**

Except as expressly provided in Sections 12 and 13 above and Section 15 below, where the Executive's employment has been terminated by the Executive or terminated or deemed to have been terminated by the Corporation for any reason, the Executive will not be entitled to receive any further payments, in lieu of notice or as damages for any reason whatsoever. Except as to any entitlement as expressly provided in this Agreement, the Executive hereby waives any claims the Executive may have against the Corporation for or in

respect of termination pay, severance pay, or on account of loss of office or employment or notice in lieu thereof.

## **15. OPTION ACCELERATION AND SEVERANCE PAYMENTS ON CHANGE OF CONTROL**

### **a. Termination by the Corporation**

If the Executive's employment is terminated by the Corporation upon the giving of written notice of such termination to the Executive at any time within the 6 month period following a Change of Control (other than for Just Cause, Disability or Death), then the Executive shall be entitled to the following:

- i. such payments on account of severance as provided for under Section 13(b) of this Agreement; and
- ii. notwithstanding anything to the contrary in Section 13 hereof or in this Agreement, all options granted by the Corporation to the Executive shall, following the giving of any notice by the Corporation under this Section 15(a), be deemed to vest immediately and shall be exercisable by the Executive for a period of 90 days following the giving of such notice by the Corporation hereunder.

### **b. Termination by Executive**

If the Executive's employment is terminated by the Executive upon the giving of written notice of such termination to the Corporation within the 6 month period following a Change of Control, and within 60 days following the occurrence of a Parachute Event, which shall be described in detail by the Executive in the written notice of termination given to the Corporation, the Executive shall be entitled to the following:

- i. such payments on account of severance as provided for under Section 13(b) of this Agreement;
- ii. notwithstanding anything to the contrary in Section 13 hereof or in this Agreement, all options granted by the Corporation to the Executive shall, following the giving of proper notice by the Executive, under this Section 15(b), be deemed to vest immediately and shall be exercisable by the Executive for a period of 90 days following the giving of such notice.

## **16. DISCLOSURE**

During the employment period, the Executive shall promptly disclose to the Reporting Manager full information concerning any interest, direct or indirect, of the Executive (as owner, shareholder, partner, lender or other investor, director, officer, employee, consultant or otherwise) or any member of his family in any business that is reasonably known to the Executive to purchase or otherwise obtain services or products from, or to sell or otherwise provide services or products to, the Corporation or to any of its suppliers or customers.

## **17. NON-COMPETITION/NON-SOLICITATION/PROPRIETARY RIGHTS AGREEMENT**

The Executive agrees to execute contemporaneously with his execution of this Agreement the confidentiality, non-solicitation, non-competition and inventions/proprietary rights agreement in substantially the form annexed hereto as Schedule "B".

## **18. RETURN OF MATERIALS**

All files, forms, brochures, books, materials, written correspondence, memoranda, documents, manuals, computer disks, software products and lists (including lists of customers, suppliers, products and prices) pertaining to the business of the Corporation or any of its subsidiaries, Affiliates, and Associates that may come into the possession or control of the Executive shall at all times remain the property of the Corporation or such subsidiary, Affiliate or Associate, as the case may be. On termination of the Executive's employment for any reason, the Executive agrees to deliver promptly to the Corporation all such property of the Corporation in the possession of the Executive or directly or indirectly under the control of the Executive. The Executive agrees not to make for his personal or business use or that of any other party, reproductions or copies of any such property or other property of the Corporation.

## **19. GOVERNING LAW**

This agreement shall be governed by and construed in accordance with the laws of the State of Illinois.



## **20. SEVERABILITY**

If any provision of this Agreement, including the breadth or scope of such provision, shall be held by any court of competent jurisdiction to be invalid or unenforceable, in whole or in part, including the Schedules attached hereto and incorporated by reference, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining provisions, or part thereof, of this Agreement and such remaining provisions, or part thereof, shall remain enforceable and binding.

## **21. ENFORCEABILITY**

The Executive hereby confirms and agrees that the covenants and restrictions pertaining to the Executive contained in this Agreement, are reasonable and valid and hereby further acknowledges and agrees that the Corporation would suffer irreparable injury in the event of any breach by the Executive of his obligations under any such covenant or restriction. Accordingly, the Executive hereby acknowledges and agrees that damages would be an inadequate remedy at law in connection with any such breach and that the Corporation shall therefore be entitled in lieu of any action for damages, temporary and permanent injunctive relief enjoining and restraining the Executive from any such breach.

## **22. ASSIGNMENT OF AGREEMENT**

The Executive may not assign, pledge or encumber the Executive's interest in this agreement nor assign any of the rights or duties of the Executive under this agreement without the prior written consent of the Corporation. This Agreement may be freely assigned by the Corporation to a purchaser of all or substantially all of the assets of the Corporation, a subsidiary of the Corporation, a division of the Corporation or the Affiliates or Associates of the Corporation, as long as the purchaser/assignee expressly agrees in writing to assume the obligations of the Corporation under this Agreement.

## **23. SUCCESSORS**

This agreement shall be binding on and enure to the benefit of the successors and assigns of the Corporation and the heirs, executors, personal legal representatives and permitted assigns of the Executive.

## **24. NOTICES**

Any notice or other communication required or permitted to be given hereunder shall be in writing and either delivered by hand or mailed by prepaid registered mail. At any time other than during a general discontinuance of postal service due to strike, lock-out or otherwise, a notice so mailed shall be deemed to have been received three business days after the postmarked date thereof or, if delivered by hand, shall be deemed to have been received at the time it is delivered. If there is a general discontinuance of postal service due to strike, lock-out or otherwise, a notice sent by prepaid registered mail shall be deemed to have been

received three business days after the resumption of postal service. Notices shall be addressed as follows:

- i. If to the Corporation:  
c/o Open Text Corporation  
275 Frank Tompa Drive  
Waterloo, Ontario  
Canada N2L 0A1
- ii. If to the Executive:  
Tony K. Preston  
14637 Crystal Tree Drive  
Orland Park, IL 60462

## **25. LEGAL ADVICE**

The Executive hereby represents and warrants to the Corporation and acknowledges and agrees that he had the opportunity to seek and was not prevented nor discouraged by the Corporation from seeking independent legal advice prior to the execution and delivery of this agreement and that, in the event that he did not avail himself of that opportunity prior to signing this agreement, he did so voluntarily without any undue pressure and agrees that his failure to obtain independent legal advice shall not be used by him as a defense to the enforcement of his obligations under this agreement.

## **26. RESIGNATION OF DIRECTORSHIPS, ETC.**

The Executive agrees that after termination of his employment, he will, at the request of the CEO or the Reporting Manager, tender his resignation from any position he may hold as an officer or director of the Corporation or any of its subsidiaries, Affiliates or Associates, and the Executive further covenants and agrees, if so requested by the CEO or the Reporting Manager, not to stand for re-election to any office of the Corporation or any of its subsidiaries, Affiliates or Associates at any time following termination of the Executive's employment hereunder.

## **27. NO DEROGATION**

Nothing herein derogates from any rights the Executive may have under applicable law, except as set out in this section. The parties agree that the rights, entitlements and benefits set out in this Agreement to be paid to the Executive are in full satisfaction of any rights or entitlements the Executive may have as against the subsidiaries, Affiliates and Associates of the Corporation as a result of the termination of his employment with such subsidiaries, Affiliates or Associates.

## **28. CURRENCY**

All dollars referenced herein are in United States dollars unless expressly provided to the contrary.

## **29. WITHHOLDING**

The Corporation shall have the right to withhold from any and all payments required to be made to the Executive pursuant to this Agreement all federal, state, local, and/or other taxes which the Corporation determines are required to be withheld in accordance with applicable statutes or regulations.

## **30. NON-DISPARAGEMENT**

The Executive covenants and agrees that he shall not engage in any pattern of conduct that involves the making or publishing of written or oral statements or remarks (including, without limitation, the repetition or distribution of derogatory rumors, allegations, negative reports or comments) which are disparaging, deleterious or damaging to the integrity, reputation or goodwill of the Corporation, its subsidiaries, Affiliates or Associates or its and their management.

## **31. PRIVACY**

- a. The Executive acknowledges and agrees that the Corporation may collect, use and disclose his personal information for purposes relating to his employment with the Corporation. The purposes of such collection, use and disclosure include, but are not limited to:
  - i. ensuring that the Executive is paid for his services to the Corporation which includes disclosure to third party payroll providers;
  - ii. administering and/or facilitating the provision of any benefits to which the Executive is or may become entitled to, including bonuses, medical, dental, disability and life insurance benefits, pension, group RRSP and/or stock options. This shall include the disclosure of the Executive's personal information to the Corporation's third party service providers and administrators;

- iii. compliance by the Corporation with any regulatory reporting and withholding requirements relating to the Executive's employment;
  - iv. in the event of a sale or transfer of all or part of the shares or assets of the Corporation or its subsidiaries or Affiliates, disclosing to any potential acquiring organization the Executive's personal information solely for the purposes of determining the value of the Corporation and its assets and liabilities and to evaluate the Executive's position in the Corporation. If the Executive's personal information is disclosed to any potential acquiring organization, the Corporation will require the potential acquiring organization to agree to protect the privacy of the Executive's personal information in a manner that is consistent with any policy of the Corporation dealing with privacy that may be in effect from time to time and/or any applicable law that may be in effect from time to time;
  - v. compliance by the Corporation of its obligations to report improper or illegal conduct by any of its directors, officers, employees or agents under any applicable securities, criminal or other law; and
  - vi. monitoring the Executive's access to the Corporation's electronic media services in order to ensure that the use of such services is in compliance with the Corporation's policies and procedures and is not in violation of any applicable laws.
- b. If the Executive's specific consent to the collection, use or disclosure of his personal information is required in the future, the Executive hereby agrees to provide such consent, and if the Executive refuses to provide or withdraws his consent, the Executive acknowledges that his employment and/or his entitlement to certain employment benefits may be negatively affected.

### **32. ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, written or oral, among the parties relating to such subject matter, including any other employment agreement made between the Corporation and the Executive.

### **33. ARBITRATION**

With the exception of an action to enforce the restrictive covenants in Schedule B hereof, any dispute arising out of or relating to this Agreement shall be resolved by final and binding arbitration in accordance with the then-current rules of the American Arbitration

Association ("AAA"). The arbitration hearing shall be held in Chicago, Illinois, unless otherwise agreed to by the parties, before a panel of three arbitrators selected in accordance with the procedures established by the AAA. An action by the Corporation to enforce the restrictive covenants in Schedule B may be filed in a court of competent jurisdiction as provided in Schedule B.

The party who initiates the arbitration shall pay the filing fees. The Corporation shall bear the fees of the arbitrator and any costs of or assessed by the arbitrator. Each party shall bear the costs and expenses of its own counsel, technical advisors and expert witnesses, unless the decision of the arbitrator otherwise directs. The decision of the arbitrators shall be tendered within sixty (60) days of final submission of the parties in writing or any hearing before the arbitrators and shall include their individual votes. Either party may enforce the arbitration award in any court of competent jurisdiction or in the forum selected in Section 34 below. The parties understand and acknowledge that they are waiving their rights to a jury trial regarding any matters subject to arbitration under this Agreement.

Signature of Executive: \_\_\_\_\_

#### **34. FORUM SELECTION**

The parties hereby agree that all demands, claims, actions, causes of action, suits, proceedings and litigation between or among the parties or arising out of the employment relationship between the Executive and the Corporation not subject to the Arbitration provision in Section 33 hereof shall be filed, tried and litigated only in a federal or state court located in Chicago, Illinois. In connection with the foregoing, the parties hereto irrevocably consent to the jurisdiction and venue of such court and expressly waive any claims or defenses of lack of jurisdiction of or proper venue by such court.

#### **35. NO CONFLICTING OBLIGATIONS**

The Executive represents and warrants that none of the negotiation, entering into or performance of this Agreement has resulted in or may result in a breach by the Executive of any agreement, duty or other obligation with or to any Person, including, without limitation, any agreement, duty or obligation not to compete with any Person or to keep confidential the confidential information of any Person, and there exists no agreement, duty or other obligation binding upon the Executive that conflicts with the Executive's obligations under this Agreement. The Executive agrees to indemnify and hold the Corporation and its subsidiaries and Affiliates, and their officers, directors, employees, agents and consultants harmless against any and all claims, liabilities, damages or costs incurred by any of them by reason of an alleged violation by the Executive of the representations contained in this Section.

**36. NO SET-OFF**

The existence of any claim, demand, action or cause of action of the Executive against the Corporation, whether or not based upon this Agreement, will not constitute a defense to the enforcement by the Corporation of any covenant or agreement of the Executive contained herein.

**37. AMENDMENT**

This Agreement may be amended, modified or supplemented only by a written agreement executed by each of the parties hereto.

**38. HEADINGS**

The headings in this Agreement have been inserted solely for ease of reference and shall not be considered in the interpretation or construction of this Agreement.

**39. COUNTERPARTS**

This Agreement may be executed in any number of counterparts, each of which shall be an original, but such counterparts shall together constitute one and the same agreement.

**IN WITNESS WHEREOF** the parties hereto have executed this agreement as of the date first above written.

**OPEN TEXT, INC.**

Per:

\_\_\_\_\_  
Authorized Signing Officer

**SIGNED, SEALED AND DELIVERED**

in the presence of:

)  
)  
)  
)

\_\_\_\_\_  
**Tony K. Preston**

## **SCHEDULE “A”**

### **Remuneration – Benefits**

**Schedule “A”** to the Employment Agreement made as of the 1st day of June, 2006, by and between Open Text, Inc. (the “Corporation”) and **Tony K. Preston** (the “Executive”).

Benefits to be enjoyed by the Executive during the term of this Agreement shall include, but are not limited to:

- (i) reimbursement of reasonable cell phone expenses consistent with corporate policy;
- (ii) a \$5,000 perquisite allowance per fiscal year, which may be used for reimbursement of the following types of services or fees:
  - Financial planning
  - Tax planning
  - Estate planning
  - Athletic/Health Club
- (iii) the services of Medisys Health Group Inc., for the purposes of obtaining mandatory and regular Health Examinations.

**SCHEDULE “B”**

**CONFIDENTIALITY, NON-SOLICITATION AND NON-COMPETITION  
AGREEMENT**

See Attached.



**Exhibit 1**

*Severance Payment vs. Length of Service*

<u>Length of Service (years)</u>	<u>Severance Payments in Months</u>
Less than 10	6
Greater than or equal to 10	12

**EXECUTIVE AGREEMENT**

THIS AGREEMENT made as of the 17th day of July, 2006  
(the “**Effective Date**”)

AMONG

**OPEN TEXT, INC.**

a corporation incorporated under the laws of  
the State of Illinois (hereinafter referred to as  
the “Corporation”)

OF THE FIRST PART

- and -

**JOHN WILKERSON,**

a resident of the State of Washington,  
(hereinafter referred to as the “Executive”)

OF THE SECOND PART

WHEREAS the Corporation is a wholly-owned subsidiary of Open Text Corporation, a corporation amalgamated under the laws of Ontario, Canada (hereinafter “**Open Text Corporation**”);

WHEREAS the Executive has agreed to enter into and deliver this Agreement in consideration of receiving certain additional benefits and other additional compensation as provided for pursuant to the terms of this Agreement;

NOW THEREFORE THIS AGREEMENT WITNESSES that in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the parties agree as follows:

**1. DEFINITIONS**

For the purposes of this Agreement, the following terms shall have the following meanings, respectively:

- a. “**Affiliate**” means, with respect to any Person, any other Person that directly or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the Person specified. For the purposes of this definition and Agreement, the term “**Control**” means the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a Person, whether through the ownership of voting securities, by contract or otherwise;

- b. **“Agreement”** means this Employment Agreement as may be amended or supplemented from time to time, including any and all schedules annexed hereto;
- c. **“Annual Base Salary”** has the meaning ascribed to that term in Section 6(a) hereof;
- d. **“Board of Directors”** means the board of directors of Open Text Corporation as may be constituted from time to time, and **“Directors”** means the directors of Open Text Corporation;
- e. **“Change of Control”** means either of the following events:
  - i. the sale of all or substantially all of the assets of Open Text Corporation; or
  - ii. any transaction whereby any person, together with Affiliates and Associates of such person, or any group of persons acting in concert (collectively, “Acquiror” or “Acquirors”), acquires beneficial ownership of more than 50% of the issued common shares of Open Text Corporation on a fully diluted basis, or any transaction as a result of which beneficial ownership of common shares constituting more than 50% in the aggregate of the issued common shares of Open Text Corporation on a fully diluted basis cease to be held by persons who are shareholders of Open Text Corporation as at the date hereof or by Affiliates or Associates of such present shareholders;

(for the purposes of this definition and this Agreement, the terms **“Associate,” “group,”** and **“beneficial ownership”** shall have the meanings ascribed thereto under Rule 14a-1(a) of the General Rules of the Exchange Act, Section 14(d)(2) of the Exchange Act, and Rule 13d-3 of the General Rules of the Exchange Act, respectively);

- f. **“Compensation Committee”** means the compensation committee of the Board of Directors of Open Text Corporation as may be constituted from time to time;

- g. **“Date of Termination”** shall mean the date of termination of the Executive’s employment, whether by death of the Executive, by the Executive or by the Corporation pursuant to the terms of this Agreement;
- h. **“Disability”** has the meaning ascribed to that term in Section 12(b) hereof;
- i. **“Exchange Act”** means the *Securities Exchange Act* of 1934, as amended from time to time;
- j. **“Incumbent Director”** shall mean any member of the Board of Directors who was a member of the Board of Directors immediately prior to a Change of Control and any successor to an Incumbent Director who was recommended or appointed to succeed any Incumbent Director by the affirmative vote of the Directors when that affirmative vote includes the affirmative vote of a majority of the Incumbent Directors then on the Board of Directors;
- k. **“Just Cause”** shall mean:
  - i. the failure by the Executive to perform his duties according to the terms of his employment or in a manner satisfactory to the Board of Directors (other than those (A) that follow a demotion in his position or duties or (B) resulting from the Executive’s Disability) after the Corporation has given the Executive reasonable notice of such failure and a reasonable opportunity to correct it;
  - ii. the engaging by the Executive in any act that is materially injurious to the Corporation, monetarily or otherwise, but not including, following a Change of Control, the expression of opinions contrary to those directors of the Corporation who are not Incumbent Directors or those of the Acquirors;
  - iii. the engaging by the Executive in any illegal conduct or any act of dishonesty resulting or intended to result directly or indirectly in personal gain of the Executive at the Corporation’s expense, including the failure by the Executive to honor his fiduciary duties to the Corporation and his duty to act in the best interests of the Corporation;
  - iv. the failure by the Executive to comply with the provisions of Section 12(d) where the Executive elects to terminate his employment with the Corporation unless notice of such termination of employment is properly given in accordance with the terms of Section 15(b) hereof;

- v. the failure of the Executive to abide by the terms of any resolution passed by the Board of Directors; or
  - vi. the failure by the Executive to abide by the policies, procedures and codes of conduct of Open Text Corporation and the Corporation.
- l. **“Person”** or **“persons”** includes an individual, sole proprietorship, partnership, unincorporated association, unincorporated syndicate, unincorporated organization, trust, body corporate, and a natural person in his capacity as trustee, executor, administrator or other legal representative;
- m. **“Parachute Event”** means the occurrence of the following without the Executive’s written consent (except in connection with the termination of the employment of the Executive for Just Cause or Disability or termination of the Executive’s employment because of the death of the Executive):
- i. a material change (other than those that are consistent with a promotion) in the Executive’s position or duties, responsibilities, title or office in effect immediately prior to the Change of Control (except for a change in any position or duties as a director of the Corporation), which includes any removal of the Executive from or any failure to re-elect or re-appoint the Executive to any such positions or offices.
  - ii. a material reduction by the Corporation or any of its subsidiaries of the Executive’s salary, benefits or any other form of remuneration payable by the Corporation or its subsidiaries; or
  - iii. any material failure by the Corporation or its subsidiaries to provide any benefit, bonus, profit sharing, incentive, remuneration or compensation plan, stock ownership or purchase plan, pension plan or retirement plan in which the Executive is participating or entitled to participate immediately prior to a Change of Control, or the Corporation or its subsidiaries taking any action or failing to take any action that would materially adversely affect the Executive’s participation in or materially reduce his rights or benefits under or pursuant to any such plan;
  - iv. any other material breach by the Corporation of this Agreement;
- n. **“Voluntary Termination”** means the termination of the Executive’s employment with the Corporation by the Executive at his discretion in accordance with the provisions of Section 12(d) of this Agreement.

## 2. INTENTIONALLY DELETED

### 3. TERM

The initial term of this Agreement shall be one (1) year commencing on the Effective Date of this Agreement (“**Initial Term**”), subject to earlier termination as provided for in this Agreement. At the end of the Initial Term and each subsequent year thereafter, this Agreement shall be deemed to be extended automatically for an additional one-year term on the same terms and conditions unless either party gives contrary written notice to the other party no less than three (3) months prior to the date on which this Agreement would otherwise be extended.

### 4. DUTIES

The Executive is engaged and agrees to perform services for and on behalf of the Corporation as its **Executive Vice President – Global Sales and Services** or in such other capacity to which the Executive may be assigned by the Corporation from time to time. The Executive shall perform such duties and exercise such powers pertaining to the management and operation of the Corporation and any subsidiaries and Affiliates of the Corporation as may be determined from time to time by the Chief Executive Officer (“**CEO**”) and the Reporting Manager (as defined below) consistent with the office of the Executive. The Executive shall:

- a. devote his full time, attention, and best efforts to the business, affairs, and goodwill of the Corporation;
- b. perform those duties that may be assigned to the Executive diligently and faithfully to the best of the Executive’s abilities and in the best interests of the Corporation; and
- c. use his best efforts to promote the interest and goodwill of the Corporation.

### 5. REPORTING PROCEDURES

The Executive shall report to the President/ CEO (“**Reporting Manager**”). The Executive shall report fully on the management, operations, and business affairs of the Corporation and advise to the best of his ability and in accordance with business standards on business matters that may arise from time to time during the term of this Agreement.

### 6. REMUNERATION AND BENEFITS

- a. The Corporation shall pay to the Executive as compensation for his services provided hereunder an annual base salary (“**Annual Base Salary**”) for each year of the term of this Agreement, which shall be determined by the Reporting Manager and the CEO (and the Compensation Committee, as may

be required) and set out in a separate document, subject to the provisions of Section 8, and which shall be exclusive of bonuses, benefits and other compensation as provided for herein. The Annual Base Salary shall be payable in accordance with the Corporation's regular payroll practices for senior executives or in such other manner as may be mutually agreed upon, less, in any case, all applicable deductions or withholdings as required by law. As of the date of this Agreement, the Annual Base Salary is **USD \$350,000**.

- b. The Corporation shall provide the Executive with employee benefits comparable to those provided by the Corporation from time to time to other senior executives of the Corporation. Benefits to be enjoyed by the Executive during the term of this Agreement shall include, but not be limited to, those benefits set forth in Schedule "A", as amended from time to time, and shall include reimbursement of any properly incurred expenses as provided for in Section 11 hereof.

## **7. ANNUAL PERFORMANCE BONUS**

In addition to the Executive's Annual Base Salary, the Executive may be awarded an additional bonus (the "**Performance Bonus**"), which shall be based upon performance goals approved by the Reporting Manager and the CEO (and the Compensation Committee, as may be required) from time to time and set forth in a separate document. Any changes respecting the amount or other terms of the Performance Bonus payable to the Executive must be approved by the Reporting Manager and the CEO (and if required, the Board of Directors). As of the date of this Agreement, the Performance Bonus target is **USD \$300,000**.

## **8. SALARY AND/OR BONUS ADJUSTMENTS**

Other than as herein provided, there shall be no cost-of-living increase or merit increase in the Annual Base Salary or increases in any bonuses payable to the Executive unless approved by the Reporting Manager and the CEO. The CEO and Reporting Manager shall review annually the Annual Base Salary and all other compensation to be received by the Executive under this Agreement.

## **9. OPTIONS**

The Corporation shall permit the Executive to participate in any share option plan, share purchase plan, retirement plan or similar plan offered by the Corporation from time to time to its senior executives in the manner and to the extent authorized by the Compensation Committee. The Compensation Committee may, in its absolute discretion, grant additional options, subject to approval by the Board of Directors, and it may review the advisability of additional option grants for the Executive.

## **10. VACATION**

The Executive shall be entitled to **twenty (20)** days paid vacation per fiscal year of the Corporation at a time approved in advance by the Reporting Manager, which approval shall not be unreasonably withheld but shall take into account the staffing requirements of the Corporation and the need for the timely performance of the Executive's responsibilities. Any vacation entitlement hereunder shall be subject to the Corporation's policy respecting same in effect from time to time.

## **11. EXPENSES**

Subject to the terms of this section, the Executive shall be reimbursed for all reasonable travel and other out-of-pocket expenses actually and properly incurred by the Executive from time to time in connection with carrying out his duties hereunder. Determination of whether expenses are reasonable or not shall be made by the Reporting Manager. For all such expenses the Executive shall furnish to the Corporation originals of all invoices or statements in respect of which the Executive seeks reimbursement.

## **12. TERMINATION**

### **a. For Just Cause**

The Corporation may immediately terminate the employment of the Executive for Just Cause without notice or any payment in lieu of notice, and for purposes of greater certainty, the Corporation shall have no obligation to make any payments to the Executive on account of severance or bonuses or partial bonuses or any other amounts except as expressly stipulated in Section 13(a) hereof.

### **b. For Disability**

- i. This Agreement may be immediately terminated by the Corporation by notice to the Executive if the Executive is determined to suffer from disability (hereinafter referred to as "Disability"). The Executive shall be deemed to suffer from Disability if in any year during the employment period, because of ill health, physical or mental disability, or for other causes beyond the control of the Executive, the Executive has been continuously unable or unwilling or has failed to perform the Executive's duties for 120 consecutive days, or if, during any year of the employment period, the Executive has been unable or unwilling or has failed to perform his duties for a total of 180 days, consecutive or not. The CEO, acting reasonably (subject to Section 33 below), shall finally determine if the Executive is suffering from ill health, physical or mental disability or other causes beyond his control during the time periods as hereinbefore set forth in the event of any dispute between the Executive and the



Corporation concerning the occurrence of Disability for purposes of this Section.

- ii. Notwithstanding any short term or long term corporate benefits or insurance policies relating to disability maintained by the Corporation at the relevant time, if during any period of ill health, physical or mental disability or for other causes beyond the control of the Executive, the Executive has been continuously unable or unwilling or has failed to perform the Executive's duties less than 120 consecutive days (the "Short-Term Illness"), the Executive shall continue to receive all amounts of remuneration and benefits otherwise payable to and enjoyed by the Executive under this Agreement less any and all amounts received by and/or payable to the Executive in connection with benefits paid and/or payable as a result of such Short-Term Illness.
- iii. Upon termination of this Agreement as a result of Disability, the Corporation shall pay to the Executive the severance payment provided for in Subsection 13(b) hereof less any and all amounts received by and/or payable to the Executive in connection with benefits paid and/or payable as a result of the Disability.
- iv. The term "any year of the employment period" means any period of 12 consecutive months during the employment period.

**c. For Death**

This Agreement shall terminate immediately, without notice or any payment in lieu thereof, upon the death of the Executive.

**d. Voluntary Termination by Executive**

If the Executive is desirous of voluntarily terminating his employment with the Corporation at any time during the Agreement or in accordance with the terms for non-renewal under Section 3 hereof, the Executive agrees to give the Corporation 3 months advance written notice of such termination and further agrees that he shall not be entitled to any payment on account of severance under Section 13(b) hereof. The Reporting Manager or the CEO may waive such notice in writing after consulting with the Board of Directors, in their sole and absolute discretion, in which case the Executive's employment shall be deemed to terminate immediately, provided the Executive shall still be entitled to compensation due on account of Annual Base Salary and benefits earned up to the last date of the 3 month advance written notice period given by the Executive and any Performance Bonus earned and prorated during such 3 month notice period. Provided that the Executive gives the 3 month notice as required hereunder, any unvested options which would have otherwise vested during such advance written notice period shall be permitted to continue to

vest during such period. The Executive shall have the right to exercise any options which are vested as at the Date of Termination for the period which is 90 days following such Date of Termination (the "90 Day Period"). For purposes of this Section 12(d), the term "Date of Termination" shall mean the actual day on which the Executive ceases to be employed plus the remainder of the 3 month notice period if and to the extent waived by the Reporting Manager or the CEO in consultation with the Board of Directors. Any termination properly given under Section 15(b) hereof and in accordance with the terms thereof shall not be considered a voluntary termination under this Section 12(d).

**e. Termination by Corporation Other than For Just Cause, Disability or Death**

The Corporation may terminate the employment of the Executive for any reason other than Just Cause, Disability or death of the Executive, notwithstanding any other provision of this Agreement, upon compliance with the terms of Section 13(b) hereof. In the event of non-renewal of this Agreement by the Corporation in accordance with Section 3 hereof, the Corporation shall comply with the terms of Section 13(b) hereof.

**13. SEVERANCE PAYMENTS**

- a. Upon termination of the Executive's employment for Just Cause, the Executive shall not be entitled to any severance or other payment other than Annual Base Salary earned by the Executive before the Date of Termination calculated pro rata up to and including the Date of Termination and all outstanding and accrued vacation pay to the Date of Termination. Upon termination of the Executive's employment: (i) for death; or (ii) by the voluntary termination of employment by the Executive pursuant to Section 12(d) hereof, the Executive shall not be entitled to any severance or other payment other than Annual Base Salary and any Performance Bonus earned by the Executive before the Date of Termination calculated pro rata up to and including the Date of Termination (which under Section 12(d) shall be as defined therein) and all outstanding and accrued vacation pay to the Date of Termination.

Notwithstanding the foregoing, the Executive shall not be entitled to any Performance Bonus earned by the Executive before the Date of Termination unless the Executive gives the Corporation the advanced written notice required by Section 12(d) hereof.

- b. If the Executive's employment is terminated by the Corporation for any other reason other than the reasons set forth in Section 12(a) the Executive shall be entitled to an amount equal to the total of:
- (i) All outstanding base salary earned before the Date of Termination, less any amounts that the Executive received in

connection with benefits paid or payable as a result of Disability if applicable;

- (ii) Any Performance Bonus which has been earned by the Executive before the Date of Termination calculated on a pro rata basis based on the number of months in the current bonus period up to and including the Date of Termination ((pro rata Performance Bonus = annual Performance Bonus target / 12) x the number of months in the then-current bonus period up to and including the Date of Termination);
- (iii) Additional payments based on the Executive's length of service with the Company, calculated as Executive's monthly base salary for the number of months set forth in the chart on Exhibit 1, less any amounts received by and/or payable to Executive in connection with benefits paid or payable as a result of the Disability if applicable (for purposes of this section 12.b.(iii), Executive's service start date is **July 17, 2006**);
- (iv) An amount equal to 1/12 of the Performance Bonus payments earned by Executive during the bonus year preceding the current bonus year times the number of months referred to in the chart on Exhibit 1, based on Executive's length of service with the Company.
- (v) All outstanding and accrued vacation pay;
- (vi) All properly incurred and reasonable business expenses owing to Executive as of the Date of Termination; and
- (vii) Executive's benefits provided for in Section 6(b) shall continue only through the Date of Termination. If Executive elects to continue his health and dental insurance coverage pursuant to COBRA, reimbursement for the COBRA premiums for Executive and his dependents for the number of months corresponding to the months of Executive's severance payments as set forth in the chart on Exhibit 1.

Any amounts due under Sections 3(c)(iii), 3(c)(iv) and 3(c)(vii) hereunder shall be paid by the Company to Executive on a monthly basis commencing 30 days following the Date of Termination and not in a lump sum. All salary, Performance Bonus, vacation and severance payments and COBRA reimbursements will be subject to applicable state and federal taxes and FICA withholding.

- c. Except as expressly stipulated in Sections 12(d) or 15 hereof or in this Section 13(c), any options which have not vested as of the Date of Termination (being in the case where the Corporation gives notice, the date specified by the Corporation as the date on which the Executive's employment will terminate) shall terminate and be of no further force and effect as of the Date of Termination and neither any period of notice nor any payment in lieu thereof upon termination of employment hereunder shall be considered as extending the period of employment for the purposes of vesting of options notwithstanding anything to the contrary in any other agreement between the Corporation and the Executive. Notwithstanding anything contained in this Section 13, in the event of termination by the Corporation other than for Just Cause, the Executive shall have the right to exercise any options which are vested as at the Date of Termination for the 90 Day Period as defined in Section 12(d). Any unvested options which would have otherwise vested during such 90 Day Period shall continue to vest during that period and to the extent any unvested options have vested during such 90 Day Period, the Executive shall also be entitled to exercise those options within a rolling 90 day period after the date of vesting of such options, which period will not exceed 180 days following the Date of Termination. In addition, notwithstanding anything contained in this Section 13 or elsewhere in this Agreement, in the event of termination due to death of the Executive, the estate of the Executive shall be entitled, at any time during the period which is 12 months following the date of death of the Executive (the "12 Month Period"), to exercise any options which have vested as at the date of death of the Executive. In addition, any unvested options which would have otherwise vested during such 12 Month Period shall continue to vest during that period and to the extent of any unvested options have vested during such period, the Executive's estate shall be entitled to exercise those options within a period which starts on the day of vesting and ends 12 months from the date of death of the Executive.

For purposes of greater certainty, if the Executive is terminated for Just Cause, Death or if the Executive's employment hereunder is terminated by the Executive pursuant to Section 12(d) then no payment whatsoever shall be made to the Executive under Sections 13(b).

#### **14. NO FURTHER ENTITLEMENTS**

Except as expressly provided in Sections 12 and 13 above and Section 15 below, where the Executive's employment has been terminated by the Executive or terminated or deemed to have been terminated by the Corporation for any reason, the Executive will not be entitled to receive any further payments, in lieu of notice or as damages for any reason whatsoever. Except as to any entitlement as expressly provided in this Agreement, the Executive hereby waives any claims the Executive may have against the Corporation for or in

respect of termination pay, severance pay, or on account of loss of office or employment or notice in lieu thereof.

## **15. OPTION ACCELERATION AND SEVERANCE PAYMENTS ON CHANGE OF CONTROL**

### **a. Termination by the Corporation**

If the Executive's employment is terminated by the Corporation upon the giving of written notice of such termination to the Executive at any time within the 6 month period following a Change of Control (other than for Just Cause, Disability or Death), then the Executive shall be entitled to the following:

- i. such payments on account of severance as provided for under Section 13(b) of this Agreement; and
- ii. notwithstanding anything to the contrary in Section 13 hereof or in this Agreement, all options granted by the Corporation to the Executive shall, following the giving of any notice by the Corporation under this Section 15(a), be deemed to vest immediately and shall be exercisable by the Executive for a period of 90 days following the giving of such notice by the Corporation hereunder.

### **b. Termination by Executive**

If the Executive's employment is terminated by the Executive upon the giving of written notice of such termination to the Corporation within the 6 month period following a Change of Control, and within 60 days following the occurrence of a Parachute Event, which shall be described in detail by the Executive in the written notice of termination given to the Corporation, the Executive shall be entitled to the following:

- i. such payments on account of severance as provided for under Section 13(b) of this Agreement;
- ii. notwithstanding anything to the contrary in Section 13 hereof or in this Agreement, all options granted by the Corporation to the Executive shall, following the giving of proper notice by the Executive, under this Section 15(b), be deemed to vest immediately and shall be exercisable by the Executive for a period of 90 days following the giving of such notice.

## **16. DISCLOSURE**

During the employment period, the Executive shall promptly disclose to the Reporting Manager full information concerning any interest, direct or indirect, of the Executive (as owner, shareholder, partner, lender or other investor, director, officer, employee, consultant or otherwise) or any member of his family in any business that is reasonably known to the Executive to purchase or otherwise obtain services or products from, or to sell or otherwise provide services or products to, the Corporation or to any of its suppliers or customers.

## **17. NON-COMPETITION/NON-SOLICITATION/PROPRIETARY RIGHTS AGREEMENT**

The Executive agrees to execute contemporaneously with his execution of this Agreement the confidentiality, non-solicitation, non-competition and inventions/proprietary rights agreement in substantially the form annexed hereto as Schedule "B".

## **18. RETURN OF MATERIALS**

All files, forms, brochures, books, materials, written correspondence, memoranda, documents, manuals, computer disks, software products and lists (including lists of customers, suppliers, products and prices) pertaining to the business of the Corporation or any of its subsidiaries, Affiliates, and Associates that may come into the possession or control of the Executive shall at all times remain the property of the Corporation or such subsidiary, Affiliate or Associate, as the case may be. On termination of the Executive's employment for any reason, the Executive agrees to deliver promptly to the Corporation all such property of the Corporation in the possession of the Executive or directly or indirectly under the control of the Executive. The Executive agrees not to make for his personal or business use or that of any other party, reproductions or copies of any such property or other property of the Corporation.

## **19. GOVERNING LAW**

This agreement shall be governed by and construed in accordance with the laws of the State of Illinois.

## **20. SEVERABILITY**

If any provision of this Agreement, including the breadth or scope of such provision, shall be held by any court of competent jurisdiction to be invalid or unenforceable, in whole or in part, including the Schedules attached hereto and incorporated by reference, such invalidity or unenforceability shall not affect the validity or enforceability of the remaining provisions, or part thereof, of this Agreement and such remaining provisions, or part thereof, shall remain enforceable and binding.

## **21. ENFORCEABILITY**

The Executive hereby confirms and agrees that the covenants and restrictions pertaining to the Executive contained in this Agreement, are reasonable and valid and hereby further acknowledges and agrees that the Corporation would suffer irreparable injury in the event of any breach by the Executive of his obligations under any such covenant or restriction. Accordingly, the Executive hereby acknowledges and agrees that damages would be an inadequate remedy at law in connection with any such breach and that the Corporation shall therefore be entitled in lieu of any action for damages, temporary and permanent injunctive relief enjoining and restraining the Executive from any such breach.

## **22. ASSIGNMENT OF AGREEMENT**

The Executive may not assign, pledge or encumber the Executive's interest in this agreement nor assign any of the rights or duties of the Executive under this agreement without the prior written consent of the Corporation. This Agreement may be freely assigned by the Corporation to a purchaser of all or substantially all of the assets of the Corporation, a subsidiary of the Corporation, a division of the Corporation or the Affiliates or Associates of the Corporation, as long as the purchaser/assignee expressly agrees in writing to assume the obligations of the Corporation under this Agreement.

## **23. SUCCESSORS**

This agreement shall be binding on and enure to the benefit of the successors and assigns of the Corporation and the heirs, executors, personal legal representatives and permitted assigns of the Executive.

## **24. NOTICES**

Any notice or other communication required or permitted to be given hereunder shall be in writing and either delivered by hand or mailed by prepaid registered mail. At any time other than during a general discontinuance of postal service due to strike, lock-out or otherwise, a notice so mailed shall be deemed to have been received three business days after the postmarked date thereof or, if delivered by hand, shall be deemed to have been received at the time it is delivered. If there is a general discontinuance of postal service due to strike, lock-out or otherwise, a notice sent by prepaid registered mail shall be deemed to have been

received three business days after the resumption of postal service. Notices shall be addressed as follows:

- i. If to the Corporation:  
c/o Open Text Corporation  
275 Frank Tompa Drive  
Waterloo, Ontario  
Canada N2L 0A1

- ii. If to the Executive:  
**JOHN WILKERSON**  
**14118 168<sup>th</sup> Avenue NE**  
**Woodinville, WA 98072**

## **25. LEGAL ADVICE**

The Executive hereby represents and warrants to the Corporation and acknowledges and agrees that he had the opportunity to seek and was not prevented nor discouraged by the Corporation from seeking independent legal advice prior to the execution and delivery of this agreement and that, in the event that he did not avail himself of that opportunity prior to signing this agreement, he did so voluntarily without any undue pressure and agrees that his failure to obtain independent legal advice shall not be used by him as a defense to the enforcement of his obligations under this agreement.

## **26. RESIGNATION OF DIRECTORSHIPS, ETC.**

The Executive agrees that after termination of his employment, he will, at the request of the CEO or the Reporting Manager, tender his resignation from any position he may hold as an officer or director of the Corporation or any of its subsidiaries, Affiliates or Associates, and the Executive further covenants and agrees, if so requested by the CEO or the Reporting Manager, not to stand for re-election to any office of the Corporation or any of its subsidiaries, Affiliates or Associates at any time following termination of the Executive's employment hereunder.



## **27. NO DEROGATION**

Nothing herein derogates from any rights the Executive may have under applicable law, except as set out in this section. The parties agree that the rights, entitlements and benefits set out in this Agreement to be paid to the Executive are in full satisfaction of any rights or entitlements the Executive may have as against the subsidiaries, Affiliates and Associates of the Corporation as a result of the termination of his employment with such subsidiaries, Affiliates or Associates.

## **28. CURRENCY**

All dollars referenced herein are in United States dollars unless expressly provided to the contrary.

## **29. WITHHOLDING**

The Corporation shall have the right to withhold from any and all payments required to be made to the Executive pursuant to this Agreement all federal, state, local, and/or other taxes which the Corporation determines are required to be withheld in accordance with applicable statutes or regulations.

## **30. NON-DISPARAGEMENT**

The Executive covenants and agrees that he shall not engage in any pattern of conduct that involves the making or publishing of written or oral statements or remarks (including, without limitation, the repetition or distribution of derogatory rumors, allegations, negative reports or comments) which are disparaging, deleterious or damaging to the integrity, reputation or goodwill of the Corporation, its subsidiaries, Affiliates or Associates or its and their management.

## **31. PRIVACY**

- a. The Executive acknowledges and agrees that the Corporation may collect, use and disclose his personal information for purposes relating to his employment with the Corporation. The purposes of such collection, use and disclosure include, but are not limited to:
  - i. ensuring that the Executive is paid for his services to the Corporation which includes disclosure to third party payroll providers;
  - ii. administering and/or facilitating the provision of any benefits to which the Executive is or may become entitled to, including bonuses, medical, dental, disability and life insurance benefits, pension, group RRSP and/or stock options. This shall include the disclosure of the Executive's personal information to the Corporation's third party service providers and administrators;

- iii. compliance by the Corporation with any regulatory reporting and withholding requirements relating to the Executive's employment;
  - iv. in the event of a sale or transfer of all or part of the shares or assets of the Corporation or its subsidiaries or Affiliates, disclosing to any potential acquiring organization the Executive's personal information solely for the purposes of determining the value of the Corporation and its assets and liabilities and to evaluate the Executive's position in the Corporation. If the Executive's personal information is disclosed to any potential acquiring organization, the Corporation will require the potential acquiring organization to agree to protect the privacy of the Executive's personal information in a manner that is consistent with any policy of the Corporation dealing with privacy that may be in effect from time to time and/or any applicable law that may be in effect from time to time;
  - v. compliance by the Corporation of its obligations to report improper or illegal conduct by any of its directors, officers, employees or agents under any applicable securities, criminal or other law; and
  - vi. monitoring the Executive's access to the Corporation's electronic media services in order to ensure that the use of such services is in compliance with the Corporation's policies and procedures and is not in violation of any applicable laws.
- b. If the Executive's specific consent to the collection, use or disclosure of his personal information is required in the future, the Executive hereby agrees to provide such consent, and if the Executive refuses to provide or withdraws his consent, the Executive acknowledges that his employment and/or his entitlement to certain employment benefits may be negatively affected.

### **32. ENTIRE AGREEMENT**

This Agreement constitutes the entire agreement and understanding between the parties with respect to the subject matter hereof and supersedes all prior agreements and understandings, written or oral, among the parties relating to such subject matter, including any other employment agreement made between the Corporation and the Executive.

### **33. ARBITRATION**

With the exception of an action to enforce the restrictive covenants in Schedule B hereof, any dispute arising out of or relating to this Agreement shall be resolved by final and binding arbitration in accordance with the then-current rules of the American Arbitration

Association (“AAA”). The arbitration hearing shall be held in Chicago, Illinois, unless otherwise agreed to by the parties, before a panel of three arbitrators selected in accordance with the procedures established by the AAA. An action by the Corporation to enforce the restrictive covenants in Schedule B may be filed in a court of competent jurisdiction as provided in Schedule B.

The party who initiates the arbitration shall pay the filing fees. The Corporation shall bear the fees of the arbitrator and any costs of or assessed by the arbitrator. Each party shall bear the costs and expenses of its own counsel, technical advisors and expert witnesses, unless the decision of the arbitrator otherwise directs. The decision of the arbitrators shall be tendered within sixty (60) days of final submission of the parties in writing or any hearing before the arbitrators and shall include their individual votes. Either party may enforce the arbitration award in any court of competent jurisdiction or in the forum selected in Section 34 below. The parties understand and acknowledge that they are waiving their rights to a jury trial regarding any matters subject to arbitration under this Agreement.

Signature of Executive: \_\_\_\_\_

### **34. FORUM SELECTION**

The parties hereby agree that all demands, claims, actions, causes of action, suits, proceedings and litigation between or among the parties or arising out of the employment relationship between the Executive and the Corporation not subject to the Arbitration provision in Section 33 hereof shall be filed, tried and litigated only in a federal or state court located in Chicago, Illinois. In connection with the foregoing, the parties hereto irrevocably consent to the jurisdiction and venue of such court and expressly waive any claims or defenses of lack of jurisdiction of or proper venue by such court.

### **35. NO CONFLICTING OBLIGATIONS**

The Executive represents and warrants that none of the negotiation, entering into or performance of this Agreement has resulted in or may result in a breach by the Executive of any agreement, duty or other obligation with or to any Person, including, without limitation, any agreement, duty or obligation not to compete with any Person or to keep confidential the confidential information of any Person, and there exists no agreement, duty or other obligation binding upon the Executive that conflicts with the Executive’s obligations under this Agreement. The Executive agrees to indemnify and hold the Corporation and its subsidiaries and Affiliates, and their officers, directors, employees, agents and consultants harmless against any and all claims, liabilities, damages or costs incurred by any of them by reason of an alleged violation by the Executive of the representations contained in this Section.

**36. NO SET-OFF**

The existence of any claim, demand, action or cause of action of the Executive against the Corporation, whether or not based upon this Agreement, will not constitute a defense to the enforcement by the Corporation of any covenant or agreement of the Executive contained herein.

**37. AMENDMENT**

This Agreement may be amended, modified or supplemented only by a written agreement executed by each of the parties hereto.

**38. HEADINGS**

The headings in this Agreement have been inserted solely for ease of reference and shall not be considered in the interpretation or construction of this Agreement.

**39. COUNTERPARTS**

This Agreement may be executed in any number of counterparts, each of which shall be an original, but such counterparts shall together constitute one and the same agreement.

**IN WITNESS WHEREOF** the parties hereto have executed this agreement as of the date first above written.

**OPEN TEXT, INC.**

Per: \_\_\_\_\_

Authorized Signing Officer

**SIGNED, SEALED AND DELIVERED**  
in the presence of:

)  
)  
)  
)

\_\_\_\_\_  
**JOHN WILKERSON**

## **SCHEDULE “A”**

### **Remuneration – Benefits**

**Schedule “A”** to the Employment Agreement made as of the 17th day of July, 2006, by and between Open Text, Inc. (the “Corporation”) and **JOHN WILKERSON** (the “Executive”).

Benefits to be enjoyed by the Executive during the term of this Agreement shall include, but are not limited to:

- (i) reimbursement of reasonable cell phone expenses consistent with corporate policy;
- (ii) a \$5,000 perquisite allowance per fiscal year, which may be used for reimbursement of the following types of services or fees:
  - Financial planning
  - Tax planning
  - Estate planning
  - Athletic/Health Club
- (iii) the services of Medisys Health Group Inc., for the purposes of obtaining mandatory and regular Health Examinations.

**SCHEDULE “B”**

**CONFIDENTIALITY, NON-SOLICITATION AND NON-COMPETITION  
AGREEMENT**

See Attached.

**Exhibit 1**

*Severance Payment vs. Length of Service*

<u>Length of Service (years)</u>	<u>Severance Payments in Months</u>
Less than 10	6
Greater than or equal to 10	12

**ARRANGEMENT AGREEMENT**

**AMONG**

**HUMMINGBIRD LTD.**

**AND**

**OPEN TEXT CORPORATION**

**AND**

**6575064 CANADA INC.**

**August 4, 2006**



## ARRANGEMENT AGREEMENT

**THIS ARRANGEMENT AGREEMENT dated August 4, 2006,**

**AMONG:**

Open Text Corporation, a corporation existing under the *Canada Business Corporations Act* (“**Parent**”),

6575064 Canada Inc., a corporation existing under the *Canada Business Corporations Act* and a wholly-owned subsidiary of Parent (“**Acquisition Sub**”),

- and -

Hummingbird Ltd., a corporation existing under the *Canada Business Corporations Act* (“**Hummingbird**”),

**THIS AGREEMENT WITNESSES THAT**, in consideration of the respective covenants and agreements herein contained and other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged), and intending to be legally bound hereby, Parent, Acquisition Sub and Hummingbird hereby agree as follows:

### ARTICLE 1 INTERPRETATION

#### 1.1 Definitions

In this Agreement, unless the context otherwise requires:

“**Acquisition Proposal**” means (i) any merger, amalgamation, arrangement, recapitalization, liquidation, dissolution, share exchange, business combination or similar transaction (other than a transaction the sole parties to which are one or more of Hummingbird and its wholly-owned subsidiaries), (ii) any acquisition, directly or indirectly, of assets which individually or in the aggregate exceed 20% of the market capitalization of Hummingbird on the date the proposal in respect of such acquisition is made (or any lease, long term supply agreement or other arrangement having the same economic effect as a material sale of assets), (iii) any tender offer, take-over bid or other acquisition, directly or indirectly, by any person or “group” within the meaning of Section 13(d) of the Exchange Act, of beneficial ownership of 20% or more of the outstanding Hummingbird Shares (or rights or interests in or to Hummingbird Shares), in the case of each of (i), (ii) and (iii) in a single transaction or a series of related transactions or similar transactions involving Hummingbird and/or its subsidiaries, or a proposal or offer (binding or non binding, oral or written, conditional or unconditional, or otherwise) or communication, announcement or other indication of an intention to do any of the foregoing, or any amendment or modification or proposed amendment or modification of any of the foregoing, excluding the Arrangement or any transaction to which Parent or an affiliate of Parent is a party;

**“affiliate”** has the meaning ascribed thereto in the Securities Act;

**“Arrangement”** means the arrangement contemplated herein to be made on the terms set out in the Plan of Arrangement, subject to any amendments or variations thereto made in accordance with this Agreement and Section 5.1 of the Plan of Arrangement or made at the direction of the Court in the Final Order (with the consent of Parent and Hummingbird, each acting reasonably);

**“Arrangement Resolution”** means the special resolution of the Hummingbird Shareholders to be considered at the Meeting, to be substantially in the form set out in Schedule B hereto;

**“Articles of Arrangement”** means the articles of arrangement of Hummingbird in respect of the Arrangement, to be filed with the Director after the Final Order is made;

**“business day”** means any day, other than a Saturday, a Sunday or a statutory holiday in Toronto, Ontario, Canada;

**“Canadian Securities Administrators”** means the securities regulatory authorities in each of the provinces of Canada;

**“CBCA”** means the *Canada Business Corporations Act* and the regulations made thereunder, as promulgated or amended from time to time;

**“Certificate of Arrangement”** means the certificate of arrangement giving effect to the Arrangement, issued pursuant to subsection 192(7) of the CBCA;

**“Circular”** means the notice of the meeting and accompanying management proxy circular and other materials to be sent by Hummingbird to Hummingbird Shareholders in connection with the Meeting;

**“Code”** has the meaning ascribed thereto in Section 2.13; **“Commitment Letter”** has the meaning ascribed thereto in Section 4.1(d); **“Competition Act”** means the *Competition Act* (Canada), as amended from time to time;

**“Contract”** means any contract, agreement, license, franchise, lease, arrangement, commitment, understanding or other right or obligation to which Hummingbird or any of its subsidiaries is a party or by which Hummingbird or any of its subsidiaries is bound or affected or to which any of their respective properties or assets is subject;

**“Court”** means the Ontario Superior Court of Justice (Commercial List);

**“Depository”** means CIBC Mellon Trust Company and any other trust company, bank or equivalent financial institution agreed to in writing by Parent and Hummingbird and appointed to carry out any of the duties of the Depository hereunder;

**“Director”** means the Director appointed pursuant to section 260 of the CBCA;

**“Disclosure Letter”** means that certain letter dated as of even date herewith and delivered to Parent by Hummingbird;

**“Dissent Rights”** means the rights of dissent in respect of the Arrangement described in the Plan of Arrangement;

**“Dissenting Shareholder”** means any Hummingbird Shareholder who has duly exercised its Dissent Rights and has not withdrawn or been deemed to have withdrawn such Dissent Rights;

**“Dissenting Shares”** means all the Hummingbird Shares registered in the name of a holder and in respect of which Dissent Rights are exercised and not withdrawn in accordance with the Plan of Arrangement;

**“Effective Date”** means the date of the Certificate of Arrangement giving effect to the Arrangement;

**“Effective Time”** means 9:00 a.m. (Toronto time) on the Effective Date;

**“Environmental Condition”** means the presence of any Hazardous Substance in material breach of any Environmental Laws, or in quantities or conditions which exceed criteria published in any applicable Laws, policies, standards or guidance documents of any Governmental Entity of competent jurisdiction;

**“Environmental Laws”** means all applicable Laws, including applicable civil and common laws, relating to the protection of human health and safety or pollution or protection of the environment, or relating to the regulation of Hazardous Substances;

**“Environmental Permits”** means all Permits necessary under Environmental Laws for Hummingbird and its subsidiaries to own, lease, license and operate their properties and conduct their businesses as presently conducted;

**“ERISA”** has the meaning ascribed thereto in Section 3.1(s);

**“Exchange”** means the Toronto Stock Exchange or the Nasdaq, and **“Exchanges”** means both of them;

**“Exchange Act”** means the United States *Securities Exchange Act of 1934*, as amended;

**“Exchange Factor”** means 0.8879, which is the exchange rate for 1 Canadian dollar into United States dollars based on the noon rate of exchange of the Bank of Canada on the business day immediately preceding the date of this Agreement;

**“Expiry Date”** means the Expiry Date under the Open Text Offer;

**“Final Order”** means the final order of the Court approving the Arrangement, as such order may be amended by the Court (with the consent of Parent and Hummingbird, each acting reasonably) at any time prior to the Effective Date or, if appealed, then, unless such appeal is withdrawn or denied, as affirmed or amended on appeal (in each case with the consent of Parent and Hummingbird, each acting reasonably);

**“Financial Contract”** means a Contract that creates, governs or guarantees, or that is otherwise entered into in connection with or with respect to, Financial Indebtedness;

**“Financial Indebtedness”** means in relation to a person (the **“debtor”**), an obligation or liability (contingent or otherwise) of the debtor (a) for borrowed money (including overdrafts and including amounts in respect of principal, premium, interest or any other sum payable in respect of borrowed money) or for the deferred purchase price of property or services, (b) under any loan, stock, bond, note, debenture or other similar instrument or debt security, (c) under any acceptance credit, bankers’ acceptance, letter of credit or other similar facilities, (d) under any conditional sale, hire purchase or title retention agreement with respect to property, under any capitalized lease arrangement, under any sale and lease back arrangement or under any lease or any other agreement having the commercial effect of a borrowing of money or treated as a finance lease or capital lease in accordance with applicable accounting principles, (e) under any foreign exchange transaction, any interest or currency swap transaction, any fuel or commodity hedging transaction or any other kind of derivative transaction, (f) in respect of any counterindemnity obligation in respect of a guarantee, indemnity, bond, standby or documentary letter of credit or any other instrument issued by a bank or financial institution, (g) in respect of preferred stock (namely capital stock of any class that is preferred as to the payment of dividends or distributions, or as to the distribution of assets upon any voluntary or involuntary liquidation or dissolution, over the capital stock of any other class) or redeemable capital stock (namely any class or series of capital stock that, either by its terms, by the terms of any security into which it is convertible or exchangeable or by contract or otherwise, is, or upon the happening of an event or passage of time would be, required to be redeemed on a specified date or is redeemable at the option of the holder thereof at any time, or is convertible into or exchangeable for debt securities at any time), or (h) for any amount raised under any transaction similar in nature to those described in paragraphs (a) to (g) of this definition, or otherwise having the commercial effect of borrowing money, or (i) under a guarantee, indemnity or similar obligation entered into by the debtor in respect of an obligation or liability of another person which would fall within paragraphs (a) to (h) of this definition if the references to the debtor referred to the other person; for greater certainty, Financial Indebtedness includes obligations and liabilities of another person which would fall within paragraphs (a) to (h) of this definition where such obligations or liabilities are secured by (or where such other person has a right to require that such obligations or liabilities be secured by) a security interest over any property of the debtor even though the debtor has not assumed or become liable for the payment of such obligations or liabilities or receivables sold, assigned, or discounted;

**“GAAP”** means United States generally accepted accounting principles;

**“Governmental Entity”** means (a) any multinational, federal, provincial, state, regional, municipal, local or other government, governmental or public department, central bank, court, tribunal, arbitral body (whether or not governmental), commission, board, bureau or agency, domestic or foreign, (b) any subdivision, agent or authority of any of the foregoing or (c) any quasi-governmental or private body, including any tribunal, commission, regulatory agency or self-regulatory organization, exercising any regulatory, expropriation or taxing authority under or for the account of any of the foregoing;

**“Hazardous Substance”** means any pollutant, contaminant, petroleum, hydrocarbons, hazardous substance, waste, hazardous material, toxic substance, dangerous or potentially dangerous substance or dangerous good as defined, judicially interpreted or identified in, or any substance regulated pursuant to, any applicable Law;

**“HSR Act”** means the United States *Hart-Scott-Rodino Antitrust Improvements Act of 1976*, as amended from time to time;

**“Hummingbird Financial Statements”** has the meaning ascribed thereto in Section 3.1(i);

**“Hummingbird IP”** means all Intellectual Property Rights that are used or held for use by Hummingbird or any of its subsidiaries in connection with the business of Hummingbird and its subsidiaries;

**“Hummingbird Option”** means an option to purchase Hummingbird Shares pursuant to the Hummingbird Stock Option Plan;

**“Hummingbird Plans”** has the meaning ascribed thereto in Section 3.1(s);

**“Hummingbird Public Disclosure Record”** means all documents filed on the System for Electronic Document Analysis and Retrieval (SEDAR) or the Electronic Document Gathering, Analysis and Retrieval System (EDGAR) after September 30, 2003;

**“Hummingbird Securityholders”** means Hummingbird Shareholders and the holders of Hummingbird Options;

**“Hummingbird Shareholders”** means the registered holders of Hummingbird Shares;

**“Hummingbird Shares”** means the common shares in the capital of Hummingbird;

**“Hummingbird Stock Option Plan”** means the 1996 Employee Stock Option Plan of Hummingbird;

**“Hummingbird Source Code”** means all source code that is part of the Owned Hummingbird IP or the Hummingbird products;

**“Identified Hummingbird Monetary Representations”** means the representations and warranties of Hummingbird set forth in Section 3.1(d)(i)(C) and Section 3.1(ee);

**“Identified Hummingbird Representations”** means the representations and warranties of Hummingbird set forth in Section 3.1(e) and Section 3.1(gg);

**“including”** means including without limitation, and “include” and “includes” have a corresponding meaning;

**“Intellectual Property Rights”** means: (a) all United States, international and foreign patents and applications therefor and all reissues, divisions, divisional, renewals, extensions, provisionals, continuations and continuations-in-part thereof, and all patents, applications, documents and filings claiming priority to or serving as a basis for priority

thereof (“**Patents**”); (b) all inventions (whether or not patentable), invention disclosures, improvements, trade secrets, proprietary information, know how, computer software programs (in both source code and object code form), technology, business methods, technical data and customer lists, tangible or intangible proprietary information, and all documentation relating to any of the foregoing; (c) all copyrights, copyrights registrations and applications therefor, and all other rights corresponding thereto throughout the world (“**Copyrights**”); (d) all industrial designs and any registrations and applications therefor throughout the world; (e) all trade names, logos, common law trademarks and service marks, trademark and service mark registrations and applications therefor throughout the world (“**Trademarks**”); (f) all databases and data collections and all rights therein throughout the world; (g) all moral and economic rights of authors and inventors, however denominated, throughout the world; (h) all Web addresses, domain names and numbers, uniform resource locators (“**URLs**”) and other names and locators associated with the Internet (“**Domain Names**”); and (i) any similar or equivalent rights to any of the foregoing anywhere in the world;

“**Interim Order**” means the interim order of the Court, as the same may be amended by the Court (with the consent of Parent and Hummingbird, each acting reasonably), containing a declaration and directions in respect of the notice to be given in respect of and the conduct of the Meeting;

“**knowledge of Hummingbird**” means collectively, the actual knowledge of Fred Sorkin, Alan Barry Litwin and Inder P.S. Duggal;

“**Law**” or “**Laws**” means all international trade agreements, codes and conventions, laws, by-laws, statutes, rules, regulations, principles of law and equity, orders, rulings, ordinances, judgments, injunctions, determinations, awards, decrees or other requirements and the terms and conditions of any grant of approval, permission, authority or license of any Governmental Entity or self-regulatory authority (including either of the Exchanges), and the term “**applicable**” with respect to such Laws and in a context that refers to one or more Parties, means such laws as are applicable to such Party or its business, undertaking, property or securities and emanate from, a person having jurisdiction over the Party or Parties or its or their business, undertaking, property or securities;

“**Legal Requirements**” means any and all applicable federal, state, local, municipal, foreign or other law, statute, constitution, principle of common law, resolution, ordinance, code, edict, decree, rule, regulation, ruling or requirement issues, enacted, adopted, promulgated, implemented or otherwise put into effect by or under the authority of any Governmental Entity;

“**Lender Sub**” means one or more wholly-owned subsidiaries of Hummingbird selected by Parent for purposes of making the loans contemplated under Section 5.5(1);

“**Licensed Hummingbird IP**” shall mean all Hummingbird IP other than the Owned Hummingbird IP;

“**Lien**” means any hypothec, mortgage, lien, charge, security interest, encumbrance and adverse right or claim;

**“Loan Alternative”** means the provision by Lender Sub of the loans contemplated under Section 5.5(1) at the request of Parent in accordance with the terms and conditions of the Plan of Arrangement;

**“Loan Amount”** means an amount up to \$58 million or such other amount requested in Section 5.5 (but which, for greater certainty, may be \$0);

**“Material Adverse Effect”** means, when used in connection with a person, any change, effect, event, occurrence or state of facts that is, or could reasonably be expected to be, material and adverse to the business, assets, rights, liabilities, capitalization, operations, results of operations or financial condition of that person and its subsidiaries, taken as a whole, other than any change, effect, event, occurrence or state of facts resulting from (a) changes in the global economy or political conditions or securities markets in general, (b) changes in the worldwide industries or markets in which such party and its subsidiaries operate, (c) the commencement, occurrence, continuation or material worsening of any war, armed hostilities or acts of terrorism, (d) the announcement or pendency of the transactions contemplated by this Agreement, the Open Text Offer or the Symphony Arrangement Agreement, (e) any change in the trading price or volume of the Hummingbird Shares, provided, however, that this clause (e) shall not exclude from the definition of Material Adverse Effect any change, effect, event, occurrence or state of facts relating to the person or its subsidiaries which caused such change in trading price or volume, (f) any failure by Hummingbird to meet the published revenue or earnings predictions in respect of Hummingbird of equity analysts, provided, however, that this clause (f) shall not exclude from the definition of Material Adverse Effect any change, effect, event, occurrence or state of facts relating to the person or its subsidiaries which caused such failure, (g) the compliance with the terms of this Agreement, (h) generally applicable changes in Law, (i) generally applicable changes in GAAP, or (j) Hummingbird’s compliance with its obligations under the Symphony Arrangement Agreement including, to the extent applicable, the payment of fees by Hummingbird as required under Sections 7.3 or 7.4 thereof; provided, that nothing in clauses (a), (b) or (c) shall include any change, effect, event, occurrence or state of facts which disproportionately affects that person and its subsidiaries, taken as a whole;

**“material fact”** has the meaning ascribed thereto in the Securities Act;

**“Maximum Cash Amount”** means the aggregate amount of cash in United States dollars equal to (a) the product obtained by multiplying (i) the number of Hummingbird Shares outstanding immediately prior to the Effective Time by (ii) the Purchase Price less (b) the Share Loan Amount;

**“MD&A”** has the meaning ascribed thereto in Section 3.1(i);

**“Meeting”** means the special meeting of Hummingbird Shareholders, and all adjournments and postponements thereof, called and held to, among other things, consider and approve the Arrangement Resolution;

**“Nasdaq”** means The Nasdaq Global Market, or any successor inter-dealer quotation system operated by Nasdaq Stock Market Inc., or any successor thereto;

**“Non-Disclosure Agreement”** means the letter agreement dated July 20, 2006 between Parent and Hummingbird providing Parent access to confidential information of Hummingbird in connection with or relating to this Agreement and the Transactions;

**“Open Text Offer”** means the offer dated July 10, 2006 by Acquisition Sub to purchase for cash all of the outstanding Common Shares of Hummingbird not currently owned by Open Text and its affiliates at a price of U.S.\$27.75 per Common Share;

**“Option Loan Amount”** means the aggregate amount of cash required to be paid by or on behalf of Hummingbird pursuant to Section 2.3(b)(i) of the Plan of Arrangement in respect of the Hummingbird Options;

**“Order”** means any judgment, decision, decree, injunction, ruling, writ, assessment or order of any Governmental Entity that is binding on any person or its property under applicable Legal Requirements;

**“Outside Date”** means (a) October 21, 2006, subject to the right of either Hummingbird or Parent to postpone the Outside Date for up to an additional 90 days (in 30-day increments) if the Regulatory Approvals have not been obtained and have not been denied by a non-appealable decision of a Governmental Entity by giving written notice to the other to such effect no later than the date that is two (2) business days prior to the original Outside Date (or any subsequent Outside Date, as applicable) or (b) such later date as may be agreed to in writing by the Parties;

**“Owned Hummingbird IP”** means all Intellectual Property Rights owned by, or filed in the name of, Hummingbird or any of its subsidiaries;

**“Parties”** means Hummingbird, Acquisition Sub and Parent, and **“Party”** means any of them;

**“Permit”** means any material license, permit, certificate, consent, order, grant, approval, classification, registration or other authorization of and from any Governmental Entity;

**“person”** includes an individual, partnership, limited partnership, association, body corporate, trustee, trust, executor, administrator, legal representative, government (including any Governmental Entity) or any other entity, whether or not having legal status;

**“Plan of Arrangement”** means the plan of arrangement substantially in the form of Schedule C hereto as amended or varied pursuant to the terms hereof and thereof;

**“Purchase Price”** means the sum of \$27.85 per Hummingbird Share, payable in cash;

**“Regulatory Approvals”** means those sanctions, rulings, consents, orders, exemptions, permits and other approvals (including the lapse, without objection, of a prescribed time under a statute or regulation that states that a transaction may be implemented if a prescribed time lapses following the giving of notice without an objection being made) of Governmental Entities as set out in Schedule A hereto;

**“Response Period”** has the meaning ascribed thereto in Section 7.2(l)(b);



**“Returns”** means all reports, forms, elections, estimates, declarations of estimated tax, information statements and returns relating to, or required to be filed in connection with any Taxes;

**“Securities Act”** means the *Securities Act* (Ontario) and the rules and regulations made thereunder, as now in effect and as they may be promulgated or amended from time to time;

**“Securities Regulators”** means the Canadian Securities Administrators and the United States Securities and Exchange Commission;

**“Securities Laws”** means the Securities Act and all other applicable Canadian provincial and territorial and United States federal securities laws, rules and regulations thereunder;

**“Shareholder Approval”** has the meaning ascribed thereto in Section 2.7;

**“Share Loan Amount”** means the difference obtained by subtracting the Option Loan Amount from the Loan Amount; provided that if the Loan Amount is \$0 the Share Loan Amount shall also be \$0;

**“subsidiary”** means, with respect to a specified body corporate, any body corporate of which more than 50% of the outstanding shares ordinarily entitled to elect a majority of the board of directors thereof (whether or not shares of any other class or classes shall or might be entitled to vote upon the happening of any event or contingency) are at the time owned directly or indirectly by such specified body corporate and shall include any body corporate, partnership, joint venture or other entity over which such specified body corporate exercises direction or control or which is in a like relation to a subsidiary;

**“Superior Proposal”** has the meaning ascribed thereto in Section 7.1(1);

**“Symphony Arrangement Agreement”** means the arrangement agreement dated May 25, 2006 among Symphony Technology II-A, L.P., Linden Management Corporation, Linden Acquisition Ltd. and Hummingbird;

**“Tax Act”** means the *Income Tax Act* (Canada), as amended from time to time;

**“Taxes”** or **“Tax”** means all taxes, imposts, levies and withholdings, however denominated and instalments in respect thereof, including any interest, penalties, fines or other additions that have been, are or will become payable in respect thereof, imposed by any Governmental Entity;

**“Transaction Documents”** means this Agreement and the Plan of Arrangement;

**“Transactions”** means, collectively, the transactions contemplated herein and in the Plan of Arrangement; and

**“Vendor Contract”** means a Contract to which Hummingbird or any of its subsidiaries is a party and pursuant to which Hummingbird or any of subsidiaries contracts to purchase or acquire goods and services.

## **1.2 Interpretation Not Affected by Headings**

The division of this Agreement into Articles, Sections, subsections and paragraphs and the insertion of headings are for convenience of reference only and shall not affect in any way the meaning or interpretation of this Agreement. Unless the contrary intention appears, references in this Agreement to an Article, Section, subsection, paragraph or Schedule by number or letter or both refer to the Article, Section, subsection, paragraph or Schedule, respectively, bearing that designation in this Agreement.

## **1.3 Number and Gender**

In this Agreement, unless the contrary intention appears, words importing the singular include the plural and vice versa, and words importing gender include all genders.

## **1.4 Date for Any Action**

If the date on which any action is required to be taken hereunder by a Party is not a business day, such action shall be required to be taken on the next succeeding day which is a business day.

## **1.5 Currency**

Unless otherwise stated, all references in this Agreement to sums of money are expressed in lawful money of United States of America and “\$” refers to United States dollars.

## **1.6 Accounting Matters**

Unless otherwise stated, all accounting terms used in this Agreement in respect of Hummingbird shall have the meanings attributable thereto under GAAP and all determinations of an accounting nature in respect of Hummingbird required to be made shall be made in a manner consistent with GAAP consistently applied.

## **1.7 Schedules**

The following Schedules are annexed to this Agreement and are incorporated by reference into this Agreement and form a part hereof:

- Schedule A - Regulatory Approvals
- Schedule B - Arrangement Resolution
- Schedule C - Plan of Arrangement
- Schedule D - Holding Company Participation Agreement

## **ARTICLE 2 THE ARRANGEMENT**

### **2.1 The Arrangement**

The Arrangement shall be comprised of substantially the events or transactions, taken in the sequence indicated, in Schedule C to this Agreement.

## **2.2 News Release Announcing the Arrangement**

Subject to compliance with Securities Laws, Parent and Hummingbird shall issue a mutually agreed joint news release as soon as possible after execution of this Agreement.

## **2.3 Interim Order**

As soon as practicable following the execution and delivery of this Agreement, and in any event not later than August 25, 2006 (subject to the availability of the Court), Hummingbird shall apply to the Court pursuant to section 192 of the CBCA for the Interim Order for the purpose of obtaining the approval of the Hummingbird Shareholders set forth in Section 2.7 and the granting of Dissent Rights.

## **2.4 Final Order**

If the Interim Order and the approval of Hummingbird Shareholders set forth in Section 2.7 are obtained, Hummingbird shall promptly thereafter take all steps necessary or desirable to submit the Arrangement to the Court and apply for the Final Order.

## **2.5 Articles of Arrangement and Effective Date**

Subject to the satisfaction or waiver of the conditions set forth in Article 6 (other than delivery of items to be delivered at the Effective Time and other than satisfaction of those conditions that by their nature are to be satisfied at the Effective Time, it being understood that the occurrence of the Effective Time shall remain subject to the delivery of such items and the satisfaction or waiver of such conditions at the Effective Time), on (a) the earlier of (i) October 2, 2006, provided that such conditions shall have been satisfied and/or waived by such date, (ii) the date that is five (5) business days after the satisfaction and/or waiver of such conditions (provided that such date is not earlier than October 2, 2006 nor later than the Outside Date), and (iii) the Outside Date or (b) such other date as Hummingbird and Parent shall mutually agree, Hummingbird and Parent shall cause to be filed, pursuant to subsection 192(6) of the CBCA, articles of arrangement to give effect to the Arrangement and implement the Plan of Arrangement. The steps of the Arrangement shall become effective in the order set out in the Plan of Arrangement.

## **2.6 Meeting**

Subject to receipt of the Interim Order:

- (a) Hummingbird shall, as promptly as practicable following the execution of this Agreement and in any event within three business days following the date of the Interim Order: (i) prepare and complete the Circular in consultation with Parent and provide Parent with a reasonable opportunity to review and comment on drafts of the Circular and Hummingbird shall give reasonable consideration to such comments; (ii) as promptly as practicable thereafter, subject to obtaining any Regulatory Approvals required in connection with the mailing of the Circular, file the Circular in all jurisdictions where the same is required to be filed by the Interim Order and applicable Law; and (iii) mail the Circular and other

documentation required in connection with the Meeting to the Hummingbird Securityholders in accordance with the Interim Order and applicable Law;

- (b) Hummingbird shall, subject to Section 7.1, (i) through Hummingbird's Board of Directors, recommend that Hummingbird Shareholders vote in favour of the Arrangement Resolution and include such recommendation in the Circular; and (ii) use its commercially reasonable efforts to secure the approval of the Arrangement Resolution by Hummingbird Shareholders;
- (c) subject to Section 7.1, Hummingbird shall duly call, convene and hold the Meeting in accordance with the Interim Order, the by-laws of Hummingbird and applicable Laws as soon as practicable for the purpose of considering the Arrangement Resolution (and, subject to the other terms and conditions herein, for any other proper purpose as may be set out in the notice of such meeting and agreed to by Parent, acting reasonably; provided that the Arrangement Resolution shall be voted on before any other matter at the Meeting, unless otherwise agreed by Parent) and Hummingbird shall provide notice to Parent and Acquisition Sub of the Meeting and allow the representatives of Parent and Acquisition Sub to attend the Meeting;
- (d) subject to Section 7.1 and except as required for quorum purposes or otherwise permitted under this Agreement, Hummingbird shall not adjourn (except as required by Law, by the Court or by valid Hummingbird Shareholder action), and Hummingbird shall not postpone or cancel (or propose for adjournment, postponement or cancellation) or fail to call the Meeting without Parent's prior consent, such consent not to be unreasonably withheld or delayed;
- (e) subject to Section 7.1, Hummingbird shall use commercially reasonable efforts to solicit from Hummingbird Shareholders proxies in favour of the Arrangement Resolution, using the services of dealers and proxy solicitation services, and take all other action that is necessary or desirable to secure the approval of the Arrangement Resolution by Hummingbird Shareholders;
- (f) Hummingbird shall permit Parent and its counsel to review and comment upon drafts of all material to be filed or circulated by Hummingbird in connection with the Arrangement, including the applications for the Interim Order, the Circular and the Final Order and any supplement or amendment thereof and Hummingbird shall give reasonable consideration to any comments provided by Parent; and
- (g) subject to Section 2.5 and subject to obtaining the Final Order and the satisfaction or waiver of the other conditions herein contained in favour of each Party, Hummingbird shall file Articles of Arrangement and such other documents as may be required in connection therewith under the CBCA to give effect to the Arrangement.

## **2.7 Approval of Hummingbird Shareholders**

Hummingbird's application for the Interim Order will request that the Interim Order provide that the Arrangement Resolution be subject to the approval of two-thirds of the votes

cast by or on behalf of those Hummingbird Shareholders present or represented by proxy at the Meeting (the “**Shareholder Approval**”).

## **2.8 Securities and Corporate Compliance**

- (a) Hummingbird shall diligently do all such acts and things as may be necessary to comply, in all material respects, with applicable Laws, including National Instrument 54-101 of the Canadian Securities Administrators, in relation to the Meeting.
- (b) Each of Parent and Hummingbird shall furnish to the other all such information concerning it, its affiliates and its shareholders and, in the case of Hummingbird, the Hummingbird Securityholders, as may be required to prepare the Circular or any application to Securities Regulators or other Governmental Entity and effect the actions described in the Plan of Arrangement. Each of Parent and Hummingbird shall ensure that no information that is so furnished by it contains any untrue statement of a material fact or omits to state a material fact required to be stated in any such document or necessary in order to make any information so furnished for use in any such document not misleading in light of the circumstances in which it is furnished or to be used.
- (c) Parent and Hummingbird shall each promptly notify the other if at any time before the Effective Time it becomes aware that the Circular or any application to Securities Regulators or other Governmental Entity for an order contains any untrue statement of a material fact or omits to state a material fact required to be stated therein or necessary to make the statements contained therein not misleading in light of the circumstances in which they are made, or that otherwise requires an amendment or supplement to the Circular or such application.
- (d) In the event that notice is given by a Party under Section 2.8(c) in respect of a document, the Party which filed, distributed or delivered such document shall prepare a supplement or amendment to such document, as required and as the case may be, and, if required by applicable Law, shall cause the same to be distributed to Hummingbird Securityholders and filed with the applicable Securities Regulators and the Court, as applicable. For greater certainty, in the event that notice is given by a Party under Section 2.8(c) in respect of the Circular, Hummingbird shall, if and to the extent required by applicable Law, prepare a supplement or amendment to the Circular and cause the same to be distributed to Hummingbird Securityholders and filed with the applicable Securities Regulators and the Court, as applicable; and if such notice relates to a portion of the Circular provided by Parent or Acquisition Sub expressly for incorporation into the Circular, Parent shall cooperate in the preparation of the aforementioned supplement or amendment.

## **2.9 Dissent**

Hummingbird shall give Parent: (a) prompt notice of any written demand for dissent received by Hummingbird prior to the Effective Time, any withdrawal of any such demand and any other demand, notice or instrument delivered to Hummingbird prior to the Effective Time

that relates to such demand; and (b) the opportunity to participate in all negotiations and proceedings with respect to any such demand, notice or instrument. Hummingbird shall not make any payment or settlement offer prior to the Effective Time with respect to any such demand, notice or instrument unless Parent shall have given its written consent to such payment or settlement offer.

## **2.10 Closing**

The closing of the Arrangement will take place at the offices of Goodmans LLP, 250 Yonge Street, Suite 2400 Toronto, Ontario, Canada, at 9:00 a.m. (Toronto time) on the Effective Date.

## **2.11 Preparation of Filings**

Parent and Hummingbird shall co-operate in the preparation of any application for the Interim Order, the Final Order, the Articles of Arrangement, the Regulatory Approvals and any other orders, registrations, consents, filings, rulings, exemptions, no-action letters and approvals and the preparation of any documents reasonably deemed by either of the Parties to be necessary to discharge its respective obligations or otherwise advisable under applicable Laws in connection with this Agreement and the Transactions.

## **2.12 Communications**

- (a) No Party nor any of its affiliates shall issue any press release or otherwise make public statements with respect to this Agreement or the Arrangement without the consent of Hummingbird and Parent (such consent not to be unreasonably withheld or delayed).
- (b) Neither Hummingbird nor Parent shall make any filing with any Governmental Entity with respect to the Transactions without giving the other Party a reasonable opportunity to review and comment on such filing. Each of Hummingbird and Parent shall reasonably consider comments provided by the other Party in respect of any such filing with a Government Entity.
- (c) Sections 2.12(a) and 2.12(b) shall be subject to each Party's (and its affiliates') overriding obligation to make any disclosure or filing required under applicable Laws and stock exchange rules, and the Party (or affiliate) making such disclosure shall use all commercially reasonable efforts to give prior oral or written notice to the other Party and reasonable opportunity to review or comment on the disclosure or filing, and if such prior notice is not possible, to give such notice immediately following the making of such disclosure or filing.
- (d) Each of Parent and Hummingbird shall promptly notify the other Party of any communication to a Party from any Governmental Entity in respect of the Transactions, and neither Hummingbird nor Parent shall participate in any meeting with any Governmental Entity in respect of any filings, investigations or other inquiry related to the Transactions unless it consults with the other Party in advance and, to the extent permitted by such Governmental Entity, gives the other Party the reasonable opportunity to attend and participate thereat. Each of Parent

and Hummingbird shall, upon request, furnish to the other all such information concerning it and, in the case of Hummingbird, the Hummingbird Shareholders, as may be reasonably required for purposes of the foregoing.

- (e) Hummingbird agrees that Parent may at any time directly or through a soliciting dealer actively solicit proxies in favour of the Arrangement and that the Circular shall constitute a proxy circular of Parent and shall disclose that Parent may make such solicitations; provided that in exercising such rights, Parent and its agents shall co-operate with Hummingbird.
- (f) Parent shall be entitled, at any time prior to the Meeting, to propose modifications to the Arrangement to: (i) increase the consideration it or Acquisition Sub is prepared to make available to Hummingbird Shareholders pursuant to the Arrangement, whether or not the Board of Directors of Hummingbird has changed its recommendation, provided that Parent shall use its commercially reasonable efforts to provide not less than one business day's prior written notice of such proposal to Hummingbird; or (ii) modify the terms of the Arrangement to achieve tax planning objectives of Parent, Acquisition Sub or any affiliate of Parent, including to provide for one or more amalgamations of subsidiaries of Parent and/or Hummingbird, which, in the opinion of Hummingbird, acting reasonably, (A) would not prejudice it or the Hummingbird Shareholders, or (B) would not impede or materially delay the completion of the transactions contemplated hereby provided that Parent or Acquisition Sub has provided notice of such modification to Hummingbird not less than 15 business days prior to the Meeting Date. Parent agrees that such modifications and any transactions or steps taken in accordance therewith shall not be considered in determining whether any representation or warranty of Hummingbird under this Agreement has been breached if such modifications, transactions and steps are the sole cause of such breach. The Parties shall enter into an amended agreement reflecting Parent's proposed amendments to the Arrangement (provided that such agreement shall be on and subject to the same terms and conditions as this Agreement, *mutatis mutandis*, except with respect to the modifications proposed by Parent), the Plan of Arrangement shall be modified accordingly in accordance with its terms and Hummingbird and Parent shall use their respective commercially reasonable efforts to communicate any such modifications to Hummingbird Shareholders and to ensure that any such modifications are presented to Hummingbird Shareholders at the Meeting.

## **2.13 Withholding**

- (a) Each of Parent and Acquisition Sub shall be entitled to directly or indirectly deduct and withhold from the amount otherwise payable pursuant to this Agreement or the Plan of Arrangement to any Hummingbird Securityholder such amounts as are required to be deducted and withheld with respect to the making of such payment under the Tax Act, the United States *Internal Revenue Code of 1986*, as amended (the "Code") or any other provision of domestic or foreign (whether national, federal, state, provincial, local or otherwise) Law relating to Taxes. To the extent the amounts are so deducted and withheld and paid to the appropriate taxing authorities directly or indirectly by Parent or its affiliates, such

deducted and withheld amounts shall be treated for all purposes of this Agreement or the Plan of Arrangement as having been paid to the Hummingbird Securityholder in respect of which such deduction and withholding was made by Parent or Acquisition Sub, as the case may be.

- (b) Hummingbird shall be entitled to directly or indirectly deduct and withhold from the amount otherwise payable pursuant to this Agreement or the Plan of Arrangement to any Hummingbird Securityholder, such amounts as are required to be deducted and withheld with respect to the making of such payment under the Tax Act, the Code or any other provision of domestic or foreign (whether national, federal, state, provincial, local or otherwise) Law relating to Taxes. To the extent the amounts are so deducted and withheld and paid to the appropriate taxing authorities directly or indirectly by Hummingbird or its affiliates, such deducted and withheld amounts shall be treated for all purposes of this Agreement or the Plan of Arrangement as having been paid to the Hummingbird Securityholder in respect of which such deduction and withholding was made by Hummingbird.

### **ARTICLE 3**

#### **REPRESENTATIONS AND WARRANTIES OF HUMMINGBIRD**

##### **3.1 Representations and Warranties**

Hummingbird hereby represents and warrants to and in favour of Parent as follows and acknowledges that Parent is relying upon such representations and warranties in connection with the entering into of this Agreement and the completion of the Plan of Arrangement:

- (a) Board Approval.
  - (i) The Hummingbird Board of Directors, at a meeting duly called and held prior to the execution and delivery of this Agreement, acting on the unanimous recommendation in favour of the Arrangement by the special committee of the Hummingbird Board of Directors, has duly and unanimously (with the exception of Andrew J. Malik, who has abstained from voting solely due to his being a Managing Director of Lehman Brothers Inc., a financial advisor to the Board of Directors of Hummingbird and the Special Committee of the Board of Directors of Hummingbird), adopted resolutions:
    - (A) authorizing and approving this Agreement and the Arrangement,
    - (B) authorizing Hummingbird to execute and deliver this Agreement,
    - (C) authorizing Hummingbird and its subsidiaries to consummate this Agreement on the terms set forth herein and in the Plan of Arrangement,
    - (D) determining that the Plan of Arrangement is fair to Hummingbird Shareholders and is in the best interests of Hummingbird,



- (E) directing that the Arrangement Resolution be submitted to a vote at a meeting of Hummingbird Shareholders, and
- (F) recommending that Hummingbird Shareholders approve the Arrangement Resolution,

which resolutions have not been subsequently rescinded, modified or withdrawn in any way prior to the date of this Agreement.

(ii) As of the date hereof, all of the directors of Hummingbird have advised Hummingbird that they intend to vote or cause to be voted all Hummingbird Shares beneficially held by them in favour of the Arrangement Resolution and Hummingbird shall make a statement to that effect in the Circular.

- (b) Organization and Qualification. Hummingbird and each of its subsidiaries is a corporation duly incorporated, continued, amalgamated or an entity duly created, validly organized and existing under the laws of its jurisdiction of incorporation, continuance, amalgamation or creation and, except as would not have a Material Adverse Effect on Hummingbird, has the requisite corporate or other power and authority to own its properties as now owned and to carry on its business as it is now being conducted. Hummingbird and each of its subsidiaries is registered, qualified or otherwise authorized to do business and each is, to the extent that such concept is legally recognized, in good standing in each jurisdiction in which the character of its properties, owned, leased, licensed or otherwise held, or the nature of its activities makes such registration necessary, except where the failure to be so registered or in good standing would not have a Material Adverse Effect, individually or in the aggregate, on Hummingbird. Copies of the articles and bylaws of Hummingbird furnished to Parent are accurate and complete and have not been amended or superseded and no steps or proceedings have been taken or are pending or contemplated to amend or supersede such constating documents. Section 3.1(b) of the Disclosure Letter sets forth a correct and complete list of each jurisdiction where Hummingbird or any of its subsidiaries has made filings for the purpose of becoming qualified, registered or otherwise authorized to do business.
- (c) Authority Relative to this Agreement. Hummingbird has the requisite corporate power and authority to enter into this Agreement and to carry out its obligations hereunder and to fulfill its obligations under the Arrangement. The execution, delivery and performance of this Agreement have been duly authorized by the Board of Directors of Hummingbird, and other than (i) with respect to the Circular and other matters relating solely thereto, the approval of the Board of Directors of Hummingbird and (ii) the Shareholder Approval, no other corporate proceedings on the part of Hummingbird are necessary to authorize the execution and delivery by it of this Agreement or the making or completion of the Plan of Arrangement. This Agreement has been duly and validly executed and delivered by Hummingbird and, assuming the due authorization, execution and delivery by Parent and Acquisition Sub, constitutes a legal, valid and binding obligation of Hummingbird enforceable against Hummingbird in accordance with its terms, subject to the qualification that such enforceability may be limited by bankruptcy,

insolvency, reorganization or other laws of general application relating to or affecting rights of creditors and that equitable remedies, including specific performance, are discretionary and may not be ordered.

(d) No Violations.

(i) Neither the execution and delivery of this Agreement by Hummingbird nor the completion of the Arrangement, nor compliance by Hummingbird with any of the provisions hereof will: (A) except as set forth in Section 3.1(d) of the Disclosure Letter, violate, conflict with, change the rights or obligations of any party under or result in a breach of any provision of, require any consent, approval or notice under, or constitute a default (or an event which, with notice or lapse of time or both, would constitute a default) or result in a right of termination or acceleration under, or result in the creation of any Lien upon, any of the properties or assets of Hummingbird or any of its subsidiaries, or in any such Lien becoming (or being capable of becoming) enforceable against any such properties or assets, or cause any indebtedness to come due before its stated maturity or cause any credit commitment or obligation to cease to be available or cause any payment or other obligation to be imposed on Hummingbird or any of its subsidiaries under any of the terms, conditions or provisions of (1) their respective charters or bylaws or other comparable organizational documents or (2) any note, bond, mortgage, indenture, loan agreement, deed of trust, Lien, or other Contract to which Hummingbird or any of its subsidiaries is a party or by which any of them, or any of their respective properties or assets is bound; (B) subject to obtaining the Regulatory Approvals and except for distributing and filing the Circular in accordance with applicable corporate and securities Laws and obtaining the Shareholder Approval, (1) violate any Law applicable to Hummingbird or any of its subsidiaries or any of their respective properties or assets; or (2) cause the suspension or revocation of any Permit currently in effect; or (C) except as set forth in Section 3.1(d) of the Disclosure Letter, (1) result in any payment (including severance, unemployment compensation, golden parachute, change of control, retention, bonus or otherwise) becoming due to any current or former director, officer or employee of, or consultant to, Hummingbird or any of its subsidiaries, or (2) result in any increase or acceleration of contributions, liabilities or benefits, or acceleration of vesting, under any Hummingbird Plan or restriction imposed on any asset held in connection with a Hummingbird Plan or otherwise (except, in the case of each of clauses (A)(2) and (B) above only, for such violations, conflicts, changes in rights or obligations, breaches, defaults, terminations, accelerations or creations of Liens which, or any consents, approvals or notices which if not given or received, would not', individually or in the aggregate, have any Material Adverse Effect on Hummingbird), and except, in the case of clause (C) above, for such payments that do not in the aggregate exceed \$250,000.

(ii) Subject to obtaining the Regulatory Approvals and except for distributing and filing the Circular in accordance with applicable corporate and securities Laws and obtaining the Shareholder Approval, (A) there is no legal impediment to the execution and delivery of this Agreement by Hummingbird, and (B) no

filing or registration with, or authorization, consent or approval of, any Governmental Entity is required of Hummingbird or its subsidiaries in connection with the execution and delivery of this Agreement and the Transaction Documents by Hummingbird or the completion of the Arrangement, except for such filings or registrations which, if not made, or for such authorizations, consents or approvals which, if not received, would not, individually or in the aggregate, have a Material Adverse Effect on Hummingbird.

- (e) Capitalization. The authorized share capital of Hummingbird consists of an unlimited number of Hummingbird Shares and an unlimited number of preference shares issuable in series. As of the close of business on August 3, 2006, there were issued and outstanding 17,617,449 Hummingbird Shares, and there were outstanding no other shares of any class or series in the capital of Hummingbird. As of the close of business on August 3, 2006, an aggregate of 1,227,287 Hummingbird Options were outstanding (whether or not vested) (the aggregate in-the-money value of which (being the aggregate amount by which the Purchase Price exceeds the product obtained by multiplying the exercise price (in Canadian dollars) of each such Hummingbird Option by the Exchange Factor) is \$3,615,836) and an aggregate of up to 1,227,287 Hummingbird Shares were issuable upon the exercise of Hummingbird Options, and except as set forth above and except for Acquisition Sub's right hereunder, there were no options, warrants or other rights, shareholder rights plans, agreements or commitments of any character whatsoever requiring or which may require the issuance, sale or transfer by Hummingbird of any shares in the capital of Hummingbird (including Hummingbird Shares) or any securities convertible into, or exchangeable or exercisable for, or otherwise evidencing a right to acquire, any shares in the capital of Hummingbird (including Hummingbird Shares). All outstanding Hummingbird Shares have been duly authorized and validly issued, are fully paid and non-assessable and are not subject to, nor were they issued in violation of, any pre-emptive rights, and all Hummingbird Shares issuable upon the exercise of rights under the Hummingbird Options in accordance with their respective terms have been duly authorized and, upon issuance, will be validly issued as fully paid and non-assessable and will not be subject to any pre-emptive rights. All securities of Hummingbird (including the Hummingbird Shares and the Hummingbird Options and all options, rights or other convertible or exchangeable securities) have been issued in compliance, in all material respects, with all applicable Securities Laws. There are no securities of Hummingbird or of any of its subsidiaries outstanding which have the right to vote generally (or are convertible into or exchangeable for securities having the right to vote generally) with the Hummingbird Shareholders on any matter. There are no outstanding contractual or other obligations of Hummingbird or any subsidiary to repurchase, redeem or otherwise acquire any of its securities or with respect to the voting or disposition of any outstanding securities of any of its subsidiaries.
- (f) Opinion of Financial Advisor. The Board of Directors of Hummingbird and the Special Committee of the Board of Directors of Hummingbird have received the opinion, dated August 3, 2006, of Banc of America Securities LLC (addressed to the Board of Directors and the Special Committee) to the effect that, as of the date

thereof and subject to the qualifications and limitations set forth therein, the Purchase Price to be received under the Arrangement by the holders of Hummingbird Shares (other than Parent, Acquisition Sub and their respective affiliates) is fair, from a financial point of view, to such holders.

- (g) Reporting Status and Securities Laws Matters. Hummingbird is a reporting issuer under applicable Canadian provincial Securities Laws and is not on the list of reporting issuers in default under such Securities Laws and is a foreign private issuer under United States federal Securities Laws and is not in material default of any material requirements of any Securities Laws. No delisting, suspension of trading in or cease trading order with respect to any securities of Hummingbird, and, to the knowledge of Hummingbird, no inquiry, review or investigation (formal or informal) of any Securities Regulator or Exchange, is in effect or ongoing or, to the knowledge of Hummingbird, expected to be implemented or undertaken.
- (h) Ownership of Subsidiaries. Section 3.1(h) of the Disclosure Letter includes a complete and accurate list of all subsidiaries, together with its jurisdiction of incorporation or organization, owned, directly or indirectly, by Hummingbird, each of which is wholly-owned except as otherwise noted in such list. All of the outstanding shares of capital stock and other ownership interests in Hummingbird's subsidiaries are duly authorized, validly issued, fully paid and non-assessable, and all such shares and other ownership interests held directly or indirectly by Hummingbird are, except as disclosed in Section 3.1(h) of the Disclosure Letter, owned free and clear of all Liens, and there are no outstanding options, rights, entitlements, understandings or commitments (contingent or otherwise) regarding the right to acquire any such shares of capital stock or other ownership interests in or material assets or properties of any of Hummingbird's subsidiaries except as set forth in Section 3.1(h) of the Disclosure Letter.
- (i) Reports. As of their respective dates or, where no such date is specified, the date of filing with Securities Regulators (i) Hummingbird's audited financial statements as at and for the fiscal years ended September 30, 2005, 2004 and 2003 (including the notes thereto and related management's discussion and analysis ("**MD&A**")), and Hummingbird's unaudited interim financial statements as at and for the three months ended December 31, 2005 and as at and for the six months ended March 31, 2006 (including the notes thereto and related MD&A) (collectively, the "**Hummingbird Financial Statements**"); (ii) Hummingbird's annual information form dated December 29, 2005 (including all documents incorporated by reference therein); (iii) Hummingbird's management information circular dated February 6, 2006 in respect of the annual meeting of Hummingbird Shareholders for fiscal year 2005 and management information circular dated June 23, 2006 in respect of a special meeting of Hummingbird Shareholders; (iv) all material change reports and other documents filed with the Securities Regulators since September 30, 2005; and (v) all prospectuses and other documents filed by Hummingbird in the offering of its securities with Securities Regulators or any Exchange since September 30, 2003: (1) did not at the respective effective dates contain any untrue statement of a material fact or omit

to state a material fact required to be stated therein or necessary to make the statements therein, in light of the circumstances in which they were made, not misleading; and (2) complied in all material respects with Securities Laws. The Hummingbird Financial Statements and all financial statements of Hummingbird and its subsidiaries included or incorporated by reference in information circulars, forms, reports, statements, prospectuses and other documents since September 30, 2003 were prepared in accordance with GAAP consistently applied (except (A) as otherwise indicated in such financial statements and the notes thereto or, in the case of audited statements, in the related report of Hummingbird's independent auditors, (B) in the case of unaudited interim statements, are subject to normal year-end adjustments and may omit notes which are not required by applicable Laws in the unaudited statements or (C) as items in such financial statements have been reclassified) and fairly present in all material respects the consolidated financial position, results of operations and changes in financial position of Hummingbird and its subsidiaries as of the dates thereof and for the periods indicated therein (subject, in the case of any unaudited interim financial statements, to normal period-end adjustments) and reflect reserves required by GAAP consistently applied in respect of all contingent liabilities, if any, of Hummingbird and its subsidiaries on a consolidated basis. Hummingbird is not currently aware of any year-end adjustments that are expected to be material. There has been no change in Hummingbird's accounting policies, except as described in the notes to the Hummingbird Financial Statements, since September 30, 2005. Except as set forth in the Hummingbird Financial Statements, neither Hummingbird nor any of its subsidiaries have any documents creating any material off-balance sheet arrangements. Neither Hummingbird nor any of its subsidiaries is a party to, or has any commitment to become a party to, any joint venture, partnership agreement or any similar contract (including any contract relating to any transaction, arrangement or relationship between or among Hummingbird or any of its subsidiaries, on the one hand, and any unconsolidated affiliate, including any structured finance, special purpose or limited purpose entity or person, on the other hand) where the purpose or intended effect of such arrangement is to avoid disclosure of any material transaction involving Hummingbird or any of its subsidiaries in the Hummingbird Financial Statements. Neither Hummingbird nor any of its subsidiaries, has, directly or indirectly, made or arranged for any extension or maintaining of credit, or renewal of an extension of credit, in the form of a personal loan to or for any director, employee or security holder of or consultant to Hummingbird or any of its subsidiaries or to any director or employee of or consultant to any such security holder.

- (j) Litigation. Except as set forth in Section 3.1(j) of the Disclosure Letter, there are no claims, actions, suits or proceedings pending or, to the knowledge of Hummingbird, threatened and to the knowledge of Hummingbird there are no material investigations or inquiries pending or threatened, affecting Hummingbird or any of its subsidiaries or affecting any of their respective property or assets at law or in equity before or by any Governmental Entity. Neither Hummingbird nor any of its subsidiaries nor their respective assets or properties is subject to any material outstanding judgment, order, writ, injunction or decree.

- (k) Taxes. Hummingbird and each of its subsidiaries has duly and timely filed all Returns required to be filed by it prior to the date hereof, other than those which have been administratively waived or those set forth in Section 3.1(k) of the Disclosure Letter, and all such Returns are complete and correct, except for any failure to file or errors or omissions that, individually or in the aggregate, would not have a Material Adverse Effect on Hummingbird. Hummingbird and each of its subsidiaries has paid on a timely basis all Taxes which are due and payable, all assessments and reassessments, and all other Taxes due and payable by it on or before the date hereof, other than those (i) which are being or have been contested in good faith and in respect of which reserves have been provided in the most recently published Hummingbird Financial Statements and (ii) any Taxes in excess of such reserves which the failure to pay would not, individually or in the aggregate, result in a Material Adverse Effect on Hummingbird. Except as provided for in the Hummingbird Financial Statements and except as disclosed in Section 3.1(k) of the Disclosure Letter, no deficiencies, litigation, proposed adjustments or matters in controversy exist or have been asserted in writing with respect to Taxes of Hummingbird or any of its subsidiaries, and neither Hummingbird nor any of its subsidiaries is a party to any action or proceeding for assessment or collection of Taxes, except to the extent that such deficiencies, litigation, proposed adjustments or matters in controversy or action or proceeding would not have, individually or in the aggregate, a Material Adverse Effect on Hummingbird. Hummingbird and each of its subsidiaries has properly withheld all Taxes required to have been withheld in connection with amounts paid or credited or deemed to be paid or credited by any of them to or for the account or benefit of any person, including any shareholder, employee, creditor, independent contractor, or other third party and has duly and timely remitted to the appropriate authority such Taxes and other amounts required by Law to be remitted by any of them, except to the extent that failure to so withhold or remit has not or would not, individually or in the aggregate, have a Material Adverse Effect on Hummingbird. None of Hummingbird or any of its subsidiaries has any liability for the Taxes of any person (other than any of Hummingbird or its subsidiaries) under Treas. Reg. § 1.1502-6 (or any similar provision of state, local, or non-US law), as a transferee or successor, by contract, or otherwise. No material claim has ever been made by a taxing authority in a jurisdiction where Hummingbird or any of its subsidiaries does not file Returns that such person is or may be subject to taxation by such jurisdiction. None of Hummingbird or its subsidiaries has consented to extend the time, or is the beneficiary of any extension of time, in which any Tax may be assessed or collected by any taxing authority. None of Hummingbird or its subsidiaries is a party to any agreement, contract, arrangement or plan that has resulted or would result, separately or in the aggregate, in the payment of any “excess parachute payment” within the meaning of Code § 280G (or any corresponding provision of state, local or non-US income Tax law).
- (l) Absence of Undisclosed Liabilities. Except as disclosed in the Hummingbird Public Disclosure Record or the Hummingbird Financial Statements, neither Hummingbird nor any of its subsidiaries has any obligations or liabilities of any nature (matured or unmatured, fixed or contingent) except for liabilities (i)

incurred in connection with the transactions contemplated by this Agreement, (ii) incurred in the ordinary course of business consistent with past practice since March 31, 2006 or (iii) that, individually or in the aggregate, would not result in a Material Adverse Effect on Hummingbird.

- (m) No Material Adverse Effect. Since March 31, 2006 there has not been any Material Adverse Effect on Hummingbird and no event, change or development has occurred, including any material damage, destruction or other casualty loss with respect to any material asset owned, leased or otherwise used by Hummingbird or any of its subsidiaries, whether or not covered by insurance, which would have a Material Adverse Effect on Hummingbird; During the period since March 31, 2006, Hummingbird and its subsidiaries have conducted their businesses only in the ordinary course consistent with past practice and have not taken any of the actions described in any of clauses (i) through (viii) and clause (x) of Section 5.1(d), except for the execution of the Symphony Arrangement Agreement and actions taken by Hummingbird in satisfaction of its obligations thereunder.
- (n) Environmental. All operations of Hummingbird and each of its subsidiaries have been and are now being conducted in material compliance with all applicable Environmental Laws. There is no Environmental Condition present at, and to the knowledge of Hummingbird, there has been no use, release, threatened release, disposal, or arrangement for disposal, generation, handling or transportation of, or exposure to, any Hazardous Substance on, at, under or from, any property currently or, to the knowledge of Hummingbird, formerly owned or leased by Hummingbird or any of its subsidiaries and, to the knowledge of Hummingbird, neither Hummingbird nor any of its subsidiaries is aware of, or is subject to: (i) any proceeding, application, order, directive, investigation, claim or complaint which relates to environmental, health or safety matters, and which may require any material work, repairs, construction, expenditures, obligations or liabilities; (ii) any demand, investigation or notice with respect to the breach of any Environmental Laws applicable to Hummingbird or any of its subsidiaries; or (iii) any changes to the terms of any Environmental Permits or any review by any Governmental Entity of such Environmental Permits, in each case as would, individually or in the aggregate, have a Material Adverse Effect on Hummingbird.
- (o) Owned Real Property; Assets. Section 3.1(o) of the Disclosure Letter sets out a list of all owned real property interests of Hummingbird or any of its subsidiaries. Hummingbird and/or each of its subsidiaries has good, marketable and valid title in fee simple to its owned real property interests, free and 'clear of all Liens, including mortgages, other than (i) easements, zoning restrictions and restrictive covenants which do not materially interfere with the use or market value of such owned real property interests in the operation of the business of Hummingbird and its subsidiaries, and (ii) Liens incurred not in connection with the borrowing of money which do not and would not, individually or in the aggregate, have a Material Adverse Effect on the occupancy, use or value of the affected assets. Hummingbird and its subsidiaries are the beneficial owners of, and have title to,

all the material assets owned by Hummingbird and its subsidiaries which are used in connection with their respective businesses.

- (p) Leased Real Property. Section 3.1(p) of the Disclosure Letter lists all real property leases to which Hummingbird or one of its subsidiaries is a party (a **“Lease”**). Each Lease has been validly executed and delivered by the tenant and is unmodified except as set forth in Section 3.1(p) of the Disclosure Letter and is in full force and effect. Each Lease represents the entire agreement between the landlord and the tenant in respect of the leased premises. Hummingbird and its subsidiaries are not in default of any of their material obligations under any Lease and there is no outstanding material dispute between Hummingbird, its subsidiaries and the landlord in respect of any Lease.
- (q) Material Contracts. All of the following Contracts (the **“Material Contracts”**) are either listed in Section 3.1(q) of the Disclosure Letter or another Section of the Disclosure Letter:
  - (i) any commission or sales agreement with an employee, individual consultant or salesperson, or under which a firm or other organization provides commission or sales-based services to Hummingbird or any of its subsidiaries, except for those agreements entered into in the ordinary course of business;
  - (ii) any stock option plan;
  - (iii) any fidelity or surety bond or completion bond;
  - (iv) any lease of personal property having aggregate outstanding ongoing obligations of Hummingbird or any of its subsidiaries in excess of \$250,000;
  - (v) the Symphony Arrangement Agreement, any amendments or variations to the Symphony Arrangement Agreement and any agreement whether oral or in writing with any of the parties to the Symphony Arrangement Agreement or their affiliates or parties related to such parties;
  - (vi) other than standard customer contracts previously provided to Parent or that contain indemnification or guaranty provisions in favour of any person that do not impose any obligation or liability (contingent or otherwise) on Hummingbird or any of its subsidiaries greater than those contained in contracts previously provided to Parent, any agreement of indemnification or guaranty to any person;
  - (vii) any agreement containing any covenant materially limiting the freedom of Hummingbird or any of its subsidiaries to engage in any line of business or in any geographic territory or to compete with any person, or which grants to any person any exclusivity to any geographic territory, any customer, or any product or service;
  - (viii) any agreement relating to capital expenditures and involving future payments in excess of \$250,000;



- (ix) any agreement relating to the disposition of assets or any interest in any business enterprise outside the ordinary course of business or any agreement relating to the acquisition of assets or any interest in any business enterprise outside the ordinary course of business;
- (x) any mortgages, indentures, loans or credit agreements, security agreements or other agreements or instruments relating to the borrowing of money or the extension of credit (other than security agreements for office or similar equipment where the value of the assets secured does not exceed \$250,000);
- (xi) any dealer, distribution, joint marketing (including any pilot program), development, content provider, destination site or merchant agreement, joint venture, partnership, strategic alliance or agreement involving the sharing of profits, losses, costs or liabilities with any person or any development, original equipment manufacturer, value added re-seller, remarketer or other agreement for distribution, data-sharing, marketing, resale, distribution or similar arrangement relating to any product or service of Hummingbird or any of its subsidiaries or the products or services of any other person that involved payments by Hummingbird and its subsidiaries of \$500,000 or more in the 12 month period ended March 31, 2006;
- (xii) any material liability of Hummingbird or any of its subsidiaries pursuant to a customer contract that does not limit the liability of Hummingbird or any of its subsidiaries to the amount of the total fees paid to Hummingbird or any of its subsidiaries under such contract;
- (xiii) any material commitment to any customer of Hummingbird or any of its subsidiaries or other person to develop or customize any product or service, or to customize or develop any third-party product, service or platform, in either case without compensation in an amount in excess of the cost to Hummingbird or any of its subsidiaries to perform such commitment;
- (xiv) to the knowledge of Hummingbird, any agreement pursuant to which Hummingbird or any of its subsidiaries agreed to provide “most favoured nation” pricing or others terms and conditions to any person with respect to the sale, distribution, license or support of any products or services;
- (xv) except as disclosed in clauses (i) through (xiii) above, any agreement that involved payments or receipts of more than \$500,000 in the 12 month period ended September 30, 2005 or that Hummingbird expects to involve payments or receipts of \$500,000 or more; or
- (xvi) any agreement, the termination or loss of which would have a Material Adverse Effect on Hummingbird. Section 3.1 (q) of the Disclosure Letter also sets forth a list of any customer or counterparty of Hummingbird or any of its subsidiaries that had purchase orders or contracts (including for services) involving payments to Hummingbird of more than \$250,000 in the 12-month period ended March 31, 2006 (the “**Material Purchase Orders**”). None of

Hummingbird, its subsidiaries nor, to the knowledge of Hummingbird, any of the other parties thereto, is in default or breach of, nor has Hummingbird or its subsidiaries received any written notice of default or breach of, or termination under, any Material Contract or Material Purchase Order, and, to the knowledge of Hummingbird, there exists no state of facts which after notice or lapse of time or both would constitute a default or breach of any such Contract except as would not, individually or in the aggregate, have a Material Adverse Effect on Hummingbird. Except as set forth in Section 3.1(q) of the Disclosure Letter, no Material Contract: (a) would be violated, contravened or breached by, or under which a default would occur; (b) requires any consent or prior approval be obtained from any person (including consents relating to the change of control of Hummingbird and its subsidiaries) or notice (prior to or following the Effective Time); or (c) would terminate; in each case, upon the execution of this Agreement or the completion of the Transactions. No state of facts exists in relation to Financial Indebtedness (as defined in any of the debt instruments of Hummingbird or any of its subsidiaries) of Hummingbird or any subsidiary of Hummingbird that (i) would constitute a default or an event of default (or a matter that with the giving of notice, the passage of time or the fulfillment of any other condition would result in the occurrence of a default or an event of default) under any such Financial Indebtedness, (ii) has resulted in any such Financial Indebtedness becoming due and payable, or being capable of being declared due and payable, prior to its stated maturity date, (iii) has resulted in any party to any Contract with respect to any such Financial Indebtedness having a right to terminate, cancel or suspend its commitment or any of its obligations under any such Contract or (iv) has resulted in any Lien securing any such Financial Indebtedness becoming, or being capable of becoming, enforceable, except, in each case, as would not, individually or in the aggregate, have a Material Adverse Effect on Hummingbird.

- (r) Permits. Hummingbird and each of its subsidiaries has obtained and is in compliance with all Permits, including Environmental Permits, required by applicable Laws, necessary to conduct its current businesses as they are now being conducted, other than where the absence of such Permits or the failure to comply would not, individually or in the aggregate, have a Material Adverse Effect on Hummingbird. No suspension or cancellation of any of the Permits is pending or, to Hummingbird's knowledge, threatened, which would have a Material Adverse Effect on Hummingbird.
- (s) Pension and Employee Benefits.
  - (i) Hummingbird and each of its subsidiaries has complied, in all material respects, with the terms of all agreements, health, welfare, supplemental unemployment benefit, bonus, incentive compensation, profit sharing, deferred compensation, stock purchase, stock appreciation rights, stock compensation, disability, pension or retirement plans and other employee compensation or benefit plans, policies or arrangements which are maintained by or binding upon Hummingbird or such subsidiary or in respect of which Hummingbird or any of its subsidiaries has any actual or potential liability (collectively, the

**“Hummingbird Plans”**) and with all applicable Laws relating thereto. Section 3.1(s) of the Disclosure Letter sets out a complete and accurate list of all Hummingbird Plans.

(ii) All of the Hummingbird Plans are and have been (where required) established, registered, qualified, invested and administered in all material respects in accordance with all applicable Laws, and in all material respects in accordance with their terms and the terms of agreements between Hummingbird and/or any of its subsidiaries, as the case may be, and their respective employees and former employees. To the knowledge of Hummingbird, no fact or circumstance exists that could adversely affect the existing tax status of a Hummingbird Plan.

(iii) All current obligations of Hummingbird or any of its subsidiaries regarding the Hummingbird Plans have been satisfied in all material respects and no Taxes are owing or exigible under any of the Hummingbird Plans except as would not have a Material Adverse Effect on Hummingbird. All contributions or premiums required to be made by Hummingbird or any of its subsidiaries, as the case may be, under the terms of each Hummingbird Plan or by applicable Laws have been made in a timely fashion in accordance with applicable Laws and the terms of the Hummingbird Plans except as would not have a Material Adverse Effect on Hummingbird.

(iv) Except as set out in Section 3.1(s) of the Disclosure Letter, none of the Hummingbird Plans provides retirement benefits on a defined benefit basis.

(v) No Hummingbird Plan is subject to any pending investigation, examination or other proceeding, action or claim initiated by any Governmental Entity, or by any other party (other than routine claims for benefits), and, to the knowledge of Hummingbird, there exists no state of facts which after notice or lapse of time or both could reasonably be expected to give rise to any such investigation, examination or other proceeding, action or claim or to affect the registration or qualification of any Hummingbird Plan required to be registered or qualified.

(vi) All liabilities of Hummingbird and each of its subsidiaries (whether accrued, absolute, contingent or otherwise) related to the Hummingbird Plans have been fully and accurately accrued and disclosed, and reported in accordance with GAAP consistently applied in the Hummingbird Financial Statements. The value of benefits that may be provided under any of the Hummingbird Plans will not be calculated on the basis of the occurrence of the Transactions.

(vii) Neither Hummingbird nor any of its subsidiaries has any liability or potential liability (including, but not limited to, withdrawal liability) with respect to (A) any **“employee pension benefit plan”** (as such term is defined in Section 3(2) of the *Employee Retirement Income Security Act of 1974*, as amended (**“ERISA”**)) that is or was subject to Section 302 of Title I of ERISA, Title IV of ERISA or Section 412 of the Code, (B) any **“multiemployer plan”** (as such term is defined in Section 3(37) of ERISA), (C) any employee benefit plan that

provides health or life insurance benefits or other welfare-type benefits to former employees, except as specifically required by law, or (D) any nonqualified deferred compensation plan within the meaning of Section 409A(d)(1) of the Code, except for severance provided under the employment agreements listed in Section 3.1(t) of the Disclosure Letter or under employment agreements that are not material to the business of Hummingbird.

(viii) Except as set out in Section 3.1(s) of the Disclosure Letter, neither Hummingbird nor any of its subsidiaries has agreed or committed to institute any plan, program, arrangement or agreement for the benefit of employees or former employees of Hummingbird or its subsidiaries other than the Hummingbird Plans, or to make any amendments to any of the Hummingbird Plans. Except as set out in Section 3.1(s) of the Disclosure Letter, no Hummingbird Plan provides benefits to any individual who is not an employee, officer or director of Hummingbird or its subsidiaries, or the dependents or other beneficiaries of any such employee, officer or director.

(t) Employment Agreements and Collective Agreements. Except as set forth in Section 3.1(t) of the Disclosure Letter, neither Hummingbird nor any of its subsidiaries is a party to or bound or governed by:

(i) any employment, retention, change of control or other agreement with any officer, employee, contractor, consultant or advisor whose base annual compensation is at least \$250,000;

(ii) any collective bargaining or union agreement or any actual or, to the knowledge of Hummingbird, threatened application for certification or bargaining rights in respect of Hummingbird or any of its subsidiaries;

(iii) any labour dispute, strike or lock-out relating to or involving any employee of Hummingbird or any of its subsidiaries or has, in the 24 months prior to date hereof, been a party to any such dispute, strike or lock-out; or

(iv) claims or, to the knowledge of Hummingbird, threatened claims arising out of or in connection with employment by Hummingbird or any of its subsidiaries or the termination thereof that exceed, in the aggregate, \$250,000.

(u) Compliance with Laws. Hummingbird and its subsidiaries are in compliance with applicable Laws, other than non-compliance or violations which would, individually or in the aggregate, not have a Material Adverse Effect on Hummingbird.

(v) Intellectual Property and Software.

(i) Section 3.1(v)(i) of the Disclosure Letter contains a complete and accurate copy of Hummingbird's current price book, which lists all material products and services currently marketed by Hummingbird.

(ii) Section 3.1(v)(ii) of the Disclosure Letter contains a complete and accurate list of the following Owned Hummingbird IP: (A) all Domain Names, (B) all registered Trademarks and material unregistered Trademarks; (C) all Patents; and (D) all registered Copyrights, in each case listing, as applicable, (1) the name of the applicant/registrant and current owner, (2) the jurisdiction of the application/registration and (3) the application or registration number. To the knowledge of Hummingbird, none of the material Owned Hummingbird IP is invalid or unenforceable.

(iii) To the knowledge of Hummingbird, in each case in which Hummingbird or any of its subsidiaries has acquired ownership of any registered Trademarks, registered Copyrights or Patents included in the Owned Hummingbird IP from another person, Hummingbird or its appropriate subsidiary has recorded or had recorded such acquisition with the U.S. Patent and Trademark Office, the U.S. Copyright Office, or their respective equivalents in the applicable jurisdiction, in each case in accordance with all applicable Legal Requirements.

(iv) Section 3.1(v)(iv) of the Disclosure Letter contains a complete and accurate list of all material Contracts (A) under which Hummingbird or any of its subsidiaries uses or has the right to use any Licensed Hummingbird IP, other than licenses and related services agreements for generally commercially available software that is not distributed by Hummingbird or incorporated by Hummingbird into any Hummingbird products (B) under which Hummingbird or any of its subsidiaries has licensed to any other person the right to use or agreed to transfer to any other person any of the Hummingbird IP, other than customer licenses and other agreements entered into in the ordinary course of business, or (C) which grant, or which may require Hummingbird or any of its subsidiaries to grant, to others the right, whether contingent or otherwise, to use or access any Hummingbird Source Code or which creates or governs any source code escrow arrangement (such Contracts referred to in the foregoing clauses (A) and (B) being referred to herein as the **“Hummingbird IP Agreements”**). Except as set forth in Section 3.1(v)(iv) of the Disclosure Letter, neither Hummingbird nor any of its subsidiaries has granted to any other person any material exclusive license or other exclusive rights under any Hummingbird IP. To the knowledge of Hummingbird, no third parties to the Hummingbird IP Agreements are in material breach thereof. To the knowledge of Hummingbird, there are no material pending disputes regarding the scope of such Hummingbird IP Agreements, performance under the Hummingbird IP Agreements, or with respect to payments made or received under such Hummingbird IP Agreements. To the knowledge of Hummingbird, all Hummingbird IP Agreements are binding and are in full force and effect.

(v) To the knowledge of Hummingbird, the Owned Hummingbird IP, together with the Licensed Hummingbird IP, is sufficient for the conduct of the business of Hummingbird and its subsidiaries as currently conducted.

(vi) Hummingbird and its subsidiaries own all right, title and interest in the Owned Hummingbird IP, free and clear of all material Liens other than (A) encumbrances, restrictions or other obligations arising under any of the

Hummingbird IP Agreements and (B) non-exclusive licenses granted by Hummingbird and its subsidiaries in the ordinary course of business.

(vii) Hummingbird and each of its subsidiaries have taken reasonable and appropriate steps to protect and preserve the confidentiality of the trade secrets that comprise any part of the Hummingbird IP and, to the knowledge of Hummingbird, there has been no material unauthorized use, disclosure or infringement of any such trade secrets by any person. Hummingbird and its subsidiaries have a policy requiring all employees, consultants and contractors to execute confidentiality and invention assignment agreements substantially in Hummingbird's standard form previously provided to Parent. Except as discussed in Section 3.1(v)(vii) of the Disclosure Letter, Hummingbird and its subsidiaries have obtained from all persons (including employees, consultants and contractors) who have created any material portion of, or otherwise who would have any material rights in or to, the Owned Hummingbird IP valid and enforceable written assignments of any such work, invention, improvement or other rights in favour of Hummingbird and its subsidiaries.

(viii) To the knowledge of Hummingbird, none of the products or services of Hummingbird or any of its subsidiaries nor any other aspect of the conduct of Hummingbird's or its subsidiaries' respective businesses has infringed upon or otherwise violated, or is infringing upon or otherwise violating, in any respect the Intellectual Property Rights of any third party. To the knowledge of Hummingbird, no third party is infringing upon in any material respect any Owned Hummingbird IP.

(ix) Other than as disclosed in Section 3.1(j) of the Disclosure Letter, there is no suit, claim, action, investigation or proceeding made, conducted or brought by any third party that has been served upon or, to the knowledge of Hummingbird, filed or threatened with respect to, and Hummingbird has not been notified in writing of, any alleged infringement or other violation in any material respect by Hummingbird or any of its subsidiaries of any Intellectual Property Rights of any third party. Other than as disclosed in Section 3.1(j) of the Disclosure Letter, to the knowledge of Hummingbird, there is no pending or threatened claim challenging the validity or enforceability of, or contesting Hummingbird's or any of its subsidiaries' ownership of or other rights with respect to any of the Hummingbird IP. Hummingbird and its subsidiaries are not subject to any Order of any Governmental Entity that restricts or impairs the use of any Hummingbird IP. ‘

(x) Except as set forth in Section 3.1(v)(x) of the Disclosure Letter, the execution and delivery of this Agreement and the consummation of the Transactions will not result in (A) any right of termination or cancellation under any Hummingbird IP Agreement or any loss of rights in or to any Hummingbird IP that is material to the business of Hummingbird and its subsidiaries as currently conducted or (B) after consummation of the Transactions, Parent or any of its subsidiaries being required, under the terms of any agreement to which Hummingbird or any of its subsidiaries is a party, to grant any third party any

license or other rights in or to any of Parent's or any of its subsidiaries' Intellectual Property Rights.

(xi) Except as specified in Section 3.1(v)(xi) of the Disclosure Letter, no Hummingbird product (including any Hummingbird product currently under development) contains or is distributed with any code that is, in whole or in part, subject to the provisions of any license to software that is made generally available to the public without requiring payment of fees or royalties (including without limitation any obligation or condition under any "open source" license such as, without limitation, the GNU General Public License, GNU Lesser General Public License, Mozilla Public License or BSD licenses) ("**Publicly Available Software**"). No Hummingbird product is subject to any license terms that require, or condition the use or distribution of such Hummingbird product on, the disclosure, licensing or distribution of any source code for any portion of such Hummingbird product.

(xii) To the knowledge of Hummingbird, no condition has occurred that would be sufficient to entitle the beneficiary under any source code escrow arrangement to require release of any Hummingbird Source Code. The consummation of the Transactions will not constitute a condition sufficient to entitle the beneficiary under any source code escrow arrangement to require release of any Hummingbird Source Code for any current Hummingbird product, nor to the knowledge of Hummingbird, that would require release of any source code for any former Hummingbird product.

(xiii) Hummingbird's and its subsidiaries' collection and dissemination of personal customer information in connection with their respective businesses has been conducted in all material respects in accordance with applicable privacy policies published or otherwise adopted by Hummingbird and its subsidiaries and any applicable Legal Requirements.

(xiv) There are no currently pending or, to Hummingbird's knowledge, threatened warranty claims with respect to any Hummingbird product. Section 3.1(v)(xiv) of the Disclosure Letter contains copies of the terms of Hummingbird's and its subsidiaries' current forms of standard product warranties. Except as set forth in Section 3.1(v)(xiv) of the Disclosure Letter, Hummingbird and its subsidiaries have made no express warranties with respect to any Hummingbird products other than such standard product warranties. There are no written notices by any Government Entity or any product testing laboratory stating that any product of Hummingbird and its subsidiaries is unsafe or fails to meet any standards promulgated by such Governmental Entity or testing laboratory.

(xv) There are no currently pending or, to Hummingbird's knowledge, threatened warranty or other claims with respect to services provided by Hummingbird or any of its subsidiaries to any Person ("**Services**").

- (w) Insurance. Hummingbird and its subsidiaries have policies of insurance with responsible insurers in full force and effect naming Hummingbird and its

subsidiaries, as applicable, as insured which provide coverage on a basis that is customary in the industries in which it and they participate and that, having regard to the nature of their risk, are reasonable. Hummingbird and its subsidiaries have such policies of insurance as are listed in Section 3.1(w) of the Disclosure Letter, and Hummingbird is in compliance with all requirements with respect thereto.

- (x) Corrupt Practices Legislation. There have been no actions taken by or, to the knowledge of Hummingbird, on behalf of Hummingbird or its subsidiaries that would cause Hummingbird to be in violation of the Foreign Corrupt Practices Act of the United States of America or the Corruption of Foreign Public Officials Act (Canada).
- (y) Brokers and Advisors. Except for Lehman Brothers and Bane of America Securities LLC, no broker, finder or investment banker is entitled to any brokerage, finder's or other fee or commission from, or to the reimbursement of any of its expenses by, Hummingbird in connection with this Agreement or the Plan of Arrangement. Hummingbird has provided to Parent a correct and complete copy of all agreements relating to the arrangements between it and its financial advisors which are in effect at the date hereof.
- (z) Investment Canada Act. Neither Hummingbird nor any of its subsidiaries is engaged in a "cultural business" for purposes of subsection 14.1(5) of the *Investment Canada Act* (Canada).
- (aa) No "Collateral Benefit" Under Ontario Rule. No related party of Hummingbird (within the meaning of Ontario Securities Commission Rule 61-501 – *Insider Bids, Issuer Bids, Business Combination and Related Party Transactions*) together with its associated entities, beneficially owns or exercises control or direction over 1% or more of the outstanding Hummingbird Shares, except for related parties who will not receive a "collateral benefit" (within the meaning of such Rule) from Hummingbird or any of its subsidiaries as a consequence of the Transactions.
- (bb) Books and Records. The financial books, records and accounts of Hummingbird and its subsidiaries in all material respects (i) have been maintained in accordance with good business practices on a basis consistent with prior years, (ii) are stated in reasonable detail and accurately and fairly reflect the material transactions and dispositions of the assets of Hummingbird and its subsidiaries and (iii) accurately and fairly reflect the basis for the Hummingbird Financial Statements. Hummingbird has devised and maintains a system of internal accounting controls sufficient to provide reasonable assurances that (A) transactions are executed in accordance with management's general or specific authorization; and (B) transactions are recorded as necessary to permit preparation of financial statements in conformity with GAAP. Hummingbird's and its subsidiaries' corporate records and minute books have been maintained in compliance in all material respects with applicable Laws and are complete and accurate in all material respects.



- (cc) Restrictions on Business Activities. There is no agreement, judgment, injunction, order or decree binding upon Hummingbird or any of its subsidiaries that has or could have the effect of prohibiting, restricting or impairing any business practices of Hummingbird or such subsidiary, except as would not have a Material Adverse Effect on Hummingbird.
- (dd) Disclosure/Internal Controls. Hummingbird has designed disclosure controls and procedures to ensure that material information relating to Hummingbird, including its subsidiaries, is made known to the management of Hummingbird by others within those entities. With respect to Hummingbird's most recent annual report on Form 40-F, Hummingbird's principal executive officer and its principal financial officer have disclosed, based on their most recent evaluation, to Hummingbird's auditors (i) all significant deficiencies in the design or operation of the internal controls that are reasonably likely to adversely affect Hummingbird's ability to record, process, summarize and report financial data and have identified for Hummingbird's auditors any material weakness in internal controls, and (ii) any fraud, whether or not material, that involves management or other employees who have a significant role in Hummingbird's internal controls.
- (ee) Cash. On March 31, 2006, Hummingbird and its subsidiaries had not less than \$94 million of consolidated cash (as defined by GAAP).
- (ff) Hummingbird Stock Option Plan. Since the original date of adoption by Hummingbird of its 1996 Stock Option Plan, there has not been a "Triggering Event" (as such term is defined in the Hummingbird Stock Option Plan), other than any Triggering Event resulting from the Open Text Offer.
- (gg) Financial Institution. Hummingbird is not a "financial institution" for the purpose of Section 142.2 of the Tax Act.

### **3.2 Survival of Representations and Warranties**

The representations and warranties of Hummingbird contained in this Agreement shall survive, and shall not be affected by, any investigation of the subject matter thereof by Parent, Acquisition Sub or any affiliate thereof or by any representative of any of the foregoing, or any knowledge of any such person with respect thereto. The representations and warranties of Hummingbird contained in this Agreement shall expire and be terminated on the earlier of the Effective Date and the date on which this Agreement is terminated in accordance with its terms.

## **ARTICLE 4 REPRESENTATIONS AND WARRANTIES OF PARENT, HOLDCO AND ACQUISITION SUB**

### **4.1 Representations and Warranties**

Parent and Acquisition Sub hereby represent and warrant to and in favour of Hummingbird as follows and acknowledge that Hummingbird is relying upon such representations and warranties in connection with the entering into of this Agreement:

- (a) Organization and Qualification. Each of Parent and Acquisition Sub is a corporation duly incorporated or an entity duly created, validly existing and in good standing under the laws of its jurisdiction of incorporation, continuance or creation and has the requisite corporate or other power and authority to own its properties as now owned and to carry on its business as it is now being conducted.

- (b) Authority Relative to this Agreement. Each of Parent and Acquisition Sub has the requisite corporate authority to enter into this Agreement and to carry out its obligations hereunder and to fulfill its obligations under the Arrangement. The execution, delivery and performance of this Agreement and the completion of the Plan of Arrangement by each of Parent and Acquisition Sub contemplated hereby have been duly authorized by the Board of Directors or equivalent governing body of each of Parent and Acquisition Sub and no other corporate proceedings on the part of Parent and Acquisition Sub are necessary to authorize the execution and delivery by it of this Agreement or the making or completion of the Plan of Arrangement. This Agreement has been duly executed and delivered by each of Parent and Acquisition Sub and constitutes a legal, valid and binding obligation of each of Parent and Acquisition Sub enforceable against it in accordance with its terms, subject to the qualification that such enforceability may be limited by bankruptcy, insolvency, reorganization or other laws of general application relating to or affecting rights of creditors and that equitable remedies, including specific performance, are discretionary and may not be ordered.
- (c) No Violations.
- (i) Neither the execution and delivery of this Agreement by each of Parent and Acquisition Sub nor the completion of the Arrangement nor compliance by each of Parent and Acquisition Sub with any of the provisions hereof will violate, conflict with, or result in a breach of any provision of, require any consent, approval or notice under, or constitute a default (or an event which, with notice or lapse of time or both, would constitute a default) under (A) the respective articles or by-laws or other comparable organizational documents of each of Parent and Acquisition Sub or (B) any material contract or other instrument or obligation to which Parent and Acquisition Sub is a party or to which it, or any of its properties or assets, may be subject or by which Parent or Acquisition Sub is bound (except, in the case of each of clauses (A) and (B) above, for such violations, conflicts, breaches, defaults, terminations or accelerations, or any consents, approvals or notices which, if not given or received, would not, in each case, individually or in the aggregate, materially adversely affect the ability of any of Parent or Acquisition Sub to perform its obligations under this Agreement).
- (ii) Subject to obtaining the Regulatory Approvals and other than in connection with or in compliance with the provisions of applicable corporate, competition, antitrust and securities Laws, (A) there is no legal impediment to the completion of the Plan of Arrangement by Parent or Acquisition Sub, and (B) no filing or registration with, or authorization, consent or approval of, any Governmental Entity is required of Parent or Acquisition Sub in connection with completion of the Plan of Arrangement, except for such filings or registrations which, if not made, or for such authorizations, consents or approvals which, if not

received, would not prevent or materially delay the making and completion of the Plan of Arrangement by Parent or Acquisition Sub.

- (d) Commitment Letters. Parent has delivered to Hummingbird a true and complete copy of a fully executed commitment letter from Royal Bank of Canada (the “**Commitment Letter**”) which, together with the loans, if any, from Lender Sub referred to in Section 2.3 of the Plan of Arrangement and a direct or indirect equity investment by Parent, will provide sufficient funds to permit Acquisition Sub, subject to the satisfaction of all relevant conditions set forth in this Agreement, to pay the Purchase Price in respect of, in reliance on the representations and warranties of Hummingbird regarding, each of the outstanding Hummingbird Shares.
- (e) Litigation. There is no litigation pending or, to the knowledge of P. Thomas Jenkins and John Shackleton of Parent, threatened against Parent or Acquisition Sub that, if determined adversely to Parent or Acquisition Sub, would materially adversely affect the ability of Parent or Acquisition Sub to consummate the Transactions.

#### **4.2 Survival of Representations and Warranties**

The representations and warranties of Parent and Acquisition Sub contained in this Agreement shall expire and be terminated on the earlier of the Effective Date and the date on which this Agreement is terminated in accordance with its terms.

### **ARTICLE 5 COVENANTS**

#### **5.1 Covenants of Hummingbird Regarding the Conduct of Business**

Hummingbird covenants and agrees that, during the period from the date of this Agreement until the earlier of the Effective Date and the time that this Agreement is terminated in accordance with its terms, unless Parent shall otherwise consent in writing (which consent shall not be unreasonably withheld or delayed) or as is otherwise expressly permitted or specifically contemplated by this Agreement or as is set forth in Section 5.1 of the Disclosure Letter:

- (a) the business of Hummingbird and its subsidiaries shall be conducted only, and Hummingbird and its subsidiaries shall not take any action except, in the usual and ordinary course of business consistent with past practice, and Hummingbird shall use all commercially reasonable efforts to maintain and preserve its and its subsidiaries’ business organization, assets, customers, employees, goodwill and business relationships and, without limiting the generality of the foregoing, neither Hummingbird nor any of its subsidiaries shall manage accounts receivable other than in the ordinary course of business in a manner comparable to the management of accounts receivable in the 12 months preceding the date hereof;
- (b) Hummingbird shall not, and shall not permit any of its subsidiaries to, directly or indirectly: (i) amend its articles, charter or by-laws or other comparable

organizational documents; (ii) declare, set aside or pay any dividend or other distribution or payment (whether in cash, shares or property) in respect of the Hummingbird Shares owned by any person or the securities' of any subsidiary owned by a person other than Hummingbird or a subsidiary of Hummingbird; (iii) issue, grant, sell, encumber or pledge or authorize or agree to issue, grant, sell, encumber or pledge any shares of Hummingbird or its subsidiaries, or securities convertible into or exchangeable or exercisable for, or otherwise evidencing a right to acquire, shares of Hummingbird or its subsidiaries or any other ownership interest (including any phantom interest or other right linked to any shares of Hummingbird or its subsidiaries in any manner), other than (A) the issuance of Hummingbird Shares issuable pursuant to the terms of the Hummingbird Options that are outstanding as of the date of this Agreement, or (B) transactions between two or more Hummingbird wholly-owned subsidiaries or between Hummingbird and a Hummingbird wholly-owned subsidiary; (iv) redeem, purchase or otherwise acquire any of its outstanding securities, other than in transactions between two or more Hummingbird wholly-owned subsidiaries or between Hummingbird and a Hummingbird wholly-owned subsidiary; (v) amend the terms of any of its securities or reclassify, combine, split or subdivide any of its securities; (vi) adopt a plan of liquidation or resolution providing for the liquidation or dissolution of Hummingbird or any of its subsidiaries, or undertake any merger, consolidation or a reorganization of Hummingbird or any of its subsidiaries except as such plans have been explicitly set forth in this Agreement; (vii) amend its accounting policies or adopt new accounting policies, in each case except as required in accordance with GAAP; (viii) make any material Tax election or settle or compromise any material Tax liability; or (ix) enter into, modify or terminate any Contract with respect to any of the foregoing;

- (c) Hummingbird shall promptly notify Parent in writing of any circumstance or development that has had or would have a Material Adverse Effect on Hummingbird or any change in any material fact set forth in the Disclosure Letter;
- (d) Hummingbird shall not, and shall not permit any of its subsidiaries to, directly or indirectly: (i) except sales of inventory or obsolete items in the ordinary course of business consistent with past practice, sell, pledge, lease, dispose of or encumber any assets of Hummingbird or of any subsidiary; (ii) acquire (by merger, amalgamation, consolidation or acquisition of shares or assets) any corporation, partnership or other business organization or division thereof, or make any investment either by the purchase of securities or contributions of capital (other than to wholly-owned subsidiaries), (iii) acquire any material property or assets of any other person except for purchases of inventory in the ordinary course of business; (iv) other than loans between one or more of Hummingbird and its wholly-owned subsidiaries for purposes of funding Lender Sub for purposes of this Agreement, incur any indebtedness for borrowed money or for any other liability or obligation of a financial nature or issue any debt securities or assume, guarantee, endorse or otherwise as an accommodation become responsible for the obligations of any other person, or make any loans or advances except for intercompany loans and borrowings under existing credit facilities, in each case in

the ordinary course and consistent with past practices; (v) pay, discharge or satisfy any claims, liabilities or obligations other than the payment, discharge or satisfaction of liabilities reflected or reserved against in the Hummingbird Financial Statements or made in the ordinary course of business consistent with past practice; (vi) waive, release, grant or transfer any rights of material value; (vii) without the approval in writing by Parent, such approval not to be unreasonably withheld or delayed, make or commit to make capital expenditures that are, in the aggregate, in excess of \$600,000; (viii) take any action or make any change with respect to accounting policies or procedures, other than actions or changes required by GAAP or by applicable Law or as set forth in the Hummingbird Financial Statements; (ix) take any action that would cause any of the representations or warranties set forth in Article 3 to be untrue as of the date of this Agreement or as of the Effective Time; or (x) authorize or propose any of the foregoing, or enter into or modify any Contract to do any of the foregoing;

- (e) Hummingbird shall not, and shall not permit any of its subsidiaries to, directly or indirectly, enter into, terminate or modify any Material Contract (including Material Contracts listed or referred to in the Disclosure Letter) outside the ordinary course of business consistent with past practice, provided that the restrictions in this Section 5.1(e) shall not apply to entering into, modifying or terminating Material Contracts: (i) that do not involve the receipt or payment by Hummingbird or any of its subsidiaries of more than \$500,000, in the aggregate, over the remaining life of the contract, or (ii) that have a term of less than 24 months and are terminable by Hummingbird or its subsidiaries on notice of six months or less (both prior to and following any such modification);
- (f) neither Hummingbird nor any of its subsidiaries shall orally or in writing (i) grant to any officer, director or employee of Hummingbird or any of its subsidiaries an increase in compensation in any form, except in the ordinary course of business and upon receipt of approval in writing by the Parent, such approval not to be unreasonably withheld or delayed, (ii) grant any general salary increase, (iii) commit to or make any loan to any officer, director or employee of Hummingbird or any of its subsidiaries, (iv) take any action with respect to the grant of any bonus or similar payment or benefit to, or the grant of any severance, retention, retirement, change of control or termination pay to or, except in connection with new hires of employees who are not officers or directors of Hummingbird or any of its subsidiaries in the ordinary course of business, the entering into of any employment agreement with any officer, director or employee of Hummingbird or any of its subsidiaries (other than as required by applicable Law or employment agreements, or severance plans, agreements or arrangements in existence on May 25, 2006), (v) increase any benefits payable under its current severance, change of control or termination pay policies, or (vi) adopt or amend in any material respect or make any voluntary contribution to any Hummingbird Plan;
- (g) Hummingbird shall not, and shall not permit any of its subsidiaries to, hire any employee except for (i) the replacement of any current employee whose employment with Hummingbird or any subsidiary is terminated or resigns for any reason (with such replacement employee receiving substantially similar or lesser

compensation and benefits as such terminated or resigned employee) and (ii) with approval in writing by Parent, such approval not to be unreasonably withheld or delayed, a new employee who does not replace any current employee pursuant to clause (i) above (A) whose annual noncontingent cash compensation and annual target commission payments does not exceed, in the aggregate, \$250,000 and (B) whose annual noncontingent cash compensation and annual target commission or bonus payments, when aggregated with the annual noncontingent cash compensation and annual target commission or bonus payments of all other such new employees, does not exceed \$2,000,000;

- (h) Hummingbird shall, whether through its Board of Directors or otherwise, facilitate as necessary the acceleration of the vesting of any unvested Hummingbird Options under the Hummingbird Stock Option Plan but shall not otherwise amend, vary or modify the Hummingbird Stock Option Plan or any Hummingbird Options;
- (i) Hummingbird shall not, and shall not permit any of its subsidiaries to, settle or compromise (i) any material action, claim or proceeding brought against it and/or any of its subsidiaries, except with respect to such settlements and compromises that do not, in the aggregate, oblige Hummingbird and its subsidiaries to make cash payments exceeding \$1,000,000; or (ii) any action, claim or proceeding brought by any present, former or purported holder of its securities or any other person in connection with the transactions contemplated by this Agreement or the Arrangement;
- (j) Hummingbird shall use its commercially reasonable efforts to cause the current insurance (or re-insurance) policies maintained by Hummingbird or any of its subsidiaries, including directors' and officers' insurance, not to be cancelled or terminated or any of the coverage thereunder to lapse, unless simultaneously with such termination, cancellation or lapse, replacement policies underwritten by insurance or re-insurance companies of nationally recognized standing having comparable deductions and providing coverage similar to or greater than the coverage under the cancelled, terminated or lapsed policies for substantially similar premiums are in full force and effect; provided that none of Hummingbird or any of its subsidiaries shall obtain or renew any insurance (or re-insurance) policy for a term exceeding 12 months from the date hereof;
- (k) Hummingbird shall not approve, adopt or implement a shareholder rights plan or similar poison pill arrangement; and
- (l) Hummingbird shall provide to Parent, as soon as practicable, but in no event later than the 14th day following the end of each calendar month, a calculation of the amount of cash of Lender Sub and the additional aggregate amount of cash of Hummingbird and its subsidiaries, in each case as of the end of such month.

## **5.2 Covenants of Hummingbird Regarding the Performance of Obligations**

Subject to Section 7.1, Hummingbird shall and shall cause its subsidiaries to perform all obligations required or desirable to be performed by Hummingbird or any of its subsidiaries

under this Agreement, co-operate with Parent in connection therewith, in order to consummate and make effective, as soon as reasonably practicable, the Arrangement and, without limiting the generality of the foregoing, Hummingbird shall and, where appropriate, shall cause its subsidiaries to:

- (a) subject to Section 2.5, carry out the terms of the Interim Order and the Final Order applicable to it and use commercially reasonable efforts to comply promptly with all requirements which applicable Law may impose on Hummingbird or its subsidiaries with respect to the Arrangement;
- (b) apply for and use all commercially reasonable efforts to obtain all Regulatory Approvals relating to Hummingbird or any of its subsidiaries which are required in order to consummate the Arrangement under this Agreement and, in doing so, keep Parent reasonably informed as to the status of the proceedings related to obtaining the Regulatory Approvals, including providing Parent with copies of all related applications and notifications excluding any part thereof constituting confidential information, in draft form, in order for Parent to provide its comments thereon; provided that Hummingbird shall not make any commitments, provide any undertakings or assume any obligations, in each case that are or could reasonably be expected to be material to Hummingbird or Parent without the prior written consent of Parent, which shall not be unreasonably withheld or delayed;
- (c) subject to the approval of the Arrangement Resolution at the Meeting in accordance with the provisions of the Interim Order, (i) it will as soon as practicable thereafter, file, proceed with and diligently pursue an application for the Final Order in cooperation with Parent and Acquisition Sub and, in applying for the Final Order, it will seek to cause the terms thereof to be consistent with the provisions of this Agreement and will oppose any proposal from any party that the Final Order contain any provision inconsistent with this Agreement, and (ii) if at any time after the issuance of the Final Order and prior to the Effective Date, Hummingbird is required by the terms of the Final Order or by Law to return to Court with respect to the Final Order, it shall do so after notice to, and in consultation and cooperation with, Parent and Acquisition Sub;
- (d) furnish promptly to Parent and Acquisition Sub a copy of each notice, report, schedule or other document or communication delivered or filed by Hummingbird in connection with the Arrangement or the Interim Order or the Meeting with any Governmental Entity in connection with, or in any way affecting, the transactions contemplated herein;
- (e) defend all lawsuits or other legal, regulatory or other proceedings against Hummingbird challenging or affecting this Agreement or the making or completion of the Arrangement;
- (f) use commercially reasonable efforts to assist in effecting the resignations of the Hummingbird directors and cause them to be replaced as of the Effective Date by persons nominated by Parent;

- (g) use commercially reasonable efforts to: (i) assist Parent in obtaining all Regulatory Approvals referred to in Section 5.3(l) (a); (ii) obtain all necessary or desirable consents, waivers or approvals under Material Contracts; provided that Hummingbird and its subsidiaries shall not, without the prior written consent of Parent (not to be unreasonably withheld or delayed), pay or commit to pay any money or issue or commit to issue any guarantee of any obligations in connection with Hummingbird obtaining such consents, waivers or approvals; and (iii) give all necessary or desirable notices under Material Contracts;
- (h) provide, on a timely basis, all reasonable cooperation in connection with the arrangement of any financing as may be reasonably requested by Parent, including (i) participation in meetings and due diligence sessions upon reasonable notice, (ii) furnishing Parent and its financing sources with historical financial and other pertinent information regarding Hummingbird and its subsidiaries as may be reasonably requested by Parent, including historical financial statements and financial data, (iii) providing Parent with historical financial data to be used by Parent in connection with its financing of the Transactions, (iv) providing and executing documents as may be reasonably requested by Parent, and (v) reasonably facilitating the provision and registration of security and pledge of collateral (including, without limitation, facilitating or obtaining any title policies or surveys, removing liens or encumbrances and providing affidavits, indemnity or other assurance reasonably requested); provided that (A) none of Hummingbird or any subsidiary shall be required to pay any commitment or other similar fee or incur any other liability in connection with any such financing prior to the Effective Time and (B) nothing in this Section 5.2(h) shall be deemed to govern the matters covered by Section 5.2(i);
- (i) provide, on a timely basis, all reasonable cooperation in connection with any dealings by Parent with any Canadian Tax authority or Canadian Governmental Entity with oversight of any Canadian Tax matters concerning any element of the Transactions (including, without limitation, any element that may be effected after the Effective Time by Parent) as may be requested by Parent, including (i) participation in meetings, (ii) furnishing Parent (or the relevant Governmental Entity) with historical financial and other pertinent information regarding Hummingbird and its subsidiaries as may be reasonably requested by Parent and (iii) if required, providing and executing an advance income tax ruling request and documents related thereto; provided that Parent covenants and agrees that no advance income tax ruling request or other submissions of any kind shall be made to the Canada Revenue Agency or any other Canadian Tax Authority or Canadian Governmental Entity with respect to Canadian Tax matters that identify or relate to Hummingbird or any of its subsidiaries in any way without Hummingbird's prior written consent, such consent not to be unreasonably withheld, delayed or conditioned;
- (j) provide or cause to be provided to Parent from time to time all proxy return information and dissent notices with respect to the Meeting on a timely basis;
- (k) provide lists of Hummingbird Shareholders prepared by its transfer agent and a list of holders of Hummingbird Options (with full particulars as to the purchase,



exercise or conversion price, vesting and expiry date) as well as a security position listing from each depository, including The Canadian Depositary for Securities Limited, and deliver any such lists to Parent promptly following the date hereof and promptly deliver to Parent upon demand thereafter supplemental lists setting out changes thereto; and

(1) subject to applicable Laws,

(i) effect such reorganizations of its business, operations and assets or such other transactions as Parent may request, acting reasonably (each a “**Pre-Acquisition Reorganization**”) and co-operate with Parent and its advisors in order to determine the nature of the Pre-Acquisition Reorganizations that might be undertaken and the manner in which they might most effectively be undertaken; provided that the Pre-Acquisition Reorganizations are not prejudicial or potentially prejudicial to Hummingbird or the Hummingbird Shareholders, or would not impede or materially delay the completion of the Transactions. Parent shall provide written notice to Hummingbird of any proposed Pre-Acquisition Reorganization at least ten business days prior to the Effective Time. Upon receipt of such notice, Parent and Hummingbird shall, if Hummingbird is required to do so pursuant to the immediately preceding sentence, work co-operatively and use commercially reasonable efforts to prepare prior to the Effective Time all documentation necessary and do all such other acts and things as are necessary to give effect to such Pre-Acquisition Reorganization. If Parent does not acquire all of the Hummingbird Shares, Parent shall promptly reimburse Hummingbird for all reasonable costs and expenses, including reasonable legal fees and disbursements, incurred in connection with any proposed Pre-Acquisition Reorganization,

(ii) assist Parent in developing the detailed operating, staffing, financial and other business models for Hummingbird’s consolidated business in order to facilitate prompt implementation of such models following the Effective Time,

(iii) not take material action inconsistent with such models except where necessary, in the opinion of Hummingbird, to avoid prejudice to it or the Hummingbird Shareholders or to avoid impeding or materially delaying the completion of the transactions contemplated hereby, and

(iv) at the request of Parent made at any time following the expiration or termination of the waiting or review period under the HSR Act, the *Competition Act* (Canada), the *Investment Canada Act* (Canada) or under any other anti-trust, competition or merger-review Law, commence implementation of such models at Parent’s expense to the extent that such implementation would not, in the opinion of Hummingbird, prejudice it or the Hummingbird Shareholders, or impede or materially delay the completion of the transactions contemplated hereby, provided that in no event shall Hummingbird be obligated to terminate any employees.

### **5.3 Covenants of Parent Regarding the Performance of Obligations**

(1) Parent shall, and shall cause its subsidiaries to, perform all obligations required or desirable to be performed by Parent or any of its subsidiaries under this Agreement, co-operate with Hummingbird in connection therewith, in order to consummate and make effective, as soon as reasonably practicable, the Arrangement and, without limiting the generality of the foregoing, Parent shall and where appropriate shall cause its subsidiaries to:

- (a) apply for and use all commercially reasonable efforts to obtain all Regulatory Approvals relating to Parent or any of its subsidiaries which are required in order to consummate the Arrangement under this Agreement and, in doing so, keep Hummingbird reasonably informed as to the status of the proceedings related to obtaining the Regulatory Approvals, including providing Hummingbird with copies of all related applications and notifications excluding any part thereof constituting confidential and/or privileged information, in draft form, in order for Hummingbird to provide its reasonable comments thereon; provided that, for greater certainty, nothing contained in this Agreement shall restrict or limit Parent from making such commitments or providing such undertakings or assuming such obligations as it considers, in its sole discretion, necessary or desirable in order to obtain the Regulatory Approvals or any other sanctions, rulings, consents, orders, exemptions, permits and other approvals required by applicable antitrust or competition Law; provided further that nothing herein shall require Parent to make any such commitments, provide any such undertakings or assume any such obligations;
- (b) use commercially reasonable efforts to: (i) assist Hummingbird in obtaining the Regulatory Approvals referred to in Section 5.2(b); and (ii) assist Hummingbird in obtaining all consents, waivers or approvals that Hummingbird is to use commercially reasonable efforts to obtain pursuant to Section 5.2(g), provided that Parent shall not be obligated to pay any fees or guarantee any obligations in connection with Hummingbird obtaining such consents, waivers or approvals;
- (c) furnish promptly to Hummingbird a copy of each notice, report, schedule or other document or communication delivered or filed by Parent in connection with the Arrangement or the Interim Order or the Meeting with any Governmental Entity in connection with, or in any way affecting, the transactions contemplated herein excluding any part thereof constituting confidential and/or privileged information;
- (d) defend all lawsuits or other legal, regulatory or other proceedings against Parent challenging or affecting this Agreement or the making or completion of the Arrangement;
- (e) without the consent of Hummingbird, which shall not be unreasonably withheld or delayed, not amend the agreement among Parent, Acquisition Sub and Fred Sorkin (as a Hummingbird shareholder) or the agreement among Parent, Acquisition Sub and Alan Barry Litwin (as a Hummingbird shareholder), in each case providing for, among other things, the Hummingbird shareholder voting in favour of the Plan of Arrangement at the Meeting; and

(2) Each of Parent and Acquisition Sub shall use commercially reasonable efforts to ensure that Acquisition Sub has funds in an amount not less than the Maximum Cash Amount to be deposited with the Depositary no later than immediately prior to the Effective Time.

(3) Parent shall cause the Open Text Offer to expire in accordance with its terms, and shall cause the conditions in the Open Text Offer to not be amended or waived, provided that: (a) this Agreement has not been terminated for any reason; (b) there has been no breach of or failure to perform any representation, warranty, covenant or agreement on the part of Hummingbird set forth in this Agreement, and no such representation and warranty shall have become untrue after the date of this Agreement, such that Section 6.2 (a) or 6.2(b) would not be satisfied on the date of expiry of the Open Text Offer.

#### **5.4 Mutual Covenants**

Each of the Parties covenants and agrees that, except as contemplated in this Agreement, during the period from the date of this Agreement until the earlier of the Effective Time and the time that this Agreement is terminated in accordance with its terms:

- (a) subject to the limitations set forth in Sections 5.2 and 5.3, it shall, and shall cause its subsidiaries to, use all commercially reasonable efforts to satisfy (or cause the satisfaction of) the conditions precedent to its obligations hereunder as set forth in Article 6 to the extent the same is within its control and to take, or cause to be taken, all other action and to do, or cause to be done, all other things necessary, proper or advisable under all applicable Laws to complete the Plan of Arrangement, including using its commercially reasonable efforts to, subject to the limitations set forth in Sections 5.2 and 5.3: (i) obtain all Regulatory Approvals required to be obtained by it; (ii) effect all necessary registrations, filings and submissions of information requested by Governmental Entities required to be effected by it in connection with the Plan of Arrangement; (iii) oppose, lift or rescind any injunction or restraining order against it or other order or action against it seeking to stop, or otherwise adversely affecting its ability to make and complete, the Plan of Arrangement; (iv) co-operate with the other Party in connection with the performance by it and its subsidiaries of their obligations hereunder; (v) co-operate with the other Party to enable Parent to satisfy the conditions set out in the Commitment Letter, including by providing Parent with cash flow and other financial information on a legal entity basis with respect to subsidiaries of Hummingbird and by taking such actions to facilitate the provision of security relating to the loans described in the Commitment Letter; and
- (b) it shall not take any action or refrain from taking any commercially reasonable action which is inconsistent with this Agreement, including, without limitation, purporting to terminate this Agreement other than in accordance with Section 8.2 (1), or which could reasonably be expected to impede the consummation of the transactions contemplated by this Agreement.

#### **5.5 Cash; Accounts Payable and Accounts Receivable**

(1) Hummingbird agrees that it shall use its commercially reasonable efforts to ensure that Lender Sub shall have such amount of cash of Hummingbird or its subsidiaries that Parent

requests sufficiently in advance of the Effective Date to be used for the purpose of consummating the Transactions (which additional cash shall not be in an amount that would reasonably be expected to result in a breach of Section 5.5(2)), provided that Hummingbird shall in any event, if Parent requests the Loan Alternative by providing written notice to Hummingbird at least ten business days prior to the Effective Time, ensure that Lender Sub shall have not less than \$58 million in cash immediately prior to the Effective Time. In connection with the completion of the Plan of Arrangement and as set forth in the Plan of Arrangement, Lender Sub will, if requested by Parent in accordance with the terms of such plan, make a loan to Acquisition Sub in an amount equal to the sum of (a) the Share Loan Amount, plus (b) any additional cash of Hummingbird or its subsidiaries that Parent requests in accordance with the foregoing. In connection with the completion of the Plan of Arrangement and as set forth in the Plan of Arrangement, Lender Sub will, if requested by Parent in accordance with the terms of such plan, make a loan to Hummingbird in an amount equal to the Option Loan Amount to be used to satisfy the payment obligations of Hummingbird under Section 2.3(b) of the Plan of Arrangement. Each of Hummingbird and Parent will consult and cooperate with each other to accomplish the cash transfers contemplated by this Section 5.5 (1) in a commercially reasonable manner. Hummingbird agrees that it shall ensure that none of the cash constituting the loan referred to in the second sentence of this Section 5.1(1) shall have come from Hummingbird or any of its subsidiaries organized or incorporated under the laws of Canada or any jurisdiction in Canada.

(2) Hummingbird agrees that it shall ensure that Hummingbird and its subsidiaries shall have, immediately prior to three minutes after the Effective Time (and, without limitation, after disbursement of the loans referred to in the second and third sentences of Section 5.5(1), the deposit of funds contemplated by Section 6.3(e) and the payments of the amounts contemplated under Sections 2.3(b) and 2.3(c) of the Plan of Arrangement), consolidated cash (as defined by GAAP) in an amount which is not less than the sum of:

- (i) Hummingbird's then-current bona fide estimate of all of the fees, costs and expenses (including legal fees, accounting fees, financial advisory fees, regulatory fees, disbursements of advisors and printing and mailing costs) that Hummingbird and any of its subsidiaries has incurred, or will incur, in connection with the Symphony Arrangement Agreement, the Open Text Offer and this Agreement and the Transactions which have not already been paid (but, for greater certainty, not including any such fees of Parent or Acquisition Sub or the fees or expenses of the lenders under the Commitment Letter in connection with the Commitment Letter or the related loans by such lender), plus
- (ii) Hummingbird's then current bona fide estimate of amounts payable to the selling shareholders under the acquisition agreement pursuant to which Hummingbird acquired on June 21, 2005 RedDot Solutions AG in full and final satisfaction of all amounts owing to such selling shareholders under the provisions providing for contingent payments by Hummingbird based on the financial performance of RedDot Solutions AG for its fiscal year ended December 31, 2005 which have not already been paid, plus
- (iii) \$22 million, less the aggregate amount paid or payable by Hummingbird under Sections 7.3 or 7.4 of the Symphony Arrangement Agreement, plus

- (iv) if the consolidated accounts payable (as defined by GAAP) of Hummingbird and its subsidiaries is greater than \$13,500,000, the amount of such difference.

## **5.6 Deliveries**

In connection with the Effective Time, Hummingbird shall deliver to Parent: (a) a certificate of compliance for Hummingbird issued pursuant to the CBCA dated within three (3) days prior to the Effective Date; (b) a certified copy of the resolutions of the Board of Directors of Hummingbird and the Hummingbird Shareholders approving the Transactions; (c) a certified copy of Hummingbird's constating documents; and (d) such other documents relating to the transactions contemplated by this Agreement as Parent may reasonably request.

## **5.7 Interim Financials**

Hummingbird's unaudited interim financial statements as at and for the nine months ended June 30, 2006 (including the notes thereto and related MD&A) (the "Interim Financials"): (a) will comply in all material respects with Securities Laws. The Interim Financials will be prepared in accordance with GAAP consistently applied (except (a) as otherwise indicated in such financial statements and the notes thereto, (b) as unaudited interim statements they are subject to normal year-end adjustments and may omit notes which are not required by applicable Laws in the unaudited statements or (c) as items in such financial statements have been reclassified) and will fairly present, in all material respects, the consolidated financial position, results of operations and changes in financial position of Hummingbird and its subsidiaries as of the dates thereof and for the periods indicated therein (subject to normal period-end adjustments) and reflect reserves required by GAAP consistently applied in respect of all material contingent liabilities, if any, of Hummingbird and its subsidiaries on a consolidated basis.

## **5.8 Other Deliveries**

Hummingbird shall, as soon as practicable following the date of this Agreement and, in any event, on or before August 9, 2006, deliver or otherwise make available to Parent for its review any employment, retention, change of control or other agreement with any officer, employee, contractor, consultant or advisor whose base annual compensation is at least \$100,000, in each case which Hummingbird or any of its subsidiaries is a party to or bound or governed by, other than such agreements as have been delivered or made available to Parent prior to the date of this Agreement.

## **5.9 Options**

Hummingbird shall propose as additional business at the Meeting the ratification by Hummingbird Shareholders of the grant of 50,000 Hummingbird Options to each of Hadley C. Ford, John B. Wade III and John A. MacDonald on March 3, 2006. However, if such grants of Hummingbird Options are not approved by Hummingbird Shareholders at the Meeting in accordance with applicable law and stock exchange requirements, Hummingbird agrees to, promptly following the effectiveness of the Arrangement on the Effective Date, make or cause to be made to each of such individuals in respect of each of his 50,000 Hummingbird Options purported to be held a cash payment equal to the amount (if any) by which the Purchase Price exceeds the product of (x) the exercise price thereof (in Canadian dollars), being \$26.20 per Hummingbird Share, multiplied by (y) the Exchange Factor.

## **ARTICLE 6**

### **CONDITIONS TO ARRANGEMENT**

#### **6.1 Conditions to the Obligations of Each Party**

The respective obligations of Parent and Hummingbird to consummate the Arrangement are subject to the satisfaction or, if permissible, waiver of the following conditions:

- (a) *Hummingbird Shareholder Approval.* The Arrangement Resolution shall have been approved, adopted and authorized by the Shareholder Approval at the Meeting, or at any adjournment or postponement thereof, in accordance with the CBCA and the Interim Order.
- (b) *Court Orders.* The Interim Order and the Final Order shall have been obtained in form and substance reasonably satisfactory to each of Parent and Hummingbird and shall not have been set aside or modified in a manner that is reasonably unacceptable to such Parties, acting reasonably, on appeal or otherwise.
- (c) *No Contrary Order.* No Governmental Entity shall have enacted, issued, promulgated, enforced or entered any Law which is then in effect and has the effect of making the Arrangement illegal or otherwise preventing or prohibiting consummation of the Arrangement.
- (d) *Regulatory Approvals.* All Regulatory Approvals (other than those relating to any and all Safe Income Transactions (as defined in Section 7.8)) shall have been obtained or concluded.
- (e) *Proceedings.* There shall not be pending or overtly, threatened by or before any Governmental Entity any proceeding seeking an injunction, judgment, decree or other order to prevent or challenge the consummation of the Arrangement or any of the other transactions contemplated hereby.

#### **6.2 Conditions to the Obligations of Parent**

The obligations of Parent to consummate the Arrangement are subject to the satisfaction or, if permissible, waiver of the following additional conditions (and in the case of Section 6.2(a) and Section 6.2(b)(i), subject to Section 8.2(3)):

- (a) *Representations and Warranties.* (i) Disregarding any Material Adverse Effect or materiality qualifiers contained therein, all representations and warranties of Hummingbird set forth in this Agreement other than the Identified Hummingbird Representations and the Identified Hummingbird Monetary Representations shall be true and correct in all respects except to the extent the failure of such representations or warranties to be so true and correct would not have, individually or in the aggregate, a Material Adverse Effect on Hummingbird, (ii) the Identified Hummingbird Representations shall be true and correct in all respects except to the extent that a failure of such representations or warranties to

be so true and correct relates to the number of Hummingbird Shares issuable upon the exercise of Hummingbird Options and the true and correct number of Hummingbird Shares issuable upon the exercise of Hummingbird Options does not exceed the number of such Hummingbird Shares set out in Section 3.1(e) by more than 10,000, and (iii) the Identified Hummingbird Monetary Representations shall be true and correct in all respects except to the extent that any and all deficiencies in the monetary amount disclosed by Hummingbird in the Identified Hummingbird Monetary Representations that are not true and correct do not exceed, in the aggregate, \$500,000, in the case of each of (i), (ii) and (iii): (A) as of the date of this Agreement and (B) as of the Effective Date as though then made on and as of the Effective Date, except for those representations and warranties that address matters only as of a particular date (in which case (1) disregarding any Material Adverse Effect or materiality qualifiers contained therein, all representations and warranties other than the Identified Hummingbird Representations and the Identified Hummingbird Monetary Representations shall be true and correct in all respects as of such date except to the extent the failure of such representations or warranties to be so true and correct would not have, individually or in the aggregate, a Material Adverse Effect on Hummingbird, (2) the Identified Hummingbird Representations shall be true and correct in all respects as of such date except to the extent that a failure of such representations or warranties to be so true and correct relates to the number of Hummingbird Shares issuable upon the exercise of Hummingbird Options and the true and correct number of Hummingbird Shares issuable upon the exercise of Hummingbird Options does not exceed the number of such Hummingbird Shares set out in Section 3.1(e) by more than 10,000, and (3) the Identified Hummingbird Monetary Representations shall be true and correct in all respects as of such date except to the extent that any and all deficiencies in the monetary amount disclosed by Hummingbird in the Hummingbird Monetary Representation that are not true and correct do not exceed, in the aggregate, \$500,000).

- (b) *Agreements and Covenants.* Hummingbird shall have performed or complied: (i) in all material respects with all agreements and covenants required by this Agreement (other than Sections 5.5, 7.1 and 7.2) to be performed or complied with by Hummingbird at or prior to the Effective Time; and (ii) in all respects with Section 5.5 immediately prior to the Effective Time and Sections 7.1 and 7.2 at and prior to the Effective Time.
- (c) *Officer's Certificate.* Hummingbird shall have delivered to Parent a certificate, dated the Effective Date, signed by each of the chief executive officer and the chief financial officer of Hummingbird (on Hummingbird's behalf and without personal liability), certifying as to the satisfaction or, if permissible, waiver of the conditions specified in Sections 6.2(a) and 6.2(b).
- (d) *Dissent.* Dissent Rights shall not have been exercised and remain outstanding at the Effective Time with respect to more than 10% of the outstanding Hummingbird Shares in connection with the Arrangement.

- (e) *Satisfaction of Commitment Letter Conditions.* The satisfaction, in accordance with the terms of the Commitment Letter as in effect as of the date hereof, of the conditions precedent set forth in the Commitment Letter.
- (f) *RedDot Solutions AG.* Hummingbird shall have paid not more than 13,500,000 Euros to the selling shareholders under the acquisition agreement pursuant to which Hummingbird acquired on June 21, 2005 RedDot Solutions AG in full and final satisfaction of all amounts owing to such selling shareholders under the provisions providing for contingent payments by Hummingbird based on the financial performance of RedDot Solutions AG for its fiscal year ended December 31, 2005.
- (g) *Completion of Safe Income Transactions.* All Safe Income Transactions (as defined in Section 7.8) shall have been completed in a manner satisfactory to Parent acting reasonably, and, without limiting the generality of the foregoing, each holding company involved in any Safe Income Transaction (“**SI Holdco**”) shall have been wound up for purposes of the Tax Act (having regard to the published administrative policy of the Canada Revenue Agency), and all Hummingbird Shares owned at any time by such SI Holdco shall have been distributed by such SI Holdco to Hummingbird on such winding-up, and all such Hummingbird Shares shall have been cancelled and shall no longer be outstanding.
- (h) *Regulatory Approvals.* All Regulatory Approvals relating to any and all Safe Income Transactions shall have been obtained or concluded.

### **6.3 Conditions to the Obligations of Hummingbird**

The obligations of Hummingbird to consummate the Arrangement, are subject to the satisfaction or, if permissible, waiver of the following additional conditions (and in the case of Section 6.3(a) and Section 6.3(b), subject to Section 8.2(3)):

- (a) *Representations and Warranties.* The representations and warranties of Parent in this Agreement that are qualified by materiality shall be true and correct in all respects, and the representations and warranties of Parent contained in this Agreement that are not so qualified shall be true and correct in all material respects, in each case, (i) as of the date of this Agreement and (ii) as of the Effective Date as though then made on and as of the Effective Date, except for those representations and warranties that address matters only as of a particular date (in which case such representations and warranties that are qualified by materiality shall be true and correct as of such date and all other representations and warranties shall be true and correct in all material respects as of such date).
- (b) *Agreements and Covenants.* Parent shall have performed or complied with in all material respects all agreements and covenants required by this Agreement to be performed or complied with by Parent at or prior to the Effective Time.
- (c) *Officer’s Certificate.* Parent shall have delivered to Hummingbird a certificate, dated the Effective Date, signed by an officer of Parent (on Parent’s behalf and



without personal liability), certifying as to the satisfaction or, if permissible, waiver of the conditions specified in Sections 6.3(a) and 6.3(b).

- (d) *Authority.* The Board of Directors of each of Parent and Acquisition Sub shall have adopted all necessary resolutions and all other necessary corporate actions shall have been taken by each of Parent and Acquisition Sub to permit the consummation of the Transactions.
- (e) *Deposit.* Parent shall have deposited, or caused Acquisition Sub to deposit, with the Depositary in escrow the Maximum Cash Amount.

## **ARTICLE 7 ADDITIONAL AGREEMENTS**

### **7.1 Non-Solicitation**

(1) Hummingbird shall not, directly or indirectly, through any officer, director, employee, representative or agent of Hummingbird or any of its subsidiaries, (a) solicit, initiate, facilitate or encourage (including by way of furnishing information or entering into any form of agreement, arrangement or understanding, but excluding compliance by Hummingbird with its continuous reporting obligations under applicable securities Laws in the ordinary course consistent with past practice) any inquiries or proposals regarding, constituting or that would reasonably be expected to lead to, an Acquisition Proposal, (b) participate in any discussions or negotiations regarding an Acquisition Proposal, (c) withdraw or modify, or propose publicly to withdraw or modify, in a manner adverse to Parent, the approval of the Board of Directors of Hummingbird of the Plan of Arrangement, (d) approve or recommend, or propose publicly to approve or recommend, any Acquisition Proposal or (e) accept or enter into, or propose publicly to accept or enter into, any agreement, understanding or arrangement in respect of an Acquisition Proposal; provided that nothing contained in this Agreement shall prevent the Board of Directors of Hummingbird from taking any of the actions described in clauses (a) through (e) above in respect of an unsolicited bona fide written Acquisition Proposal received after the date hereof that:

- (a) did not result from a breach of any agreement between the person making such Acquisition Proposal and Hummingbird or any of its subsidiaries, or this Section 7.1;
- (b) involves not less than 66<sup>2</sup>/<sub>3</sub> percent of the outstanding Hummingbird Shares or not less than 66<sup>2</sup>/<sub>3</sub> percent of the consolidated assets (measured on a fair value) of Hummingbird; and
- (c) in respect of which the Board of Directors of Hummingbird determines in its good faith judgment pursuant to the exercise of its fiduciary duties under applicable Laws, after consultation with its financial advisors and its outside counsel, that there is a substantial likelihood that any required financing will be obtained and that the Acquisition Proposal would, if consummated in accordance with its terms (but not assuming away any risk of non-completion), result in a transaction that:
  - (i) is reasonably capable of completion in accordance with its terms without significant additional delay, taking into account all legal, financial, regulatory,

financing and other aspects of such Acquisition Proposal and the person making such Acquisition Proposal; and (ii) is more favourable from a financial point of view to Hummingbird Shareholders than under the Plan of Arrangement on a cash-equivalent basis taking into account any approval requirements and all other financial, legal, regulatory and other aspects of such proposal (including any proposal made by Parent or Acquisition Sub in response to such Acquisition Proposal or otherwise)

(any such Acquisition Proposal being referred to herein as a “**Superior Proposal**”).

(2) Hummingbird shall, and shall cause the officers, directors, employees, representatives and agents of Hummingbird and its subsidiaries to, immediately terminate any existing discussions or negotiations with any parties (other than Parent) with respect to any proposal that constitutes, or may reasonably be expected to constitute, an Acquisition Proposal. Hummingbird agrees not to release any third party from (a) any confidentiality agreement or (b) any standstill agreement or provision in each case to which such third party is a party unless such third party has made a Superior Proposal and Hummingbird has accepted such Superior Proposal.

Hummingbird shall immediately following the public announcement by the Parties of this Agreement request the return or destruction of all information provided to any third party which, at any time since January 1, 2005, has entered into a confidentiality agreement with Hummingbird relating to a potential Acquisition Proposal except to the extent that a request has previously been made that such information be returned or destroyed, and, upon the request of Parent, shall use all commercially reasonable efforts to ensure that such requests are honoured.

(3) Hummingbird shall immediately notify Parent of, at first orally and then, within 24 hours, in writing, any Acquisition Proposal or inquiry that would reasonably be expected to lead to an Acquisition Proposal, in each case received after the date hereof of which any of its directors or officers become aware, or any amendments to the foregoing, or any request for nonpublic information relating to Hummingbird or any of its subsidiaries in connection with an Acquisition Proposal or for access to the properties, books or records of Hummingbird or any of its subsidiaries by any person that informs Hummingbird or such subsidiary that it is considering making, or has made, an Acquisition Proposal and any amendment thereto. Hummingbird shall keep Parent promptly and reasonably informed from time to time of the status, including any change to the material terms of any such Acquisition Proposal or inquiry. Such notice shall include or be accompanied by a copy of all documentation relating to any Acquisition Proposal and any amendment thereto and a description of all material terms of any oral or other communications related to any Acquisition Proposal, including the identity of the person making such Acquisition Proposal and such other details as Parent may reasonably request.

(4) If Hummingbird receives a request for material non-public information from a person who proposes an unsolicited bona fide Acquisition Proposal, Hummingbird may request clarifications in writing from such person solely for purposes of valuing, and solely in respect of, any non-cash consideration that is offered under such Acquisition Proposal, provided that such clarifications are reasonably necessary as part of the efforts of the Board of Directors of Hummingbird to ascertain whether such Acquisition Proposal is, or is reasonably likely to be, if consummated in accordance with its terms, a Superior Proposal. If Hummingbird receives a request for material non-public information from a person who proposes an unsolicited bona fide Acquisition Proposal and the Board of Directors of Hummingbird determines that such proposal would reasonably likely be, if consummated in accordance with its terms, a Superior Proposal,

then, and only in such case, the Board of Directors of Hummingbird may, subject to the execution by such person of a confidentiality agreement having substantially the same terms as the Non-Disclosure Agreement, provide such person with access in accordance with subsection (1) to such information regarding Hummingbird, acting reasonably, provided however that the person making the Acquisition Proposal shall not be precluded thereunder from making the Acquisition Proposal, and provided further that Hummingbird sends immediately a copy of any such confidentiality agreement to Parent upon its execution and Parent is immediately provided with a list and copies of all information provided to such person not previously provided to Parent and is immediately provided with access to information similar to that which was provided to such person.

(5) Hummingbird shall ensure that its officers and directors and those of its subsidiaries and any financial or other advisors, agents or representatives retained by it are aware of the provisions of this Section, and Hummingbird shall be responsible for any breach of this Section by any such person or its advisors or representatives.

(6) Nothing contained in this Section 7.1 shall prohibit the Board of Directors of Hummingbird from making any disclosure to all of the Hummingbird Shareholders prior to the Outside Date if, in the good faith judgment of the Board of Directors of Hummingbird, after consultation with outside counsel, the failure to make such disclosure would be inconsistent with its fiduciary duties or would contravene applicable Laws (including Section 99 of the *Securities Act* (Ontario)), provided that any such disclosure that relates to an Acquisition Proposal shall be deemed to constitute a basis for termination of this Agreement by Parent pursuant to Section 8.2(1)(e) unless the Board of Directors of Hummingbird reaffirms its recommendation to the Hummingbird Shareholders to accept the Offer in such disclosure.

## **7.2 Right to Match**

(1) Subject to Section 7.2(2), Hummingbird covenants that it will not accept, approve, recommend or enter into any agreement, understanding or arrangement in respect of a Superior Proposal (other than a confidentiality agreement permitted by Section 7.1(4)) unless:

- (a) Hummingbird has complied with its obligations under Section 7.1 and the other provisions of this Article 7 and has provided Parent with a copy of all material documentation and a summary of any material oral or other communications relating to the Superior Proposal (the **“Superior Proposal Information”**);
- (b) a period (the **“Response Period”**) of five (5) business days shall have elapsed from the date on which Parent received both the Superior Proposal Information together with written notice from the Board of Directors of Hummingbird that the Board of Directors of Hummingbird determined, subject only to compliance with this Section 7.2, to accept, approve, recommend or enter into a binding agreement to proceed with the Superior Proposal Information; and
- (c) if the Response Period would not terminate on or before the date fixed for the Meeting, Hummingbird shall, upon the written request of Parent, adjourn the Meeting to a date selected by Parent that is not less than two nor more than 20 business days after the expiration of the Response Period.

(2) During the Response Period, Parent will have the right, but not the obligation, to offer to amend the terms of the Transactions. The Board of Directors of Hummingbird will review any such proposal by Parent to amend the terms of the Transactions, including an increase in, or modification of, the consideration to be received by the holders of Hummingbird Shares, to determine whether the Acquisition Proposal to which Parent is responding would be a Superior Proposal when assessed against the Transactions as it is proposed by Parent to be amended. If the Board of Directors of Hummingbird does not so determine, the Board of Directors of Hummingbird will promptly reaffirm its recommendation of the Transactions as amended and Hummingbird will not implement the proposed Superior Proposal. If the Board of Directors of Hummingbird does so determine, Hummingbird may on termination of this Agreement in accordance with Section 8.2(1)(g) and payment of the fee to Parent pursuant to Section 7.3, approve, recommend, accept or enter into an agreement, understanding or arrangement to proceed with the Superior Proposal.

(3) Each successive amendment to any Acquisition Proposal that results in an increase in, or modification of, the consideration (or value of such consideration) to be received by the holders of Hummingbird Shares shall constitute a new Acquisition Proposal for the purposes of this Section 7.2 and Parent shall be afforded a new Response Period in respect of each such Acquisition Proposal.

### **7.3 Certain Payments**

(1) Notwithstanding any other provision relating to the payment of fees, including the payment of brokerage fees, in the event that:

- (a) Parent has terminated this Agreement pursuant to Section 8.2(1)(e);
- (b) Hummingbird has terminated this Agreement pursuant to Section 8.2(1)(g);
- (c) (i) (A)(1) this Agreement has been terminated pursuant to Section 8.2(1)(h) or 8.2(1)(i) and (2) the Arrangement has failed to receive the requisite approval of the Hummingbird Shareholders in accordance with applicable Law; or  
(B)(1) this Agreement has been terminated pursuant to Section 8.2(1)(c), provided that in the case of a breach of a representation or warranty such breach was made knowingly by Hummingbird;
- (ii) an Acquisition Proposal has been negotiated or discussed with Hummingbird (directly or indirectly through any officer, director, employee, representative or agent of Hummingbird or any of its subsidiaries), made or publicly announced or an inquiry to Hummingbird (directly or indirectly through any officer, director, employee, representative or agent of Hummingbird or any of its subsidiaries) concerning an Acquisition Proposal has been made, in each case prior to the termination of this Agreement; and
- (iii) (A) an agreement or a letter of intent in respect of any Acquisition Proposal has been entered into by Hummingbird on or before the first anniversary

of the termination of this Agreement and such Acquisition Proposal has been completed; or

(B) any Acquisition Proposal, in respect of which Hummingbird has not entered into an agreement or a letter of intent, has been completed on or before the first anniversary of the termination of this Agreement; or

(d) Hummingbird has breached its obligations under Section 7.1 or Section 7.2,

then Hummingbird shall promptly, but in no event later than the Payment Deadline (defined below), make a payment to Parent in the amount of \$12,356,544, less any amounts paid to Parent pursuant to Section 7.4 by wire transfer of immediately available funds to an account designated by Parent. Hummingbird acknowledges that the agreements contained in this Section 7.3(1) are an integral part of the transactions contemplated by this Agreement, and that, without these agreements, Parent and Acquisition Sub would not enter into this Agreement. Notwithstanding anything to the contrary, this Section 7.3 shall survive completion of any and all of the Transactions. Payment Deadline means: the fifth business day following termination of this Agreement in the case of a payment to be made under Section 7.3(1)(a); the time of termination of this Agreement in the case of a payment to be made under Section 7.3(1)(b); the fifth business day following completion of an Acquisition Proposal in the case of a payment to be made under Section 7.3(1)(c); and the fifth business day following Parent's request for payment in the case of a payment to be made under Section 7.3(1)(d).

#### **7.4 Fees and Expenses**

(1) Subject to subsections (2) and (3) of this Section 7.4, each Party shall pay all fees, costs and expenses, including legal fees, accounting fees, financial advisory fees, regulatory fees, stock exchange fees, disbursements of advisors and printing and mailing costs, incurred by such Party in connection with this Agreement and the Transactions and any financing thereof.

(2) In the event that:

(a) this Agreement is terminated pursuant to Section 8.2(1)(a) or 8.2(1)(c); or

(b) (i) this Agreement is terminated pursuant to Section 8.2(1)(h) or 8.2(1)(i); and

(ii) the Arrangement has failed to receive the requisite approval of the Hummingbird Shareholders in accordance with applicable Law, then Hummingbird shall promptly, but in no event later than five business days following the request by Parent, pay all of the charges and expenses incurred by Parent and Acquisition Sub in connection with this Agreement and the Transactions and the financing thereof, subject to a maximum of \$2,000,000 (which maximum amount will be reduced to \$1,000,000 if the Agreement has been terminated pursuant to Section 8.2(1)(i) in circumstances where the Hummingbird Shareholders have voted on the Arrangement Resolution at the Meeting but the Arrangement Resolution failed to receive the requisite approval of at least two-thirds of the votes cast at the Meeting), as reimbursement to Parent and Acquisition Sub payable by wire transfer of same day funds to or to the order

parent, provided however, that no payment under Section 7.4(2) shall be made if a payment has been made under Section 7.3.

(3) Each Party acknowledges that the agreements contained in this Section 7.4 are an integral part of the transactions contemplated by this Agreement, and that, without these agreements, neither Party would enter into this Agreement. Notwithstanding anything to the contrary, this Section 7.4 shall survive completion of any and all of the Transactions.

#### **7.5 Liquidated Damages and Injunctive Relief**

Each of the Parties acknowledges that all of the payment amounts set out in Sections 7.3 and 7.4 are payments of liquidated damages which are a genuine pre-estimate of the damages Parent and Acquisition Sub, on the one hand, or Hummingbird, on the other hand (as the case may be) will suffer or incur as a result of the event giving rise to such payment and the resultant termination of this Agreement and are not penalties. Each of the Parties irrevocably waives any right it may have to raise as a defense that any such liquidated damages are excessive or punitive. For greater certainty, the Parties agree that, subject to Sections 7.3 and 7.4, payment of the amounts determined pursuant to Sections 7.3 and/or 7.4 in the manner provided in respect thereof is the sole monetary remedy of the Party receiving such payment. Nothing contained herein shall preclude a Party from seeking injunctive relief to restrain any breach or threatened breach of the covenants or agreements set forth in this Agreement or otherwise to obtain specific performance of any of such acts, covenants or agreements, without the necessity of posting a bond or security in connection therewith.

#### **7.6 Access to Information; Confidentiality**

(1) From the date hereof until the earlier of the Effective Time and the termination of this Agreement, upon reasonable notice and subject to applicable Law, including pre-merger notification and other competition law requirements, Hummingbird shall, and shall cause its subsidiaries and their respective officers, directors, employees, independent auditors, accounting advisers and agents to, afford to Parent and to the officers, employees, agents and representatives of Parent such access as Parent may reasonably require at all reasonable times, including for the purpose of facilitating integration business planning, to their officers, employees, agents, properties, books, records and Contracts, and shall furnish Parent with all data and information as Parent may reasonably request. Parent and Hummingbird acknowledge and agree that information furnished pursuant to this Section shall be subject to the terms and conditions of the Non-Disclosure Agreement.

(2) Parent and Hummingbird acknowledge that information received pursuant to this Section 7.6 may be personal information under applicable privacy and other Laws, or non-public or proprietary in nature and therefore all such information shall be deemed to be and shall be treated as confidential information for purposes of the Non-Disclosure Agreement. Parent and Hummingbird further acknowledge their obligation to maintain the confidentiality of such confidential information in accordance with the Non-Disclosure Agreement. If any material is withheld by Hummingbird or any of its subsidiaries because of the confidential nature of such material, or otherwise, Hummingbird or such subsidiary shall inform Parent as to the general nature of what is being withheld and such information may, in the sole discretion of Hummingbird, be disclosed to external advisors of Parent.

## **7.7 Insurance and Indemnification**

(1) Parent will, or will cause Acquisition Sub to, at Parent's option, either (a) maintain in effect without any reduction in scope or coverage for not less than six years from the Effective Date customary policies of directors' and officers' liability insurance providing protection no less favourable to the protection provided by the policies maintained by Hummingbird in favour of the directors and officers of Hummingbird and each of its subsidiaries which are in effect immediately prior to the Effective Date and providing protection in respect of claims arising from facts or events which occurred prior to the Effective Time or (b) purchase as an extension of Hummingbird's current insurance policies, prepaid non cancellable run-off directors' and officers' liability insurance providing coverage comparable to that contained in Hummingbird's existing policy for six years from the Effective Time with respect to claims arising from or related to facts or events that occurred at or prior to the Effective Time.

(2) Parent agrees that all rights to indemnification or exculpation existing in favour of the directors or officers of Hummingbird or any subsidiary of Hummingbird as at the date of the Non-Disclosure Agreement (the "**Hummingbird D&O Rights**") as provided in Hummingbird's articles or by-laws or as disclosed in Section 7.7 of the Disclosure Letter shall survive the transactions contemplated hereby and shall continue in full force and effect for a period of not less than six years from the Effective Time. For a period of six years from the Effective Date, Parent will, or will cause Acquisition Sub or Hummingbird to, perform the obligations of Hummingbird under the Hummingbird D&O Rights.

(3) In the event Hummingbird or any of its successors or assigns (a) consolidates with or merges into any other person and shall not be the continuing or surviving corporation or entity of such consolidation or merger or (b) transfers all or substantially all of its properties and assets to any person, then, and in such case, proper provision shall be made so that such successors and assigns of Hummingbird or, at Parent's option, Parent, shall assume the obligations set forth in this Section 7.7.

(4) This Section 7.7 shall survive the consummation of the Arrangement, is intended to benefit Hummingbird and each of its directors and officers and their respective heirs and personal representatives and shall be enforceable by such directors and officers and their respective heirs and personal representatives.

## **7.8 Safe Income**

Subject to the terms of the Interim Order and the receipt of all necessary approvals or exemptive relief orders from applicable Governmental Entities, Hummingbird Shareholders will be permitted to effect a "safe income tuck-in" transaction (a "**Safe Income Transaction**") in accordance with applicable Laws to be effective shortly prior to the Effective Date, on the terms and subject to the conditions and limitations described in the holding company participation agreement attached as Schedule D hereto (the "**Participation Amendment**"); provided that: (a) no Shareholder will be permitted to effect a Safe Income Transaction unless the terms and conditions of such Safe Income Transaction are satisfactory to Hummingbird and Parent acting reasonably; (b) draft documentation regarding any Hummingbird Shareholder's proposed Safe Income Transaction (including with respect to any transfers or deemed dividends) shall be delivered to Hummingbird and Parent no later than September 18, 2006, and Hummingbird and Parent shall have a reasonable opportunity to review and comment on such draft documentation,

and all reasonable comments of Hummingbird and Parent shall be reflected in the final documentation executed in respect of such Safe Income Transaction; and (c) in the event that (i) the terms and conditions of such Safe Income Transaction are not satisfactory to the Director or the Court or (ii) any securities regulatory authority, including any of the Canadian Securities Administrators, refuses to grant any relief required or, in the opinion of Parent, desirable, in connection with any such Safe Income Transaction (for greater certainty, including exemptive relief from the issuer bid requirements under applicable Canadian securities laws) or such relief is not granted prior to the date of the Meeting, then the agreement under this Section 7.8 shall be immediately terminated and of no further force or effect and none of Parent, Acquisition Sub or Hummingbird shall be obligated to consider, facilitate or assist in any alternative or amended form of “safe income” transaction for Hummingbird Shareholders.

## **ARTICLE 8**

### **TERM, TERMINATION, AMENDMENT AND WAIVER**

#### **8.1 Term**

This Agreement shall be effective from the date hereof until the earlier of the Effective Time and the termination of this Agreement in accordance with its terms.

#### **8.2 Termination**

- (1) This Agreement may, at any time prior to the Effective Time:
- (a) be terminated by Parent if there shall have occurred after the date hereof (or prior to such date to the extent that the relevant change, event, occurrence or development shall have been disclosed generally or to Parent only after the date of this Agreement) up to and including the Effective Date, a Material Adverse Effect in respect of Hummingbird;
  - (b) be terminated either by Parent or by Hummingbird, if any Law makes the completion of the transactions contemplated by this Agreement illegal or otherwise prohibited;
  - (c) subject to Section 8.2(3), be terminated by Parent, if there has been a breach of or failure to perform any representation, warranty, covenant or agreement on the part of Hummingbird set forth in this Agreement or any such representation and warranty shall have become untrue after the date of this Agreement, such that Section 6.2(a) or 6.2(b) would not be satisfied;
  - (d) subject to Section 8.2(3), be terminated by Hummingbird, if there has been a breach of or failure to perform any representation, warranty, covenant or agreement on the part of Parent set forth in this Agreement or any such representation and warranty shall have become untrue after the date of this Agreement, such that Section 6.3(a) or 6.3(b) would not be satisfied;
  - (e) be terminated by Parent, if the Board of Directors of Hummingbird shall have: (i) withdrawn, withheld, qualified or modified in a manner adverse to Parent its recommendation of this Agreement (it being understood that the taking of a



neutral position or no position with respect to an Acquisition Proposal shall be considered an adverse modification),  
(ii) after being requested by Parent in writing, failed to reaffirm its recommendation of the Arrangement as promptly as practicable (but in any event within two (2) business days) after receipt of any written request to do so from Parent or  
(iii) approved or recommended an Acquisition Proposal or entered into a binding written agreement in respect of an Acquisition Proposal (other than a confidentiality agreement permitted by Section 7.1(4));

- (f) be terminated by the mutual written consent of Parent and Hummingbird;
- (g) be terminated by Hummingbird, in order to enter into a binding written agreement with respect to a Superior Proposal (other than a confidentiality agreement permitted by Section 7.1(4)), subject to compliance with Sections 7.1 and 7.2 and provided that no termination under this Section 8.2(1)(g) shall be effective unless and until Hummingbird shall have paid to Parent the amount required to be paid pursuant to Section 7.3;
- (h) be terminated either by Parent or by Hummingbird, if the Effective Time shall not have occurred on or before the Outside Date; provided, that the right to terminate this Agreement pursuant to this Section 8.2(1)(h) shall not be available to any party that has breached in any material respect its obligations under this Agreement in any manner that shall have proximately contributed to the occurrence of the failure of the Effective Time to occur on or before such date; or
- (i) be terminated by Parent, if the Arrangement Resolution shall have failed to receive the requisite approval of at least two-thirds of the votes cast at the Meeting or at any adjournment or postponement thereof in accordance with the CBCA.

(2) If this Agreement is terminated in accordance with the foregoing provisions of this Section, this Agreement shall forthwith become void and of no further force or effect and no Party shall have any further obligations hereunder except as provided in Sections 7.3 and 7.4 and the Non-Disclosure Agreement.

(3) None of Parent, Acquisition Sub or Hummingbird may elect to not consummate the transactions contemplated hereby pursuant to the conditions under Section 6.2(a), Section 6.2(b)(i), Section 6.3(a) or Section 6.3(b) (the “**Specified Conditions**”) or to exercise the termination rights under Section 8.2(1)(c) (as it relates to Section 6.2(a) or Section 6.2(b)(i)) or Section 8.2(1)(d) (the “**Specified Termination Rights**”) unless Parent or Hummingbird, as the case may be, has delivered a written notice to the other specifying in reasonable detail all breaches of covenants, agreements or representations and warranties which Parent or Hummingbird, as the case may be, is asserting as the basis for non-fulfilment of the applicable Specified Condition or the exercise of the applicable Specified Termination Right, as the case may be. If any such notice is delivered, provided that Parent or Hummingbird, as the case may be, is proceeding diligently to cure such matter and such matter is capable of being cured, the other may not terminate this Agreement until the earlier of the Outside Date and the expiration of a period of 30 days from such notice (and then only if such breach remains uncured). If such notice has been delivered prior to the date of the Special Meeting, such meeting shall be

postponed until the expiry of such period. For greater certainty, in the event that such matter is cured within the time period referred to herein, this Agreement may not be terminated as a result of the cured breach. Also for greater certainty, this Section 8.2(3) does not apply to a Party electing to not consummate the transactions contemplated hereby pursuant to any condition precedent contained herein other than the Specified Conditions or exercising any termination rights herein other than the Specified Termination Rights.

### **8.3 Amendment**

This Agreement may be amended by the parties hereto by action taken by or on behalf of their respective boards of directors at any time prior to the Effective Time; provided, however, that, after receipt of approval of Hummingbird Shareholders there shall be made no amendment that by Law requires further approval by Hummingbird Shareholders at the Meeting without the further approval of such holders. This Agreement may not be amended except by an instrument in writing signed by each of the parties hereto.

### **8.4 Waiver**

Any Party may (a) extend the time for the performance of any of the obligations or acts of the other Party, (b) waive compliance with any of the other Party's agreements or the fulfillment of any conditions to its own obligations contained herein, or (c) waive inaccuracies in any of the other Party's representations or warranties contained herein or in any document delivered by the other Party; provided, however, that any such extension or waiver shall be valid only if set forth in an instrument in writing signed on behalf of such Party and, unless otherwise provided in the written waiver, will be limited to the specific breach or condition waived.

## **ARTICLE 9 GENERAL PROVISIONS**

### **9.1 Notices**

All notices and other communications given or made pursuant hereto shall be in writing and shall be deemed to have been duly given or made as of the date delivered or sent if delivered personally or sent by facsimile or e-mail transmission, or as of the following business day if sent by prepaid overnight courier, to the Parties at the following addresses (or at such other addresses as shall be specified by either Party by notice to the other given in accordance with these provisions):

- (1) if to Parent or Acquisition Sub:  
275 Frank Tompa Drive  
Waterloo, Ontario N2L 0A1  
  
Attention: P. Thomas Jenkins  
Telephone: 519.888.7111  
Facsimile: 519.888.0254

with a copy to:

Osler, Hoskin & Harcourt LLP  
Box 50,1 First Canadian Place  
Toronto, Ontario M5X 1B8

Attention: Clay Horner  
Telephone: 416.862.6590  
Facsimile: 416.862.6666

with a copy to:

Mayer, Brown, Rowe & Maw LLP  
1675 Broadway  
New York, NY 10019

Attention: Wayne C. Matus, Esq.  
Telephone: 212.506.2122  
Facsimile: 212.849.5922

(2) if to Hummingbird:

1 Sparks Avenue,  
Toronto, Ontario  
M2H 2W1

Attention: Inder P.S. Duggal  
Telephone: 416.496.2200  
Facsimile: 416.496.2207

with a copy to:

Skadden, Arps, Slate, Meagher & Flom LLP  
222 Bay Street, Suite 1750  
Toronto, Ontario  
M5K 1J5

Attention: Christopher W. Morgan  
Telephone: 416.777.4700  
Facsimile: 416.777.4747

with a copy to:

Goodmans LLP  
250 Yonge Street, Suite 2400  
Toronto, Ontario, Canada M5B 2M6

Attention: Stephen Halperin/Michael Partridge  
Telephone: 416.597.4115/416.597.5498  
Facsimile: 416.979.1234

## **9.2 Miscellaneous**

This Agreement constitutes the entire agreement and supersedes all other prior agreements and understandings, both written and oral, between the Parties with respect to the subject-matter hereof save for the Non-Disclosure Agreement and is not intended to confer upon any person other than the Parties any rights or remedies hereunder. The Parties shall be entitled to rely upon delivery of an executed facsimile or similar electronic copy of this Agreement, and such facsimile or similar electronic copy shall be legally effective to create a valid and binding agreement between the Parties.

## **9.3 Governing Law**

This Agreement shall be governed, including as to validity, interpretation and effect, by the laws of the Province of Ontario and the federal laws of Canada applicable therein, and shall be construed and treated in all respects as an Ontario contract. Each of the Parties hereby irrevocably submits to the non-exclusive jurisdiction of the Courts of the Province of Ontario in respect of all matters arising under and in relation to this Agreement and the Plan of Arrangement.

## **9.4 Injunctive Relief**

The Parties agree that irreparable harm would occur in the event that any of the provisions of this Agreement were not performed in accordance with their specific terms or were otherwise breached for which money damages would not be an adequate remedy at law. It is accordingly agreed that the Parties shall be entitled to an injunction or injunctions and other equitable relief to prevent breaches of this Agreement, any requirement for the securing or posting of any bond in connection with the obtaining of any such injunctive or other equitable relief hereby being waived.

## **9.5 Time of Essence**

Time shall be of the essence in this Agreement.

## **9.6 Binding Effect and Assignment**

Parent may, without the prior written consent of Hummingbird, assign all or any part of its rights under this Agreement (a) to, and its obligations under this Agreement may be assumed by, a wholly-owned subsidiary of Parent, provided that if such assignment and/or assumption takes place, Parent shall continue to be liable jointly and severally with such subsidiary for all of its obligations hereunder or (b) for collateral security purposes, to any lender providing financing to Parent or any of its affiliates. This Agreement shall be binding on and shall enure to the benefit of the Parties and their respective successors and permitted assigns. Except as expressly permitted by the terms hereof, neither this Agreement nor any of the rights, interests or obligations hereunder may be assigned by either of the Parties without the prior written consent of the other Party.

### **9.7 Severability**

If any term or other provision of this Agreement is invalid, illegal or incapable of being enforced by any rule or Law or public policy, all other conditions and provisions of this Agreement shall nevertheless remain in full force and effect so long as the economic or legal substance of the transactions contemplated hereby is not affected in any manner materially adverse to any Party. Upon such determination that any term or other provision is invalid, illegal or incapable of being enforced, the Parties shall negotiate in good faith to modify this Agreement so as to effect the original intent of the Parties as closely as possible in an acceptable manner to the end that the transactions contemplated hereby are fulfilled to the fullest extent possible.

### **9.8 Counterparts**

This Agreement may be executed in two or more counterparts, each of which shall be deemed to be an original but all of which together shall constitute one and the same instrument.

### **9.9 No Recourse**

(1) Notwithstanding anything that may be expressed or implied in this Agreement, except as provided in Article 7, Hummingbird covenants, agrees and acknowledges that no recourse under this Agreement shall be had against any current or future affiliates, shareholders or agents of Parent, Acquisition Sub or their respective affiliates, as such, or any current or former director, officer, employee, member, general or limited partner or shareholder of any of the foregoing, as such, whether by the enforcement of any assessment or by any legal or equitable proceeding, or by virtue of any Law, it being expressly agreed and acknowledged that no personal liability whatsoever shall attach to, be imposed on or otherwise be incurred by any current or future affiliate, shareholder or agent of Parent, Acquisition Sub or their respective affiliates, as such, or any current or future director, officer, employee, member, general or limited partner or shareholder of any of the foregoing, as such, for any obligation of Parent, Acquisition Sub or their respective affiliates under this Agreement.

Notwithstanding anything that may be expressed or implied in this Agreement, except as provided in Article 7, each of Parent and Acquisition Sub covenants, agrees and acknowledges that no recourse under this Agreement shall be had against any current or future affiliates, shareholders or agents of Hummingbird, as such, or any current or former director, officer, employee or shareholder of any of the foregoing, as such, whether by the enforcement of any assessment or by any legal or equitable proceeding, or by virtue of any Law, it being expressly agreed and acknowledged that no personal liability whatsoever shall attach to, be imposed on or otherwise be incurred by any current or future affiliate, shareholder or agent of Hummingbird, as such, or any current or future director, officer, employee or shareholder of any of the foregoing, as such, for any obligation of Hummingbird under this Agreement.

**IN WITNESS WHEREOF**, each of Parent, Acquisition Sub and Hummingbird has caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

**IN WITNESS WHEREOF**, each of Parent, Acquisition Sub and Hummingbird has caused this Agreement to be executed as of the date first written above by their respective officers thereunto duly authorized.

**OPEN TEXT CORPORATION**

By: /s/ John Shackleton  
Name: John Shackleton  
Title: President and Chief Executive Officer

**6575064 CANADA INC.**

By: /s/ John Shackleton  
Name: John Shackleton  
Title: President

**HUMMINGBIRD LTD.**

By: /s/ Alan Barry Litwin  
Name: Alan Barry Litwin  
Title: President and Chief Executive Officer

Arrangement Agreement

## Schedule A

### **To the Arrangement Agreement**

#### **Regulatory Approvals**

##### **Part A – Canada**

- Expiration of the applicable waiting period related to merger pre-notification under Part IX of the Competition Act or earlier termination or waiver thereof in accordance with the Competition Act, and the Commissioner of Competition will have advised Parent in writing (which advice will not have been rescinded or amended), that she does not intend to oppose the purchase of the Hummingbird Shares under the Plan of Arrangement and will not have made or have threatened to make application under Part VIII of the Competition Act in respect of the purchase of the Hummingbird Shares under the Plan of Arrangement, or the Commissioner will have issued an advance ruling certificate in respect of the purchase of the Hummingbird Shares pursuant to Section 102 of the Competition Act.
- Approvals of the Canadian Securities Administrators and any other securities regulatory authorities, as required or, in the opinion of Parent, desirable, (including exemptive relief from the issuer bid requirements under applicable Canadian securities Laws in respect of any and all Safe Income Transactions)

##### **Part B – United States**

- Expiration of all applicable waiting periods under the Hart-Scott-Rodino Antitrust Improvement Act of 1976, as amended (“HSR Act”), including any voluntary agreed extensions thereof, or earlier termination thereof in accordance with the HSR Act.

##### **Part C – Germany**

- Notification (Anmeldung) to the German Federal Cartel Office (Bundeskartellamt) in Bonn pursuant to the German Act Against Restraints of Competition (Gesetz gegen Wettbewerbsbeschränkungen).

## **SCHEDULE B**

### **ARRANGEMENT RESOLUTION**

#### **BE IT RESOLVED, AS A SPECIAL RESOLUTION, THAT:**

(1) The arrangement (the “**Arrangement**”) under section 192 of the Canada Business Corporations Act (the “**CBCA**”) involving Hummingbird Ltd. (the “**Company**”), as more particularly described and set forth in the management information circular (the “**Circular**”) of the Company accompanying the notice of this meeting (as the Arrangement may be modified or amended in accordance with its terms) is hereby authorized, approved and adopted.

(2) The plan of arrangement (the “**Plan of Arrangement**”) involving the Company, the full text of which is set out as Schedule C to the Arrangement Agreement made as of August 4, 2006 among Open Text Corporation, 6575064 Canada Inc. and the Company (the “**Arrangement Agreement**”), (as the Plan of Arrangement may be modified or amended in accordance with its terms) is hereby authorized, approved and adopted.

(3) The Arrangement Agreement, the actions of the directors of the Company in approving the Arrangement Agreement and the actions of the directors and officers of the Company in executing and delivering the Arrangement Agreement and any amendments thereto in accordance with its terms are hereby ratified and approved.

(4) Notwithstanding that this resolution has been passed (and the Plan of Arrangement adopted) by the shareholders of the Company or that the Arrangement has been approved by the Ontario Superior Court of Justice, the directors of the Company are hereby authorized and empowered without further notice to or approval of the shareholders of the Company (i) to amend the Arrangement Agreement or the Plan of Arrangement, to the extent permitted by the Arrangement Agreement, and (ii) subject to the terms of the Arrangement Agreement, not to proceed with the Arrangement.

(5) Any director or officer of the Company be and is hereby authorized and directed for and on behalf of the Company to execute, under the corporate seal of the Company or otherwise, and to deliver to the Director under the CBCA for filing articles of arrangement and such other documents as are necessary or desirable to give effect to the Arrangement and the Plan of Arrangement in accordance with the Arrangement Agreement.

(6) Any director or officer of the Company is hereby authorized and directed for and on behalf of the Company to execute or cause to be executed, under the corporate seal of the Company or otherwise, and to deliver or cause to be delivered, all such other documents and instruments and to perform or cause to be performed all such other acts and things as in such person’s opinion may be necessary or desirable to give full effect to the foregoing resolutions and the matters authorized thereby, such determination to be conclusively evidenced by the execution and delivery of such document, agreement or instrument or the doing of any such act or thing.



**SCHEDULE C**  
**PLAN OF ARRANGEMENT**  
**UNDER SECTION 192**  
**OF THE CANADA BUSINESS CORPORATIONS ACT**

**ARTICLE 1**  
**INTERPRETATION**

**1.1 Definitions**

In this Plan of Arrangement, unless there is something in the subject matter or context inconsistent therewith, the following terms shall have the respective meanings set out below and grammatical variations of such terms shall have corresponding meanings:

**“Acquisition Sub”** means 6575064 Canada Inc., a corporation incorporated under the CBCA and being a wholly-owned subsidiary of Parent;

**“Arrangement”** means the arrangement under section 192 of the CBCA on the terms and subject to the conditions set out in this Plan of Arrangement, subject to any amendments or variations thereto made in accordance with Section 8.3 of the Arrangement Agreement or Article 5 hereof;

**“Arrangement Agreement”** means the agreement dated August 4, 2006 among Parent, Acquisition Sub and Hummingbird providing for, among other things, the Arrangement;

**“Articles of Arrangement”** means the articles of arrangement of Hummingbird in respect of the Arrangement that are required by the CBCA to be sent to the Director after the Final Order is made;

**“Business Day”** means any day, other than a Saturday or Sunday or a statutory holiday in Ontario, Canada;

**“CBCA”** means the *Canada Business Corporations Act*, as amended;

**“Certificate of Arrangement”** means the certificate of arrangement issued by the Director pursuant to subsection 192(7) of the CBCA in respect of the Articles of Arrangement;

**“Circular”** means the notice of the Meeting and accompanying management proxy circular, including all schedules thereto, to be sent by Hummingbird to Shareholders in connection with the Meeting;

**“Court”** means the Ontario Superior Court of Justice (Commercial List);

**“Depository”** means CIBC Mellon Trust Company and any other trust company, bank or equivalent financial institution agreed to in writing by Parent and Hummingbird and appointed to carry out any of the duties of the Depository hereunder;

**“Director”** means the Director appointed pursuant to section 260 of the CBCA;

**“Dissent Rights”** means the rights of dissent in respect of the Arrangement described in Section 3.1;

**“Dissenting Holder”** means any Shareholder who has duly exercised its Dissent Rights and has not withdrawn or been deemed to have withdrawn such Dissent Rights;

**“Effective Date”** means the date shown on the Certificate of Arrangement giving effect to the Arrangement;

**“Effective Time”** means 9:00 a.m. (Toronto time) on the Effective Date;

**“Exchange Act”** means the *United States Securities Exchange Act of 1934*, as amended;

**“Exchange Factor”** means 0.8879, which is the exchange rate for one Canadian dollar into United States dollars based on the noon rate of exchange of the Bank of Canada on the business day immediately preceding the date of the Arrangement Agreement.

**“Final Order”** means the order of the Court approving the Arrangement as such order may be amended at any time prior to the Effective Date or, if appealed, then, unless such appeal is withdrawn or denied, as affirmed or as amended on appeal;

**“Hummingbird”** means Hummingbird Ltd., a corporation existing under the CBCA;

**“Hummingbird Option”** means any option to purchase Hummingbird Shares granted pursuant to the Hummingbird Stock Option Plan or any other stock option plan of Hummingbird or any predecessor of Hummingbird, or any option assumed or adopted by Hummingbird;

**“Hummingbird Shares”** means the common shares in the capital of Hummingbird;

**“Hummingbird Stock Option Plan”** means Hummingbird’s 1996 Employee Stock Option Plan;

**“Interim Order”** means the interim order of the Court providing for, among other things, the calling and holding of the Meeting, as such order may be amended, as contemplated by the Arrangement Agreement;

**“Lender Sub”** means one or more wholly-owned subsidiaries of Hummingbird selected by Parent for purposes of making the loans contemplated in Section 2.3(a);

**“Lender Sub Option Note”** has the meaning ascribed thereto in Section 2.3(a);

**“Lender Sub Share Note”** has the meaning ascribed thereto in Section 2.3(a);

**“Letter of Transmittal”** means the letter of transmittal forwarded by Hummingbird to Shareholders in connection with the Arrangement, in the form accompanying the Circular;

**“Loan Alternative”** means the provision by Lender Sub of the loans contemplated under Section 2.3(a);

**“Loan Amount”** means such amount of cash of Hummingbird or its subsidiaries that Parent requests in accordance with Section 5.5 of the Arrangement Agreement, provided that in any event, if so requested by Parent, such amount shall be not less than \$58,000,000 and may be \$0;

**“Mailing Date”** means the date of mailing of the Circular to Shareholders;

**“Maximum Cash Amount”** means the aggregate amount of cash in United States dollars equal to (a) the product obtained by multiplying (i) the number of Hummingbird Shares outstanding immediately prior to the Effective Time by (ii) the Purchase Price, less (b) the Share Loan Amount;

**“Meeting”** means the special meeting of Shareholders to be held to consider the Arrangement Resolution, including any adjournment or postponement thereof, to be called and held in accordance with the Interim Order;

**“Option Loan Amount”** means the aggregate amount of cash required to be paid by or on behalf of Hummingbird pursuant to Section 2.3(b)(i) in respect of the Hummingbird Options;

**“Optionholders”** means the holders of Hummingbird Options;

**“Parent”** means Open Text Corporation, a corporation existing under the CBCA;

**“Person”** means an individual, corporation, partnership, limited partnership, limited liability company, joint venture, estate, association, trust, unincorporated organization or other entity of any kind or nature, as well as any syndicate or group that would be deemed to be a person under section 13(d)(3) of the Exchange Act;

**“Purchase Price”** means the sum of \$27.85 per Hummingbird Share, payable in cash;

**“Share Loan Amount”** means the difference obtained by subtracting the Option Loan Amount from the Loan Amount; provided that if the Loan Amount is \$0 the Share Loan Amount shall also be \$0;

**“Shareholders”** means the holders of Hummingbird Shares whose names appear in the register of holders of Hummingbird Shares maintained by or on behalf of Hummingbird and, where the context so provides, includes joint holders of such Hummingbird Shares; and

**“Tax Act”** means the *Income Tax Act* (Canada), as amended.

## **1.2 Interpretation Not Affected by Headings, Etc.**

The division of this Plan of Arrangement into articles, sections and other portions and the insertion of headings are for reference purposes only and shall not affect the interpretation of this Plan of Arrangement. Unless otherwise indicated, any reference in this Plan of Arrangement to

“Article” or “section” followed by a number refers to the specified Article or section of this Plan of Arrangement. The terms “**this Plan of Arrangement**”, “**hereof**”, “**herein**”, “**hereunder**” and similar expressions refer to this Plan of Arrangement, including any appendices hereto, and any amendments, variations or supplements hereto made in accordance with the terms hereof or the Arrangement Agreement or made at the direction of the Court in the Final Order and do not refer to any particular Article, section or other portion of this Plan of Arrangement.

### **1.3 Rules of Construction**

In this Plan of Arrangement, unless the context otherwise requires, (a) words importing the singular number include the plural and vice versa, (b) words importing any gender include all genders, and (c) “include”, “includes” and “including” shall be deemed to be followed by the words “without limitation”.

### **1.4 Date of Any Action**

In the event that any date on which any action is required to be taken hereunder by any of the parties hereto is not a Business Day, such action shall be required to be taken on the next succeeding day which is a Business Day.

### **1.5 Time**

Time shall be of the essence in every matter or action contemplated hereunder. All times expressed herein or in the Letter of Transmittal are local time (Toronto, Ontario) unless otherwise stipulated herein or therein.

### **1.6 Currency**

Unless otherwise stated, all references in this Plan of Arrangement to sums of money are expressed in lawful money of the United States of America.

### **1.7 Statutes**

Any reference to a statute includes all rules and regulations made pursuant to such statute and, unless otherwise specified, the provisions of any statute or regulations or rule which amends, supplements or supersedes any such statute, regulation or rule.

## **ARTICLE 2 ARRANGEMENT**

### **2.1 Arrangement Agreement**

This Plan of Arrangement is made pursuant to, is subject to the provisions of and forms part of the Arrangement Agreement.

### **2.2 Binding Effect**

This Plan of Arrangement will become effective at, and be binding at and after, the Effective Time on (i) Hummingbird, (ii) Parent and Acquisition Sub, (iii) all Shareholders and

beneficial owners of Hummingbird Shares and (iv) all registered and beneficial owners of Hummingbird Options.

### **2.3 Arrangement**

Commencing at the Effective Time, the following events set out in this Section 2.3 shall occur and shall be deemed to occur consecutively in the order and at the times set out in this Section 2.3 without any further authorization, act or formality (subject to the order of Sections 2.3(b) and 2.3(c) being reversed if so requested by Parent in the notice referred to in Section 2.3(a) below):

- (a) If Parent has provided written notice to Hummingbird of Parent's request for the Loan Alternative at least ten business days prior to the Effective Time and such notice sets out the Loan Amount, the Share Loan Amount and the Option Loan Amount, then effective at the Effective Time, (i) if the Share Loan Amount is not \$0, Hummingbird shall cause Lender Sub to loan an amount equal to the Share Loan Amount to Acquisition Sub, and Acquisition Sub shall deliver to Lender Sub a duly issued and executed promissory note (the **"Lender Sub Share Note"**) in the form attached as Appendix A hereto to evidence such loan and the full amount of such loan shall be immediately deposited with the Depositary to be held in a segregated account by the Depositary for the exclusive purpose of paying a portion of the aggregate Purchase Price for the Hummingbird Shares, (ii) Hummingbird shall cause Lender Sub to loan an amount equal to the Option Loan Amount to Hummingbird, and Hummingbird shall deliver to Lender Sub a duly issued and executed promissory note (the **"Lender Sub Option Note"**) in the form attached as Appendix A hereto to evidence such loan and the full amount of such loan shall be immediately deposited with the Depositary to be held in a segregated account by the Depositary for the exclusive purpose of making the payments contemplated by Section 2.3(b)(i), and (iii) the Maximum Cash Amount held by the Depositary shall cease to be held in escrow and shall be held in a segregated account by the Depositary for the exclusive purpose of paying a portion of the aggregate Purchase Price for the Hummingbird Shares. If Parent has not provided written notice to Hummingbird of Parent's request for the Loan Alternative but Parent provides written notice to Hummingbird at least ten business days prior to the Effective Time that it wishes Acquisition Sub to fund Hummingbird to enable Hummingbird to make the payments contemplated by Section 2.3(b)(i), then effective at the Effective Time, Acquisition Sub shall loan an amount equal to the Option Loan Amount to Hummingbird, and Hummingbird shall deliver to Acquisition Sub a duly issued and executed promissory note (the **"Acquisition Sub Option Note"**) in the form attached as Appendix A hereto to evidence such loan and the full amount of such loan shall be immediately deposited with the Depositary to be held in a segregated account by the Depositary for the exclusive purpose of making the payments contemplated by Section 2.3(b)(i).
- (b) Effective at one minute after the Effective Time (or, if specified in the notice referred to in Section 2.3(a) above, effective at two minutes after the Effective Time) each Hummingbird Option, notwithstanding any contingent vesting

provisions to which it might otherwise have been subject, shall be deemed to be conditionally vested and exercisable only as part of the Arrangement and:

- (i) each Hummingbird Option shall be transferred by the Optionholder to Hummingbird in exchange for a cash payment from or on behalf of Hummingbird equal to the amount (if any) by which the Purchase Price exceeds the product of (x) the exercise price thereof (in Canadian dollars) multiplied by (y) the Exchange Factor, which amount shall be paid from the funds deposited with the Depositary under Section 2.3(a);
  - (ii) each Hummingbird Option shall immediately be cancelled and all option agreements related thereto shall be terminated and the Optionholders shall thereafter have only the right to receive the consideration to which they are entitled pursuant to this Section 2.3(b) at the time and in the manner specified in Article 4; and
  - (iii) the Hummingbird Stock Option Plan shall be terminated and none of Hummingbird or any of its affiliates shall have any liabilities or obligations with respect to such plan except pursuant to this Section 2.3(b).
- (c) Effective at two minutes after the Effective Time (or, if specified in the notice referred to in Section 2.3(a) above, effective at one minute after the Effective Time), each Hummingbird Share outstanding immediately prior to the Effective Time shall be transferred to Acquisition Sub in exchange for the Purchase Price from Acquisition Sub, which amount shall be paid from the funds deposited with the Depositary under Sections 2.3(a)(i) and (iii), and the names of the holders of such Hummingbird Shares transferred to Acquisition Sub shall be removed from the applicable registers of Shareholders, and Acquisition Sub shall be recorded as the registered holder of the Hummingbird Shares so acquired and shall be deemed the legal and beneficial owner thereof; subject to the right of Dissenting Holders to be paid the fair value of the Hummingbird Shares held prior to the Effective Time by such Dissenting Holders in accordance with Section 3.1.
- (d) Effective at three minutes after the Effective Time, all directors of Hummingbird shall cease to be directors and the following persons shall become the directors of Hummingbird (the “**New Directors**”): John Shackleton, Paul McFeeters and John Trent.

### **ARTICLE 3**

#### **RIGHTS OF DISSENT**

#### **3.1 Rights of Dissent**

- (a) A Shareholder may exercise rights of dissent (the “**Dissent Rights**”) pursuant to and in the manner set forth in section 190 of the CBCA and this section 3.1 in connection with the Arrangement; provided, however, that, (i) notwithstanding subsection 190(5) of the CBCA, any written objections to the Arrangement Resolution must be received by Hummingbird not later than 5:00 p.m. (Toronto time) on the day which is two Business Days preceding the Meeting, and (ii)

notwithstanding section 190 of the CBCA, Acquisition Sub and not Hummingbird shall be required to pay fair market value for the Hummingbird Shares held by holders who duly exercise Dissent Rights. A Shareholder who duly exercises such Dissent Rights and who:

(i) is ultimately entitled to be paid fair value for its Hummingbird Shares shall be deemed to have transferred such Hummingbird Shares to Acquisition Sub on the Effective Date contemporaneously with the event described in Section 2.3(e) in exchange for the fair value of such Hummingbird Shares; or

(ii) is ultimately not entitled, for any reason, to be paid fair value for its Hummingbird Shares shall be deemed to have participated in the Arrangement on the same basis as a non-dissenting Shareholder.

- (b) In no circumstances shall Parent, Acquisition Sub, Hummingbird or any other Person be required to recognize a Person exercising Dissent Rights unless such Person is a Shareholder of those Hummingbird Shares in respect of which such rights are sought to be exercised.
- (c) For greater certainty, in no case shall Parent, Acquisition Sub, Hummingbird or any other Person be required to recognize a Dissenting Holder as a Shareholder after the Effective Time, and the name of each Dissenting Holder shall be deleted from the register of Shareholders on the Effective Date at the same time as the events described in Section 2.3(e) occur.

## **ARTICLE 4**

### **CERTIFICATES AND PAYMENTS**

#### **4.1 Letter of Transmittal**

At the time of mailing the Circular or as soon as practicable thereafter, Hummingbird shall forward to each Shareholder and each Optionholder at the address of such holder as it appears on the register maintained by or on behalf of Hummingbird in respect of the holders of Hummingbird Shares or Hummingbird Options, as the case may be, a letter of transmittal in the case of the holders of Hummingbird Shares and, in the case of Optionholders, instructions for obtaining delivery of the consideration payable to Optionholders following the Effective Date pursuant to this Plan of Arrangement.

#### **4.2 Exchange of Certificates for Cash**

- (a) At or before the Effective Time, Acquisition Sub shall deposit the Maximum Cash Amount with the Depositary to be held in escrow until Section 2.3(a) takes effect. Upon surrender to the Depositary for cancellation of a certificate which immediately prior to the Effective Time represented outstanding Hummingbird Shares, together with a duly completed and executed Letter of Transmittal and such additional documents and instruments as the Depositary may reasonably require, the Shareholder of such surrendered certificate shall be entitled to receive in exchange therefor, and the Depositary shall deliver to such Shareholder as soon as practicable after the Effective Time, a cheque representing the cash which such

Shareholder has the right to receive under the Arrangement for such Hummingbird Shares, less any amounts withheld pursuant to Section 4.4, and any certificate so surrendered shall forthwith be cancelled. The cash deposited with the Depositary shall be held in an interest-bearing account, and any interest earned on such funds shall be for the account of Acquisition Sub.

- (b) Until surrendered as contemplated by this Section 4.2, each certificate which immediately prior to the Effective Time represented any Hummingbird Shares shall be deemed after the Effective Time to represent only the right to receive upon such surrender a cash payment in lieu of such certificate as contemplated in this Section 4.2, less any amounts withheld pursuant to Section 4.4. Any such certificate formerly representing Hummingbird Shares not duly surrendered on or before the sixth anniversary of the Effective Date shall cease to represent a claim by or interest of any former Shareholder of any kind or nature against or in Hummingbird, Parent or Acquisition Sub. On such anniversary date, all certificates representing Hummingbird Shares shall be deemed to have been surrendered to Acquisition Sub and cash to which such former holder was entitled, together with any entitlements to dividends, distributions and interest thereon, shall be deemed to have been surrendered to Hummingbird.
- (c) On or as soon as practicable after the Effective Date, the Depositary shall deliver on behalf of Hummingbird to each Optionholder as reflected on the books and records of Hummingbird a cheque representing the payment to which such holder is entitled in accordance with Section 2.3(b) of this Plan of Arrangement, against receipt of such documentation as Parent or Hummingbird may reasonably require acknowledging the transfer and termination of the Hummingbird Options held by such Optionholder.
- (d) Any payment made by way of cheque by the Depositary on behalf of Acquisition Sub or Hummingbird that has not been deposited or has been returned to the Depositary or that otherwise remains unclaimed, in each case on or before the sixth anniversary of the Effective Date, shall cease to represent a right or claim of any kind or nature and the right of the Shareholder or Optionholder to receive the consideration for Hummingbird Shares or Hummingbird Options, as the case may be, pursuant to this Plan of Arrangement shall terminate and be deemed to be surrendered and forfeited to Hummingbird for no consideration.

#### **4.3 Lost Certificates**

In the event any certificate which immediately prior to the Effective Time represented one or more outstanding Hummingbird Shares that were transferred pursuant to Section 2.3 shall have been lost, stolen or destroyed, upon the making of an affidavit of that fact by the Person claiming such certificate to be lost, stolen or destroyed, the Depositary will issue in exchange for such lost, stolen or destroyed certificate, cash deliverable in accordance with such holder's Letter of Transmittal. When authorizing such payment in exchange for any lost, stolen or destroyed certificate, the Person to whom such cash is to be delivered shall as a condition precedent to the delivery of such cash, give a bond satisfactory to Hummingbird and the Depositary in such sum as Hummingbird may direct, or otherwise indemnify Hummingbird in a manner satisfactory to



Hummingbird, against any claim that may be made against Acquisition Sub and Hummingbird with respect to the certificate alleged to have been lost, stolen or destroyed.

#### **4.4 Withholding Rights**

Hummingbird, Acquisition Sub, Parent and the Depositary and any affiliate of Hummingbird shall be entitled to deduct and withhold from any consideration otherwise payable to any Shareholder or Optionholder such amounts as Hummingbird, Acquisition Sub, Parent or the Depositary is required or permitted to deduct and withhold with respect to such payment under the Tax Act, the United States Internal Revenue Code of 1986 or any provision of federal, provincial, state, local or foreign tax law, in each case, as amended. To the extent that amounts are so withheld, such withheld amounts shall be treated for all purposes hereof as having been paid to the holder of the Hummingbird Shares or Hummingbird Options in respect of which such deduction and withholding was made, provided that such withheld amounts are actually remitted to the appropriate taxing authority.

### **ARTICLE 5 AMENDMENTS**

#### **5.1 Amendments to Plan of Arrangement**

- (a) Hummingbird may amend, modify and/or supplement this Plan of Arrangement at any time and from time to time prior to the Effective Date, provided that each such amendment, modification and/or supplement must be (i) set out in writing, (ii) approved by Parent and Acquisition Sub, (iii) filed with the Court and, if made following the Meeting, approved by the Court, and (iv), communicated to Shareholders if and as required by the Court.
- (b) Any amendment, modification or supplement to this Plan of Arrangement may be proposed by Hummingbird at any time prior to the Meeting (provided that Parent and Acquisition Sub shall have consented thereto) with or without any other prior notice or communication, and if so proposed and accepted by the Persons voting at the Meeting (other than as may be required under the Interim Order), shall become part of this Plan of Arrangement for all purposes.
- (c) Any amendment, modification or supplement to this Plan of Arrangement that is approved or directed by the Court following the Meeting shall be effective only if (i) it is consented to by each of Hummingbird, Parent and Acquisition Sub (in each case, acting reasonably) and (ii) if required by the Court, it is consented to by Shareholders voting in the manner directed by the Court.
- (d) This Plan of Arrangement may be withdrawn prior to the occurrence of any of the events in Section 2.3 in accordance with the terms of the Arrangement Agreement.
- (e) Any amendment, modification or supplement to this Plan of Arrangement may be made following the Effective Date unilaterally by Parent, provided that it concerns a matter which, in the reasonable opinion of Parent, is of an administrative nature required to better give effect to the implementation of this

Plan of Arrangement and is not adverse to the economic interest of any former Shareholder.

**ARTICLE 6  
FURTHER ASSURANCES**

- 6.1** Notwithstanding that the transactions and events set out herein shall occur and be deemed to occur in the order set out in this Plan of Arrangement without any further act, authorization or formality, each of the parties to the Arrangement Agreement shall make, do and execute, or cause to be made, done and executed, all such further acts, deeds, agreements, transfers, assurances, instruments or documents as may reasonably be required by any of them in order further to document or evidence any of the transactions or events set out herein.

**PLAN OF ARRANGEMENT**

**APPENDIX A**

**FORM OF PROMISSORY NOTE**

**Promissory Note**

Date: •

**FOR VALUE RECEIVED** the undersigned unconditionally promises to pay on demand to • (the “Lender”) or anyone else who the Lender may specify at •, or such other place as the Lender may direct in writing, the sum of \$• with interest calculated daily from the date of this promissory note on the outstanding balance of such sum and payable monthly on the last day of each month at the same place, both before and after demand, default and judgment, at a nominal annual rate of interest equal to • percent and with interest on overdue interest payable at the same time, place and rate.

The undersigned agrees to provide the Lender with a written acknowledgement of its indebtedness to the Lender hereunder within thirty (30) days prior to each anniversary of this promissory note or as otherwise requested by the Lender from time to time.

This promissory note shall be governed by, and construed in accordance with, the laws of the Province of Ontario and the laws of Canada applicable in that Province. The undersigned waives presentment for payment, notice of dishonour, protest and notice of protest in respect of this promissory note. This promissory note shall become effective when it has been executed and delivered. Time shall be of the essence of this promissory note in all respects. This promissory note constitutes the entire agreement of the parties pertaining to the indebtedness evidenced by this promissory note and supersedes all prior agreements, understandings, negotiations and discussions with respect to such indebtedness, whether oral or written.

**[BORROWER]**

By: \_\_\_\_\_  
Name: \_\_\_\_\_  
Title: \_\_\_\_\_

## SCHEDULE D

### HOLDING COMPANY PARTICIPATION AGREEMENT

**THIS AGREEMENT** made the • day of •, 2006.

BETWEEN:

•,

a corporation incorporated under the *Canada Business Corporations Act*  
(hereinafter referred to as “**HoldCo**”)

- and -

•,

the sole shareholder of HoldCo, [a corporation  
**incorporated established under the laws of •**]  
(hereinafter referred to as the “**Vendor**”)

- and -

**HUMMINGBIRD LTD.,**

a corporation incorporated under the *Canada Business Corporations Act*  
(hereinafter referred to as “**Hummingbird**”)

- and -

**OPEN TEXT CORPORATION**

a corporation incorporated under the *Canada Business Corporations Act*  
(hereinafter referred to as “**Parent**”)

- and -

**6575064 CANADA INC.**

a corporation incorporated under the *Canada Business Corporations Act*  
(hereinafter referred to as “**Acquisition Sub**”)

**WHEREAS** pursuant to an arrangement agreement made as of • , 2006 (the “**Arrangement Agreement**”) between Parent, Acquisition Sub and Hummingbird, Acquisition Sub will acquire all of the outstanding common shares of Hummingbird;

**AND WHEREAS** a shareholder who owns Hummingbird common shares directly or indirectly through one or more Canadian holding companies may choose to transfer to Hummingbird all of the issued and outstanding shares of a holding company holding Hummingbird common shares in return for new Hummingbird common shares issued from treasury (the “**Holding Company Alternative**”);

**AND WHEREAS** the Vendor is the registered and beneficial owner of all of the issued and outstanding common shares of HoldCo;

**AND WHEREAS** HoldCo is the registered and beneficial owner of Hummingbird Shares;

**NOW THEREFORE** in consideration of the respective covenants and agreement herein contained and for other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged by the parties hereto), the parties hereby agree as follows:

## **ARTICLE 1 INTERPRETATION**

### **1.1 Defined Terms**

In this Agreement, capitalized terms used herein and not otherwise defined shall have the meaning ascribed to such terms in the Arrangement Agreement. The following terms shall have the respective meanings set out below:

- (a) “**Claim**” has the meaning set out in Section 6.2;
- (b) “**Closing Date**” means the date on which the Closing Time occurs; INTD: No later than 5 business days prior to Effective Date
- (c) “**Closing Time**” has the meaning set out in Section 5.1;
- (d) “**Contract**” means any agreement, indenture, contract, deed of donation, lease, deed of trust, licence, option, instrument or other commitment or undertaking, whether written or oral;
- (e) “**Direct Claim**” has the meaning set out in Section 6.2;
- (f) “**HoldCo Documents**” has the meaning set out in Section 4.1;
- (g) “**HoldCo Shares**” means all of the issued and outstanding common shares in the capital of HoldCo;
- (h) “**Indemnified Party**” has the meaning set out in Section 6.2;
- (i) “**Indemnifying Party**” has the meaning set out in Section 6.2;

- (j) **“ITA”** means the *Income Tax Act* (Canada), as amended from time to time;
- (k) **“Liabilities”** has the meaning set out in Section 6.1;
- (l) **“Reorganization”** means the Agreements and transactions set forth in Schedule
- (m) **“Subject Shares”** means the • Hummingbird Shares currently owned beneficially and of record by HoldCo;
- (n) **“Tax Returns”** includes all returns, reports, declarations, elections, notices, filings, forms, statements and other documents (whether in tangible, electronic or other form) and including any amendments, schedules, attachments, supplements, appendices and exhibits thereto, made, prepared, filed or required to be made, prepared or filed by Law in respect of Taxes;
- (o) **“Taxes”** includes any taxes, duties, fees, premiums, assessments, imposts, levies and other charges of any kind whatsoever imposed by any Governmental Authority, including all interest, penalties, fines, additions to tax or other additional amounts imposed by any Governmental Authority in respect thereof, and including those levied on, or measured by, or referred to as, income, gross receipts, profits, capital, transfer, land transfer, sales, goods and services, harmonized sales, use, value-added, excise, stamp, withholding, business, franchising, property, development, occupancy, employer health, payroll, employment, health, social services, education and social security taxes, all surtaxes, all customs duties and import and export taxes, countervail and antidumping, all licence, franchise and registration fees and all employment insurance, health insurance and Canada, Québec and other government pension plan premiums or contributions;
- (p) **“Third Party”** has the meaning set out in Section 6.4;
- (q) **“Third Party Claim”** has the meaning set out in Section 6.2; and

## **1.2 Sections and Headings**

The division of this Agreement into Sections and the insertion of headings are for convenience of reference only and shall not affect the interpretation of this Agreement. Unless otherwise indicated, any reference in this Agreement to a Section refers to the specified Section of this Agreement. Whenever the word “including” is used it means including without limitation.

## **1.3 Currency**

All amounts in this Agreement are expressed in Canadian dollars.

## **1.4 Number, Gender and Persons**

In this Agreement, words importing the singular number only shall include the plural and vice versa, words importing gender shall include all genders and words importing persons shall include individuals, corporations, partnerships, associations, shareholders, unincorporated organizations, governmental bodies and other legal or business entities.

### **1.5 Applicable Law**

This Agreement shall be construed, interpreted and enforced in accordance with, and the respective rights and obligations of the parties shall be governed by, the laws of the Province of Ontario and the federal laws of Canada applicable therein, and each party hereby irrevocably and unconditionally submits to the non-exclusive jurisdiction of the courts of such province and all courts competent to hear appeals therefrom.

### **1.6 Severability**

If any provision of this Agreement is determined by a court of competent jurisdiction to be invalid, illegal or unenforceable in any respect, such determination shall not impair or affect the validity, legality or enforceability of the remaining provisions hereof, and each provision is hereby declared to be separate, severable and distinct.

### **1.7 Amendment and Waivers**

No amendment or waiver of any provision of this Agreement shall be binding on any party unless consented to in writing by such party. No waiver of any provision of this Agreement shall constitute a waiver of any other provision, nor shall any waiver constitute a continuing waiver unless otherwise expressly provided.

### **1.8 Entire Agreement**

This Agreement including the Schedule(s) hereto constitutes the entire agreement between the parties pertaining to the subject matter of such documents. There are no warranties, conditions or representations (including any that may be implied by statute) and there are no agreements in connection with the subject matter of such documents except as specifically set forth or referred to in such documents.

## **ARTICLE 2 PURCHASE AND SALE OF HOLDCO SHARES**

### **2.1 Purchase and Sale of HoldCo Shares**

Subject to the terms and conditions hereof, the Vendor covenants and agrees to sell, assign and transfer to Hummingbird and Hummingbird agrees to purchase from the Vendor at the Closing Time all of the HoldCo Shares in consideration for the issuance and the allotment by Hummingbird to the Vendor of • fully paid and non-assessable Hummingbird Shares (the “**New Hummingbird Shares**”). [Note to Draft: The number of Subject Shares owned by HoldCo will be equal to the number of New Hummingbird Shares.]

### **2.2 Listing of New Hummingbird Shares**

Hummingbird shall use commercially reasonable efforts cause the New Hummingbird Shares to be listed for trading on the Toronto Stock Exchange as soon as possible after the Closing Time.

## 2.3 Expenses

The Vendor shall be responsible for all costs and expenses (including counsel's fees and expenses and fees and expenses of auditors) incurred by HoldCo, Parent, Acquisition Sub or Hummingbird respectively, in connection with the negotiation and settlement of this Agreement and the transactions contemplated hereby.

## ARTICLE 3 REPRESENTATIONS AND WARRANTIES

### 3.1 Representations and Warranties of the Vendor

The Vendor hereby represents, warrants and covenants to Parent, Acquisition Sub and Hummingbird as follows, and hereby acknowledges that Parent, Acquisition Sub and Hummingbird are relying on such representations, warranties and covenants in connection with the purchase by Hummingbird of the HoldCo Shares:

- (a) the execution and delivery of this Agreement by the Vendor and HoldCo and the completion by the Vendor and HoldCo of the transactions contemplated hereby:
  - (i) do not and will not conflict with, result in the breach of or constitute a default under the articles, by-laws or resolutions of the Vendor (if applicable) or HoldCo, or any Contract to which the Vendor or HoldCo is a party or is otherwise bound; and
  - (ii) do not and will not violate any law or any judicial or administrative award, judgment or decree binding upon the Vendor or HoldCo;
- (b) the Vendor is not a non-resident of Canada within the meaning of the ITA or any applicable provincial or territorial legislation;
- (c) HoldCo is a corporation duly incorporated on • **[Note: Must be incorporated after •, 2006]** and HoldCo is duly incorporated and organized and validly existing and in good standing under the Canada Business Corporations Act, and has the corporate power to enter into and perform its obligations under this Agreement;
- (d) **[the Vendor is a corporation duly incorporated on • and the Vendor is duly incorporated and organized and validly existing and in good standing under the • Act, and has the corporate power to enter into and perform its obligations under this Agreement];**
- (e) this Agreement has been duly executed and delivered by each of the Vendor and HoldCo and is a valid and binding obligation of each of the Vendor and HoldCo enforceable against each of them in accordance with its terms, subject to applicable bankruptcy, insolvency and other laws affecting the enforcement of creditors' rights generally and provided that equitable remedies will only be awarded in the discretion of a court of competent jurisdiction;
- (f) no person has any Contract, entitlement, warrant or option or any right capable of becoming a Contract, entitlement, warrant or option whether under statute or



otherwise for the purchase from the Vendor of any of the HoldCo Shares or from HoldCo of any HoldCo Shares or of any of the Subject Shares;

- (g) the authorized share capital of HoldCo consists solely of an unlimited number of common shares, of which • common shares, being all of the HoldCo Shares, are validly issued and outstanding as fully paid and non-assessable shares;
- (h) all of the HoldCo Shares are registered in the name of, and are beneficially owned by the Vendor with good and marketable title thereto free and clear of any Liens;
- (i) upon completion of the transactions contemplated hereby, Hummingbird will acquire the sole ownership of all of the HoldCo Shares with good and marketable title thereto free and clear of any Liens;
- (j) HoldCo is the sole registered and beneficial owner of the Subject Shares, all of which are held and owned by HoldCo with good and marketable title thereto free and clear of any Liens;
- (k) since its incorporation, the sole activity of HoldCo has been the entering into and performance under this Agreement;
- (l) HoldCo does not own or hold and has never owned or held any property or assets or any interests therein of any nature or kind whatsoever other than the Subject Shares and HoldCo has never carried on nor currently carries on any active business;
- (m) HoldCo has no obligations or liabilities (whether actual or contingent) including indebtedness to any person including, without limitation, any liabilities in respect of Taxes of any nature or kind whatsoever, or in respect of any judgments, orders, fines, penalties, awards or decrees of any court, tribunal or governmental, administrative or regulatory department, commission, board, bureau, agency or instrumentality, domestic or foreign;
- (n) HoldCo has not, and at the Closing Date will not have, declared or paid any dividends, except through one or more increases to the stated capital account maintained in respect of its common shares as contemplated by Schedule A, or made any distribution in respect of any of its shares or repurchased, redeemed or otherwise acquired any of its shares;
- (o) the paid-up capital for purposes of the ITA and any applicable provincial or territorial legislation in respect of the HoldCo Shares is \$•;
- (p) HoldCo has no subsidiaries and is not a party to, bound by or affected by any Contract;
- (q) HoldCo has no employees and its directors and officers receive no remuneration or compensation from HoldCo;
- (r) HoldCo has not paid any amounts to any non-residents of Canada within the meaning of the ITA;

- (s) HoldCo is not a partner, co-tenant, joint venturer or otherwise a participant in any partnership, joint venture, co-tenancy or other jointly owned business;
- (t) there are no claims, investigations, actions, suits or proceedings commenced, pending or threatened by, against or affecting: (i) HoldCo, whether at law or in equity before any Governmental Entity; or (ii) the Vendor, whether at law or in equity before any Governmental Entity, that would adversely affect in any manner the ability of the Vendor to enter into this Agreement and perform its obligations hereunder;
- (u) both HoldCo and the Vendor are in full compliance with all laws, rules or regulations to which they are subject (including all laws, rules and regulations relating to its ownership of the Subject Shares);
- (v) no consent, waiver, approval, authorization, exemption, registration, license or declaration of or by, or filing with, or notification to any Governmental Entity or other person is required to be made or obtained by the Vendor or HoldCo in connection with the execution, delivery, performance or enforcement of this Agreement;
- (w) HoldCo does not maintain any depository account, trust account or safety deposit box and has not granted any powers of attorney;
- (x) the books and records of HoldCo fairly and correctly set out and disclose in all respects, in accordance with generally accepted accounting principles in Canada consistently applied, the financial position of HoldCo as of the date hereof and all financial transactions of HoldCo have been accurately recorded in such books and records;
- (y) the corporate records and minute books of HoldCo contain complete and accurate minutes of all meetings or resolutions of the directors and shareholders of HoldCo held since its incorporation and all such meetings were duly called and held and the share certificate books, register of shareholders, register of transfers and register of directors and officers of HoldCo are complete and accurate;
- (z) the Subject Shares are not subject to any contractual or other restrictions (including on transferability or voting) and neither the Vendor nor HoldCo is a party to or otherwise bound by any agreement (including a voting trust or similar agreement) in respect of the Subject Shares;
- (aa) the HoldCo Shares are not subject to any contractual or other restrictions (including on transferability or voting) and neither the Vendor nor HoldCo is a party to or otherwise bound by any agreement (including a voting trust or similar agreement) in respect of the HoldCo Shares;
- (bb) all issuances and transfers of HoldCo Shares, including the transfer of HoldCo Shares contemplated hereunder, have been and will be made in compliance with applicable law and have not conflicted, resulted in the breach of or constituted, and will not conflict with, result in the breach of or constitute a default under the

articles, by-laws or resolutions of HoldCo, or any Contract to which HoldCo or the Vendor was or is a party or was or is otherwise bound, and did not, do not and will not violate any law or any judicial or administrative award, judgment or decree binding upon HoldCo or the Vendor;

(cc) with respect to tax matters:

- (i) HoldCo has duly and in a timely manner filed its Tax Returns with the appropriate taxing or other governmental authority or agency or if not timely filed has paid any penalties imposed as a result thereof and has duly, completely and correctly reported all income and all other amounts and information required to be reported thereon;
- (ii) HoldCo has duly and in a timely manner paid all Taxes, including all instalments on account of Taxes for the current year, that are due and payable by it and Taxes that are not yet due and payable and that relate to periods ending on or prior to the Closing Date;
- (iii) HoldCo has duly and timely withheld from any amount paid or credited by it to or for the benefit of any person, the amount of all Taxes and other deductions required by applicable Law, rule or regulation or the administration thereof, to be withheld from such amount and has duly and timely remitted the same to the appropriate taxing or other Governmental Entity;
- (iv) there are no actions, suits, proceedings, investigations, audits, assessments or reassessments or claims now pending or (after due inquiry) threatened against HoldCo in respect of any Taxes and there are no matters under discussion, audit or appeal with any taxing or other governmental authority or agency relating to Taxes;
- (v) HoldCo has not requested, nor entered into, any agreement or other arrangement or executed any waiver providing for, an extension of time within which: (A) to file any Tax Return covering any Taxes for which HoldCo is or may be liable, (B) to file any elections, designations or similar things relating to Taxes for which HoldCo is or may be liable, (C) HoldCo is required to pay or remit any Taxes or amounts on account of Taxes, or (D) any taxing or other governmental authority or agency may assess or collect Taxes for which HoldCo is or may be liable;
- (vi) except as provided in Section 3.1 (q)(ii), HoldCo has not paid or credited to or for the account or benefit of any person, including, without limitation, any of its directors or any non-resident person, any amounts which under any applicable law, rule or regulation would require any Taxes or other deductions to be withheld therefrom;
- (vii) HoldCo is a resident of Canada and is a taxable Canadian corporation for the purposes of the ITA and is not a non-resident owned investment corporation for the purposes of the ITA;

- (viii) no amount has been deducted under paragraph 53(2)(g. 1) of the ITA in computing the adjusted cost based to HoldCo of the Subject Shares at any time;
- (ix) the Subject Shares have an adjusted cost base (as such term is defined in the ITA) to HoldCo of \$● per share;
- (x) for purposes of the ITA, the cost to Hummingbird of the HoldCo Shares will be greater than or equal to the paid-up capital of such shares;
- (xi) the Subject Shares are capital property to HoldCo for the purposes of the ITA and any applicable provincial or territorial legislation;
- (xii) HoldCo has not been a party to any transactions with any person with whom it did not deal at arm's length within the meaning of the ITA which would result in any liability for Taxes under the provisions of section 160 of the ITA or an analogous provision of any applicable provincial or territorial legislation;
- (xiii) the HoldCo Shares are not "taxable preferred shares" for purposes of the ITA;
- (dd) no person has taken or will take any action in connection with any rights to dissent in respect of the Subject Shares; and
- (ee) none of the foregoing representations, warranties and statements of fact contains any untrue statement of fact or omits to state any material fact necessary to make any such statement or representation not misleading to a prospective purchaser of the HoldCo Shares seeking full information as to HoldCo, its property, business and affairs.

### **3.2 Representations and Warranties of Hummingbird**

Hummingbird hereby represents and warrants to the Vendor and HoldCo as follows and hereby acknowledges and confirms that the Vendor and HoldCo are relying on such representations and warranties in connection with the sale of the HoldCo Shares:

- (a) Hummingbird is a corporation incorporated and validly existing under the laws of Canada and has the corporate power to enter into and perform its obligations under this Agreement; and
- (b) this Agreement has been executed and delivered by Hummingbird and is a valid and binding obligation of Hummingbird enforceable against Hummingbird in accordance with its terms, subject to applicable bankruptcy, insolvency and other laws affecting the enforcement of creditors' rights generally and provided that equitable remedies will only be awarded in the discretion of a court of competent jurisdiction.

## **ARTICLE 4 COVENANTS**

### **4.1 Availability of HoldCo Documents**

The Vendor shall forthwith make available to Hummingbird, Parent and their respective authorized representatives all minute books, share certificate books, share registers, books of account, accounting records, corporate documents and all other books or records, documents, information or data relating to HoldCo (collectively, the **“HoldCo Documents”**). If the transactions contemplated herein are not completed for any reason, Parent, Acquisition Sub and Hummingbird agree that, except as authorized by the Vendor or as required by applicable law, Parent, Acquisition Sub and Hummingbird and any of their respective representatives will not disclose to any Third Party any confidential information or data relating to HoldCo or the Vendor discovered by Parent, Acquisition Sub and Hummingbird or their respective representatives as a result of their review of the HoldCo Documents.

### **4.2 Compliance with the Law**

The parties shall comply with all applicable securities and other laws of Canada and the provinces in connection with the sale of the HoldCo Shares to Hummingbird.

### **4.3 Directors and Officers**

All officers and directors of HoldCo shall resign as at the Closing Date and Hummingbird shall cause the filing of the Form 6 with Industry Canada.

### **4.4 Financial Statements**

The Vendor shall provide all reasonable assistance to Hummingbird and Parent to enable all financial statements of HoldCo for all fiscal years ending immediately before the Closing Time to be prepared.

### **4.5 Tax Returns**

The Vendor further agrees that it will, at its own cost and expense, duly and timely file all Tax Returns of HoldCo not yet filed for all periods ending on or prior to the Closing Date, that such returns as filed will be complete and correct, that such returns will be approved by Parent and Hummingbird as to form and substance, that all Taxes payable by HoldCo in respect of such periods shall be paid on a timely basis by the Vendor, that copies of all returns filed will be provided to Hummingbird and Parent forthwith after they have been filed and that in any event all such Tax Returns will be filed and all Taxes payable pursuant thereto will be paid at the latest two months after the Closing Date.

### **4.6 Elections**

In connection with the transfer of the HoldCo Shares to Hummingbird, the Vendor and Hummingbird undertake and agree to make joint elections under subsection 85(1) of the ITA (and any analogous provision of any applicable provincial or territorial legislation) such that the Vendor's proceeds of disposition and the cost to Hummingbird of the HoldCo Shares will be \$●, subject to the provisions respectively of subsection 85(1) of the ITA (and any analogous provision of any applicable provincial or territorial legislation); provided that the agreed amount in such elections will be such an amount as ensures that, for purposes of the ITA, the cost to

Hummingbird of such HoldCo Shares shall be greater than or equal to the paid-up capital of such shares.

Hummingbird shall have no liability whatsoever for the proper completion of or timely filing of such election forms which shall be prepared at the expense of and by the Vendor. The Vendor shall deliver such election forms to Hummingbird on the Closing Date, and Hummingbird agrees to sign properly completed forms and return them to the Vendor within three Business Days of receipt.

The Vendor and Hummingbird shall ensure that all such elections, and any other elections to which Hummingbird or HoldCo is a party in respect of transactions occurring on or prior to the Closing Date, will be filed on or prior to the Business Day prior to the Effective Date.

#### **4.7 Winding Up**

The Vendor acknowledges that Hummingbird will, prior to the Effective Time, cause HoldCo to be wound-up for purposes of the ITA (having regard to the published administrative policy of the Canada Revenue Agency), and all Subject Shares owned at any time by HoldCo shall have been distributed by HoldCo to Hummingbird on such winding-up, and all such Subject Shares shall have been cancelled and shall no longer be outstanding at the Effective Time.

#### **4.8 Documents**

The Vendor and HoldCo shall consider and accept all reasonable comments and requests from each of Hummingbird and Parent in respect of, and make the corresponding changes to, any and all draft documents and other instruments that, in their final form, are executed and delivered prior to, at, or following closing of the transactions contemplated hereunder.

### **ARTICLE 5 CLOSING**

#### **5.1 Place of Closing**

The closing shall take place on • at the offices of Osier, Hoskin & HarcourtJLLP at 10:00 a.m. (Toronto time) (the “**Closing Time**”), or at such other time and place as the parties may in writing agree.

#### **5.2 Conditions of Closing for Benefit of Each of Hummingbird and Parent**

The purchase and sale of the HoldCo Shares is subject to the following terms and conditions for the exclusive benefit of each of Hummingbird and Parent, to be fulfilled or performed at or prior to the Closing Time:

- (a) the representations and warranties of the Vendor contained in this Agreement shall be true and correct at the Closing Time, with the same force and effect as if such representations and warranties were made at and as of such time, and a certificate of an officer or other duly authorized representative of the Vendor dated as of the Closing Date to that effect shall have been delivered by the Vendor at the Closing Time, in form and substance satisfactory to each of Hummingbird and Parent;

- (b) all of the obligations and covenants contained in this Agreement to be complied with or performed by the Vendor and HoldCo at or before the Closing Time shall be complied with or performed to the satisfaction of each of Hummingbird and Parent;
- (c) without limiting the generality of the foregoing conditions set out in Section 5.2(a) and 5.2(b), the results of the review of the HoldCo Documents provided for in Section 4.1 shall be satisfactory to each of Hummingbird and Parent, and all necessary proceedings (including corporate proceedings) or other actions of the Vendor and HoldCo in connection with this Agreement shall have been taken to the satisfaction of each of Hummingbird and Parent, and certified or other copies dated as of the Closing Date and otherwise acceptable to each of Hummingbird, Parent and their respective counsel shall have been provided of all resolutions and documents of HoldCo relating thereto;
- (d) the minute books and all corporate records of HoldCo including copies of all filings made with any governmental or regulatory body shall have been delivered to Hummingbird;
- (e) there shall have been provided such security, if any, in favour of each of Parent, Acquisition Sub and Hummingbird and their directors, officers, employees, advisors and agents (including but not limited to a guarantee in the form set out in Schedule "B" to this agreement from one or more of the shareholders of the Vendor, if applicable, and any security therefor), in the form satisfactory to each of Hummingbird and Parent, which either of Hummingbird or Parent may require in respect of the representations, warranties, obligations, and covenants of the Vendor and HoldCo contained in this Agreement in order to secure the indemnity obligations of the Vendor and HoldCo under Article 6 (the "Security");
- (f) any exemptions requested, or in the opinion of Parent, desirable, from any applicable Canadian securities regulatory authority in connection with the transactions contemplated hereby have been obtained and are of full force and effect;
- (g) the Arrangement Agreement has not been terminated in accordance with its terms;
- (h) each of Vendor and HoldCo shall have provided to each of Hummingbird and Parent and Acquisition Sub an opinion of counsel dated as of the Closing Date acceptable to each of Hummingbird and Parent as to such matters as may be requested by either Hummingbird or Parent, acting reasonably, including the due incorporation and organization of each of the Vendor and HoldCo and any person executing and delivering the Security (the "Debtor"), the power and capacity of the Debtor, the Vendor and HoldCo, the due authorization by the Debtor, the Vendor and HoldCo of the transactions contemplated by this Agreement including the Reorganization, the due execution and delivery by the Vendor and HoldCo of this Agreement and any other material documents required to be executed in connection herewith, including the Reorganization, the due execution and delivery by the Debtor of the Security and related documents, the legal, valid and binding nature of the obligations of the Vendor and HoldCo under this Agreement

and such other documents and of the Debtor under the Security and related documents, the enforceability of this Agreement and such other documents against the Vendor and HoldCo in accordance with their terms and of the Security and related documents against the Debtor in accordance with its terms, the authorized and issued share capital of HoldCo, the HoldCo Shares being duly issued and fully paid and non-assessable shares and registered in the name of Hummingbird on the Closing Date and compliance with applicable laws by the Debtor, Vendor and HoldCo relating to the Holding Company Alternative, such opinion to be in such form and subject to such customary qualifications and exceptions as are acceptable to the respective counsel for Hummingbird and Parent, acting reasonably;

- (i) all documents and instruments executed and delivered by the Vendor and/or HoldCo in connection with the transactions contemplated hereunder at or prior to the Closing Time, the Security and related documents, if any, executed and delivered at or prior to the Closing Time, and all actions taken or proposed to be taken by any person or entity other than Parent or Acquisition Sub in connection with the transactions contemplated hereunder (including the Reorganization and the Winding-Up) shall be in form and substance acceptable to each of Hummingbird and Parent;
- (j) no Governmental Entity shall have enacted, issued, promulgated, enforced or entered any Law which is then in effect and has the effect of making the transactions contemplated by this Agreement (including the Reorganization and Winding-Up) illegal or otherwise preventing or prohibiting consummation of such transactions, and no Governmental Entity (including for the avoidance of doubt the Canada Revenue Agency and any applicable provincial or territorial taxing authority) shall have enacted, issued, promulgated, enforced or entered any Law which is or is proposed to be then in effect, or changed or introduced any administrative policy or assessing practice, the result of which has caused or, in the opinion of either Hummingbird or Parent, in their respective sole discretion, could cause the transactions contemplated by this Agreement (including the Reorganization and Winding-Up) to have an adverse effect on any of HoldCo, Hummingbird, Acquisition Sub or Parent; and
- (k) there shall not be pending or threatened by or before any Governmental Entity any proceeding the result of which has caused or, in the opinion of either Hummingbird or Parent, in their respective sole discretion, could cause the transactions contemplated by this Agreement (including the Reorganization and Winding-Up) to have an adverse effect on any of HoldCo, Hummingbird, Acquisition Sub or Parent.

### **5.3 Conditions for the Benefit of the Vendor**

The purchase and sale of the HoldCo Shares is subject to the following terms and conditions for the exclusive benefit of the Vendor, to be fulfilled or performed at or prior to the Closing Time:

- (a) the representations and warranties of Hummingbird contained in this Agreement shall be true and correct in all material respects at the Closing Time with the same



force and effect as if such representations and warranties were made at and as of such time, and a certificate of a senior officer of Hummingbird dated as of the Closing Date to that effect shall have been delivered by Hummingbird at the Closing Time;

- (b) all of the obligations and covenants contained in this Agreement to be complied with or performed by Hummingbird at or before the Closing Time shall be complied with or performed in all material respects;
- (c) any exemptions required from any applicable Canadian securities regulatory authority in connection with the transactions contemplated hereby have been obtained and are of full force and effect; and
- (d) the Arrangement Agreement has not been terminated in accordance with its terms.

#### **5.4 Closing Deliveries**

- (a) At the Closing Time, the Vendor shall deliver to each of Hummingbird and Parent:
  - (i) certificates representing the HoldCo Shares duly endorsed by the Vendor for transfer to Hummingbird;
  - (ii) certificates representing the Subject Shares registered in the name of HoldCo;
  - (iii) the HoldCo Documents;
  - (iv) the certificates referred to in Section 5.2(a);
  - (v) the certified copies of the resolutions and documents of HoldCo referred to in Section 5.2(c); and
  - (vi) the resignations of, and the unconditional release of HoldCo and its past, present and future shareholders by, all directors and officers of HoldCo dated the Closing Date which shall take effect at the Closing Time in form and substance acceptable to each of Hummingbird and Parent;

and such other documents as Hummingbird or Parent may reasonably request including the guarantee and documents relating to any security referred to in Section 5.2(e).

- (b) At the Closing Time, Hummingbird shall deliver to the Vendor:
  - (i) the certificate referred to in Section 5.3(a); and
  - (ii) certificates representing the New Hummingbird Shares registered in accordance with a letter of direction executed by the Vendor.

## 5.5 Further Assurances

The Vendor covenants and agrees that, from time to time, subsequent to the Closing Time, the Vendor will, at the request of any other party to this Agreement, execute and deliver all such documents, including, without limitation, all such additional conveyances, transfers, consents, tax elections (or any amendment thereto) and other assurances and do all such other acts and things as any such requesting party, acting reasonably, may from time to time request to be executed or done in order to better evidence, perfect or effectuate any provision of this Agreement or any of the respective obligations intended to be created hereby.

## ARTICLE 6 INDEMNIFICATION

### 6.1 Obligations to Indemnify

The Vendor agrees to indemnify and save harmless Parent, Acquisition Sub, Hummingbird and HoldCo (and their directors and officers, employees, advisors and agents) from all actions, claims, demands, processes, proceedings, losses, damages, liabilities, deficiencies, Taxes (whether or not such Taxes have been assessed or reassessed as at the date hereof), and any instalments with respect thereto, costs and expenses (including, without limitation, all legal and other professional fees and disbursements, interest, penalties and amounts paid in settlement) (collectively **“Liabilities”**) whether resulting from a breach of contract, by the commission of a fault or otherwise suffered or incurred by Parent, Acquisition Sub, Hummingbird and HoldCo (and their directors, officers, employees and agents), the whole to be computed on an after-tax basis, as a result of or arising directly or indirectly out of or in connection with:

- (a) any breach by the Vendor of any of its representations, warranties, obligations or covenants contained in this Agreement or any certificate or document delivered pursuant hereto;
- (b) any Liability sustained, incurred, assumed or acquired by HoldCo on or before, or related to any matter occurring on or before, the purchase of the HoldCo Shares hereunder; and
- (c) this Agreement and the transactions contemplated hereby (including the negotiation, execution, delivery and performance of this Agreement), the Reorganization or the Winding Up, including all Liabilities which, as a result of the Reorganization or Winding Up, are assumed or incurred by Parent, Acquisition Sub, Hummingbird and HoldCo.

### 6.2 Notice of Claim

In the event that a party to this Agreement (the **“Indemnified Party”**) shall become aware of any claim, proceeding or other matter (a **“Claim”**) in respect of which another party to this Agreement (the **“Indemnifying Party”**) agreed to indemnify the Indemnified Party pursuant to this Agreement, the Indemnified Party shall promptly give written notice thereof to the Indemnifying Party. Such notice shall specify whether the Claim arises as a result of a claim by a person against the Indemnified Party (a **“Third Party Claim”**) or whether the Claim does not so arise (a **“Direct Claim”**), and shall also specify with reasonable particularity (to the extent that the information is available) the factual basis for the Claim and the amount of the Claim, if known. If, through the gross negligence or wilful misconduct of the Indemnified Party, the

Indemnifying Party does not receive notice of any Claim in time to contest effectively the determination of any liability susceptible of being contested, the Indemnifying Party shall be entitled to set off against the amount claimed by the Indemnified Party the amount of any Liabilities incurred by the Indemnifying Party resulting from the Indemnified Party's failure to give such notice on a timely basis.

### **6.3 Direct Claims**

With respect to any Direct Claim, following receipt of notice from the Indemnified Party of the Claim, the Indemnifying Party shall have 30 days to make such investigation of the Claim as is considered necessary or desirable. For the purpose of such investigation, the Indemnified Party shall make available to the Indemnifying Party the information relied upon by the Indemnified Party to substantiate the Claim, together with all such other information as the Indemnifying Party may reasonably request. If both parties agree at or prior to the expiration of such 30-day ~ period (or any mutually agreed upon extension thereof) to the validity and amount of such Claim, the Indemnifying Party shall immediately pay to the Indemnified Party the full agreed upon amount of the Claim.

### **6.4 Third Party Claims**

With respect to any Third Party Claim, the Indemnified Party shall have the exclusive right, at the expense of the Indemnifying Party, to contest, settle or pay the amount claimed and to retain counsel and other experts or advisors selected by the Indemnified Party in its sole discretion in connection therewith; provided, however, that the Indemnified Party shall not settle any Third Party Claim without the written consent of the Indemnifying Party, which consent shall not be unreasonably withheld or delayed; provided, however, that the Indemnifying Party shall remain liable for the settlement amount even if any such consent is not obtained for any reason. If the Indemnified Party elects to assume such control, the Indemnifying Party shall have the right, at its sole expense, to participate in the negotiation, settlement or defence of such Third Party Claim. If any Third Party Claim is of a nature such that the Indemnified Party is required by applicable law to make a payment to any person (a **"Third Party"**) with respect to the Third Party Claim before the completion of settlement negotiations or related legal proceedings, the Indemnified Party may make such payment and the Indemnifying Party shall, forthwith after demand by the Indemnified Party, reimburse the Indemnified Party for such payment. If the amount of any liability of the indemnified Party under the Third Party Claim in respect of which such payment was made, as finally determined, is less than the amount that was paid by the Indemnifying Party to the Indemnified Party, the Indemnified Party shall, forthwith after receipt of the difference from the Third Party, pay the amount of such difference to the Indemnifying Party.

### **6.5 Reduction, Set-off, Payment and Co-operation**

The Indemnifying Party shall pay to the Indemnified Party all amounts for which the Indemnifying Party is liable pursuant to this Section 6 promptly after the Indemnified Party incurs the Liability in respect of which such liability arises. If such amount is not so paid, the Indemnified Party may deduct or set-off such amount from any obligation it may have to the Indemnifying Party. The Indemnified Party and the Indemnifying Party shall co-operate fully with each other with respect to Third Party Claims, and shall keep each other fully advised with

respect thereto (including supplying copies of all relevant documentation promptly as it becomes available).

## **ARTICLE 7 RELEASE**

### **7.1 Release**

Each of the Vendor and HoldCo, together with their respective assigns, estates, heirs, executors, administrators and holders of any beneficial interest in any of them (i) grants to Parent, Acquisition Sub and Hummingbird (and their respective successors, assigns, parent companies, subsidiaries, affiliated companies, and all such entities' present and former directors, officers, employees, advisors and agents) a full and final release from any and all Liabilities suffered or incurred as a result of or with respect to or in any way connected with the transactions contemplated hereby including the computation of "safe income" for purposes of the ITA and any relevant provincial or territorial legislation and any information in that regard provided by any of Parent, Acquisition Sub and Hummingbird (and their respective directors, officers, employees, advisors and agents) to the Vendor, the adequacy or completeness of any such information or the failure of any of Parent, Acquisition Sub and Hummingbird (and their respective directors, officers, employees, advisors and agents) to provide information with respect to the transactions contemplated hereby; and (ii) acknowledges it has relied exclusively on its own tax advisors and has not received or relied upon any statements or representations whatsoever from Parent, Acquisition Sub, Hummingbird or their respective affiliates or advisors.

## **ARTICLE 8 NON-COMPLETION OF ARRANGEMENT**

### **8.1 Non-Completion**

In the event the Arrangement Agreement is terminated with the result that the Transaction is not completed, the rights and benefits and obligations and responsibilities of Parent and Acquisition Sub contained in this Agreement shall automatically and without further action of the parties hereto terminate as of the same date as the termination of the Arrangement Agreement. In such event, Parent and Acquisition Sub shall have no right to enforce any such rights and benefits thereafter and this Agreement shall be read as if Parent and Acquisition Sub were not parties to the Agreement. Parent and Acquisition Sub shall have no liabilities in connection with this Agreement and shall maintain the benefit of the release of any indemnity for any costs incurred.

**ARTICLE 9**  
**MISCELLANEOUS**

**9.1 Addresses for Notices**

Any notice or other communication required or permitted to be given hereunder shall be in writing and shall be delivered in person, transmitted by telecopy or similar means of recorded electronic communications, addressed as follows:

(a) If to HoldCo:

•

Phone: •

Fax: •

Attention: •

with a copy to: •

•

Phone: •

Fax: •

Attention: •

(b) if to the Vendor:

•

Phone: •

Fax: •

Attention: •

with a copy to: •

•

Phone: •

Fax: •

Attention: •

(c) if to Hummingbird:

1 Sparks Avenue,  
Toronto, Ontario  
M2H2W1

Attention: Inder P.S. Duggal

Telephone: 416.496.2200

Facsimile: 416.496.2207

with a copy to:

Skadden, Arps, Slate, Meagher & Flom LLP  
222 Bay Street, Suite 1750  
Toronto, Ontario  
M5K 1J5

Attention: Christopher W. Morgan  
Telephone: 416.777.4700  
Facsimile: 416.777.4747

with a copy to:

Goodmans LLP  
250 Yonge Street, Suite 2400  
Toronto, Ontario, Canada M5B 2M6

Attention: Stephen Halperin/Michael Partridge  
Telephone: 416.597.4115/416.597.5498  
Facsimile: 416.979.1234

(d) if to Parent or Acquisition Sub:

- 

Attention: •  
Telephone: •  
Facsimile: •

with a copy to:

- 

Attention: •  
Telephone: •  
Facsimile: •

with a copy to:

Osler, Hoskin & Harcourt LLP  
100 King Street West  
1 First Canadian Place  
Suite 6100, P.O. Box 50  
Toronto, Ontario  
M5X 1B8

Attention: •  
Telephone: 416.862. •  
Facsimile: 416.862-6666

## **9.2 Date of Notice**

Any such notice or other communication shall be deemed to have been given and received on the date on which it was delivered or received (or, unless actually received by the addressee, if such day is not a Business Day at the place of receipt, on the next following Business Day).

### 9.3 Change of Address

Any party may at any time change its address for notice from time to time by giving notice to the other parties in accordance with Section 9.1.

### 9.4 Binding Nature of the Agreement

The provisions of this Agreement shall enure to the benefit of and shall be binding upon the parties hereto and their respective heirs, legal personal representatives, successors and permitted assigns. This agreement may not be assigned by the Vendor or HoldCo without the prior written consent of Hummingbird and Parent.

### 9.5 Survival of Covenants, Representations and Warranties

The covenants, obligations and agreements to the extent that they have not been fully performed at or prior to the Closing Time, and the representations and warranties herein contained and in all certificates and documents delivered pursuant to or contemplated by this Agreement shall survive the consummation of the transactions contemplated hereby and shall continue in full force and effect following the Closing Time, without limitation of time, notwithstanding such closing nor any investigation made by or on behalf of the party entitled to the benefit thereof.

### 9.6 Counterparts and Facsimile

This Agreement may be executed in counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument, and delivery of counterparts may be effected by means of a telecopied transmission.

**IN WITNESS WHEREOF** the parties hereto have executed this Agreement on the date first above mentioned.

**[HOLDCO]**

By: \_\_\_\_\_

Name: •

Title: •

**[VENDOR]**

By: \_\_\_\_\_

Name: •

Title: •

**HUMMINGBIRD LTD.**

By: \_\_\_\_\_  
Name: •  
Title: •

**OPEN TEXT CORPORATION**

By: \_\_\_\_\_  
Name: •  
Title: •

**6575064 CANADA INC.**

By: \_\_\_\_\_  
Name: •  
Title: •



## **SCHEDULE “A”**

The following is a list of agreements and transactions intended to implement the Holding Company Alternative:

- (i) the transfer by the Vendor to HoldCo of the Subject Shares in exchange for • common shares in the capital of HoldCo on a tax-deferred basis (to the extent possible) pursuant to subsection 85(1) of the ITA (and any analogous provision of any applicable provincial or territorial legislation);
- (ii) HoldCo Will implement one or more increases to the stated capital account maintained in respect of its common shares;  
and
- (iii) the transfer by the Vendor to Hummingbird of all of the HoldCo Shares pursuant to this Holding Company Participation Agreement.

**SCHEDULE "B"**  
**GUARANTEE**

**THIS GUARANTEE**, dated as of June •, 2006, made by [Full legal name of guarantor] (the "**Guarantor**"), with its [address/principal place of business] at •, in favour of **HUMMINGBIRD LTD. ("Hummingbird")**, with its principal place of business at 1 Sparks Avenue, Toronto, Ontario M2H 2W1, **OPEN TEXT CORPORATION ("Parent")**, **6575064 CANADA INC. ("Acquisition Sub")** and the directors officers, employees and agents (collectively the "**Related Parties**") of Hummingbird, Parent and Acquisition Sub (Hummingbird, Parent, Acquisition Sub and the Related Parties, together in each case with their respective successors and assigns, being collectively the "**Creditors**" and individually a "**Creditor**"),

**WHEREAS:**

- A. • ("HoldCo"), • ("**Vendor**"), and collectively with HoldCo, the "**Debtors**") Hummingbird, Parent and Acquisition Sub are parties to a Holding Company Participation Agreement dated as of •, 2006 (such agreement as it may from time to time be supplemented, amended, consolidated or restated being the "**Participation Agreement**") providing for the purchase by Hummingbird from the Vender of the issued and outstanding common shares of HoldCo in consideration for the issue and allotment by Hummingbird to HoldCo of fully paid and non-assessable common shares of Hummingbird.
- B. The Guarantor directly or indirectly owns [shares] of the Vendor.
- C. A condition to Hummingbird completing the transactions provided for under the Participation Agreement is that the Guarantor execute and deliver this guarantee.
- D. All capitalized terms used but not defined in this guarantee have the meanings specified in the Participation Agreement.

**THIS GUARANTEE WITNESSES THAT**, in consideration for Hummingbird completing the transactions provided for under the Participation Agreement and for other good and valuable consideration (the receipt and sufficiency of which are hereby acknowledged by the Guarantor), the Guarantor agrees to, with and in favour of each of the Creditors as follows:

1. *Guarantee:* The Guarantor hereby unconditionally and irrevocably guarantees to each of the Creditors the due and punctual payment and performance in full of all present and future indebtedness, liabilities and obligations of each of the Debtors under, pursuant to or in respect of the Participation Agreement and all certificates and documents delivered by each of the Debtors pursuant thereto or in connection therewith (collectively the "**Participation Documents**") (including without limitation all such indebtedness, liabilities and obligations arising as a result of, in connection with or in respect of a breach of covenant, or a breach of a representation or warranty, by a Debtor under a Participation Document or arising pursuant to or in respect of any indemnity liability or obligation of a Debtor contained in a Participation Document), and any ultimate unpaid balance thereof (collectively the "**Liabilities**").

2. *Demand for Payment:* The Guarantor shall from time to time pay to Hummingbird for the account of the Creditors forthwith after written demand on the Guarantor from Hummingbird, at the address specified in such demand, the amount of the liability of the Guarantor hereunder specified in such demand (the Guarantor acknowledging that Hummingbird may make demand on the Guarantor on its own behalf and on behalf of any one or more of the other Creditors). All amounts payable hereunder by the Guarantor shall be paid in the currency in which the related amounts are owed by the applicable Debtor. The Guarantor hereby waives any and all presentments, demands, notices and protests in the enforcement of this guarantee, other than as may be required by applicable law.

3. *Continuing Guarantee:* This guarantee shall be a continuing guarantee and shall be binding as a continuing obligation of the Guarantor. For all purposes of the liability of the Guarantor hereunder including without limitation the calculation of the amount of the Liabilities at any time, every sum of money which is now or which may hereafter from time to time be due or owing to any Creditor by any Debtor (or would have become so due or owing were it not for the insolvency, bankruptcy, reorganization or winding-up of such Debtor) shall be deemed to be and to continue due and owing to such Creditor until the same shall be actually paid in cash to such Creditor, notwithstanding the insolvency, bankruptcy, reorganization or winding-up of such Debtor or any other event whatsoever. The Guarantor agrees that, if at any time all or any part of any payment previously applied by any Creditor to any of the Liabilities is or must be rescinded or returned by such Creditor for any reason whatsoever (including without limitation the insolvency, bankruptcy, reorganization or winding-up of a Debtor), such Liability shall, for the purpose of this guarantee, to the extent that such payment is or must be rescinded or returned, be deemed to have continued in existence, notwithstanding such application by such Creditor, and this guarantee shall continue to be effective or be reinstated, as the case may be, as to such Liability, all as though such application had not been made. No assurance, security or payment which may be rescinded or avoided under any law relating to insolvency, bankruptcy, reorganization or winding-up and no release, settlement, discharge or arrangement which may have been given or made on the faith of any such assurance, security or payment shall prejudice or affect the right of the Creditors to recover from the Guarantor to the full extent of this guarantee as if such assurance, security, payment, release, settlement, discharge or arrangement had never been granted, given or made. Any such release, settlement, discharge or arrangement shall as between the Creditors and the Guarantor, be deemed to have been given or made upon the express condition that it shall become and be wholly void and of no effect if the assurance, security or payment on the faith of which it was made or given shall at any time thereafter be rescinded or avoided as aforesaid, to the intent so that the Creditors shall become and be entitled at any time after any such rescission or avoidance to exercise all or any of the rights conferred upon the Creditors hereunder and of all other rights which by virtue and as a consequence of this guarantee the Creditors would have been entitled to exercise but for such release, settlement, discharge or arrangement.

4. *Enforcing Rights Against Guarantor:* The Guarantor hereby waives the benefits of division and discussion. Without limiting the foregoing, no Creditor shall be obliged to take any action or to exhaust any recourse against any Debtor, any other person, or any security held at any time by any Creditor, nor to value any security held by any Creditor, before requiring, or being entitled to, payment from, and to enforce its rights and remedies against, the Guarantor under this guarantee. No Creditor shall be obliged to marshal any assets in favour of the

Guarantor. Any third party dealing with any Creditor shall not be concerned to see or inquire as to the validity of any demand under this guarantee.

*5. Guarantee Absolute:*

- (1) The liability of the Guarantor hereunder shall be absolute and unconditional and shall not be released, discharged, diminished, limited or in any way affected by any matter, act, failure to act, or circumstance whatsoever, including without limitation: (a) any lack of enforceability of any agreement between any Creditor and any Debtor or any document provided by any Debtor to any Creditor; (b) any failure on the part of any Debtor to carry out any rights or obligations under any agreement or document; (c) any change in the name, objects, powers, organization, share capital, constating documents, business, shareholders, directors or management of any Debtor; (d) any amalgamation, merger or consolidation of any Debtor into or with any other person or entity, or any sale, lease or transfer of all or any of the assets of any Debtor to any other person or entity; (e) any lack or limitation of power, incapacity or disability on the part of any Debtor or any of its directors, officers, shareholders, partners, employees or agents, or any other irregularity, defect or informality, or any fraud, on the part of any Debtor or any of its directors, officers, shareholders, employees or agents with respect to any or all of the Liabilities; (f) any impossibility, impracticability, frustration of purpose, illegality, force majeure or act of government or governmental authority; (g) the insolvency, bankruptcy, reorganization, winding-up or financial condition of any Debtor or any other person at any time; (h) any loss of or in respect of any security held by or on behalf of any Creditor, whether occasioned through the fault of a Creditor or otherwise; (i) any law, regulation, limitation period or other matter or circumstance which might otherwise constitute a defence available to, or a discharge of, a Debtor with respect to any or all of the Liabilities; (j) any loss or impairment of any right of the Guarantor to subrogation, reimbursement or contribution, whether or not as a result of any action taken or omitted to be taken by any Creditor; and (k) anything done, omitted to be done, suffered or permitted by any Creditor in connection with all or any of the Liabilities or otherwise or in connection with any security held by or on behalf of any Creditor (whether relating to the Liabilities or otherwise), or which might otherwise operate to release, discharge, diminish or limit in any way the liability of, or otherwise provide a defence to, a guarantor or surety.
- (2) The Creditors may, with respect to all or any of the Liabilities and without releasing, discharging, limiting or otherwise affecting in whole or in part the Guarantor's liability hereunder: (a) amend, alter or vary any of their agreements with any of the Debtors or any other person; (b) grant time, renewals, extensions, indulgences, releases and discharges to any Debtor or any other person; (c) increase or reduce the rate of interest on all or any of the Liabilities; (d) alter, compromise, accelerate, extend or change the time or manner for payment by any Debtor of, or by any other person or persons liable to the Creditors in respect of any or all of the Liabilities; (e) take or abstain from taking security from any Debtor or any other person or from completing or perfecting any security taken; (f) release or add one or more guarantors or sureties, accept additional or

substituted security, or release or subordinate any security; (g) accept compromises from any Debtor or any other person; (h) apply all money at any time received from any Debtor or from any person other than the Guarantor or from any security upon such part of the Liabilities as the Creditors may see fit, and change any such application from time to time in their discretion, or keep such money in a separate account for such period as the Creditors may determine without application to the Liabilities; and (i) otherwise deal with the Debtors, the Guarantor and all other persons and security as the Creditors may determine. The Creditors may apply all money at any time received from the Guarantor hereunder upon such part of the Liabilities as the Creditors may see fit, and may change any such application from time to time in their discretion.

6. *Indemnity*: If any amount in respect of the Liabilities is not recoverable from the Guarantor hereunder on the basis of a guarantee, then, notwithstanding any other provision hereof, (a) the Guarantor shall be liable hereunder as principal debtor in respect of the due payment of such amount, and shall pay such amount to Hummingbird for the benefit of the Creditors after demand as herein provided, and (b) the Guarantor shall indemnify and saves each of the Creditors harmless from and against all losses, costs, damages, expenses, claims and liabilities that such Creditor may suffer or incur in connection with or in respect of any failure by the applicable Debtor for any reason to pay or perform any such Liability and shall pay the amount of such loss, cost, damage, expense, claim or liability to Hummingbird for the benefit of the applicable Creditor after written demand for same by Hummingbird.

7. *Conclusive Statement*: Any account settled or stated by or between a Creditor and a Debtor at any time respecting the Liabilities shall be prima facie evidence that the balance or amount thereof appearing due to the applicable Creditor is so due.

8. *Stay of Acceleration, etc.*: If acceleration of the time for payment, or the liability of a Debtor to make any payment, of any amount specified to be payable by a Debtor in respect of the Liabilities is stayed, prohibited or otherwise affected upon the insolvency, bankruptcy, reorganization or winding-up of such Debtor or any moratorium affecting the payment of the Liabilities by such Debtor, all such amounts otherwise subject to acceleration or payment shall nonetheless be deemed for all purposes of this guarantee to be and to become due and payable by such Debtor and shall be payable by the Guarantor hereunder forthwith after demand by Hummingbird.

9. *Subrogation, etc.*: Until the Liabilities have been indefeasibly paid in full, the Guarantor shall not exercise or enforce any right of subrogation against any Debtor. In case of the insolvency, bankruptcy, reorganization or winding-up of a Debtor (whether voluntary or compulsory) or in the event that a Debtor shall make a bulk sale of any assets or scheme of arrangement with creditors, all dividends and other payments which may be due or payable to the Guarantor are hereby assigned and transferred to and shall be due and paid to Hummingbird for the benefit of the Creditors on account of the Liabilities, and for such payment to Hummingbird this shall be a sufficient warrant and authority to any person making the same. The Guarantor shall continue to be liable under this guarantee for any balance of the Liabilities which may be owing to the Creditors by a Debtor, and in the event of the valuation by the Creditors of any of their security and/or retention thereof by the Creditors in accordance with the *Bankruptcy and Insolvency Act* (Canada) or any other applicable legislation, such valuation and/or continuation

shall not as between the Creditors and the Guarantor, be considered as a purchase of such security, or as payment or satisfaction or reduction of all or any part of the Liabilities.

10. *Amounts Owed by Debtors.* All present and future indebtedness and liabilities of each of the Debtors to the Guarantor are, effective from and after the date of any demand under this guarantee, postponed and subordinated to the full and final payment of all Liabilities, and until otherwise agreed in writing by the Creditors, all moneys received by the Guarantor in respect of any such indebtedness and liabilities at any such time shall be received as mandatary and agent for the Creditors, shall be kept by the Guarantor separate and apart from its other assets, and shall be paid over to Hummingbird on account of the Liabilities.

11. *Alteration or Waiver:* No alteration or waiver of this guarantee or of any of its terms, provisions or conditions shall be binding on the Creditors unless made in writing by an authorized officer of Hummingbird. No failure on the part of any Creditor to exercise, and no delay in exercising, any right hereunder shall operate as a waiver thereof, nor shall any single or partial exercise of any right hereunder preclude the other or further exercise thereof or the exercise of any other right.

12. *Rights Not Exhaustive:* All rights, powers and remedies of the Creditors hereunder shall be in addition to all rights, powers and remedies given to the Creditors at law, in equity, under statute, by agreement or otherwise. All such rights, powers and remedies are cumulative and not alternative and shall not be exhausted by any exercise thereof against the Guarantor or by any number of successive actions until and unless all of the Liabilities have been paid and each of the Guarantor's obligations hereunder has been fully performed. This guarantee is in addition to and not in substitution for any security held at any time by any of the Creditors.

13. *Severability:* Any provision of this guarantee which is or is deemed to be void, prohibited or unenforceable in any jurisdiction shall be severed from this guarantee with respect to such jurisdiction, without in any way invalidating the remaining provisions of this guarantee and without affecting such provision in any other jurisdiction.

14. *Delivery and Completeness of Guarantee:* Upon this guarantee, bearing the signature of the Guarantor, coming into the possession of Hummingbird, the same shall be deemed to be finally executed and delivered by the Guarantor and shall not be subject to or affected by any promise or condition affecting or limiting the Guarantor's liability except as set forth herein, and no statement, representation, agreement or promise on the part of any officer, employee or agent of any Creditor, unless contained herein, forms any part of this guarantee or has induced the making of this guarantee or shall be deemed in any way to affect the Guarantor's liability hereunder. This guarantee and the Participation Documents constitute the entire agreement between the Creditors and the Guarantor with respect to the subject matter hereof and cancels and supersedes any prior understandings and agreements between them with respect thereto.

15. *Financial Condition:* The Guarantor is fully aware of the financial condition of each of the Debtors, has made all inquiries which the Guarantor feels are necessary and acknowledges that the Guarantor has received no information from any Creditor regarding any Debtor or its financial condition.

16. *No Set-off*: All payments to be made by the Guarantor hereunder shall be made in immediately, available funds and shall be made without set-off, or counterclaim and without deduction for any Taxes, levies, duties, fees, deductions, withholdings, restrictions or conditions of any nature whatsoever. If at any time any applicable law, regulation or international agreement requires the Guarantor to make any such deduction or withholding from any such payment, the sum due from the Guarantor with respect to such payment will be increased to the extent necessary to ensure that, after the making of such deduction or withholding, the Creditors receive a net sum equal to the sum which they would have received had no deduction or withholding been required.

17. *Expenses*: The Guarantor shall from time to time forthwith after demand by Hummingbird pay to Hummingbird all liabilities, costs and expenses (including reasonable legal fees and expenses on a solicitor and own client basis and any sales, goods and services or other similar taxes payable to any governmental authority with respect to any such liabilities, costs and expenses) incurred by the Creditors in the preservation or enforcement of any of their rights hereunder.

18. *Interest*: The liability of the Guarantor to make any payments under this guarantee will bear interest at a nominal rate per annum equal to the Prime Rate in effect from time to time plus 2%, which rate per annum will change automatically without notice to the Guarantor as and when the Prime Rate changes. Such interest will be payable by the Guarantor on demand and will be calculated, but not compounded, daily (both before and after judgement) from and including the date such payment becomes due and payable by the Guarantor under this guarantee to but not including the date of payment. The term "Prime Rate" shall mean the reference rate of interest (however designated) of • for determining interest chargeable by it on Cdn. dollar commercial loans made in Canada.

19. *Communications*: Any notice or communication to be given hereunder may be effectively given by delivering the same at the addresses set forth in the first paragraph hereof or by sending the same by prepaid registered mail or facsimile transmission to the parties at such addresses to the attention of • in the case of the Guarantor and Inder P.S. Duggal in the case of Hummingbird. The facsimile number for the Guarantor is • and for Hummingbird is (416) 496- 2207. Any notice so mailed shall be deemed to have been received on the fifth Business Day next following the mailing thereof, provided that postal service is in normal operation during such time. Any delivered or facsimile notice shall be deemed to have been received on transmission if the date thereof is a Business Day and if sent prior to 5:00 p.m. (local time of the recipient), and if not, on the next Business Day following transmission. Either party may from time to time notify the other party, in accordance with the provisions hereof, of any change of its address which thereafter, until changed by like notice, shall be the address of such party for all purposes of this guarantee.

20. *Amalgamation*. The Guarantor acknowledges that if a Debtor amalgamates or consolidates with any other body corporate or person, this guarantee will extend to and include all indebtedness, liabilities and obligations of the amalgamated body corporate or consolidated person; the term "Debtor", where used in this guarantee, will extend to and include the amalgamated body corporate or consolidated person; and the term "Liabilities", where used in this guarantee, will extend to and include the indebtedness, liabilities and obligations of the amalgamated body corporate or consolidated person of the nature described in paragraph 1 hereof.

21. *Governing Law*: This guarantee shall be conclusively deemed to be a contract made under, and shall for all purposes be governed by and construed in accordance with the laws of the Province of Ontario, excluding any conflict of laws rule or principle which might refer such construction to the laws of another jurisdiction, and without prejudice to or limitation of any other rights or remedies available to the Creditors under the laws of any jurisdiction where property or assets of the Guarantor may be found. The Guarantor hereby irrevocably attorns to the non-exclusive jurisdiction of the courts of the Province of Ontario without prejudice to the right of the Creditors to commence an action against the Guarantor in any other jurisdiction.

22. *Time*: Time is of the essence with respect to this guarantee and the time for performance of the obligations of the Guarantor hereunder may be strictly enforced by the Creditors.

23. *Interpretation*: Any word herein importing the singular number shall include the plural and vice versa and any reference herein to a person shall include reference to an individual, a firm, a partnership, a corporation, an association, a government and any other entity of any nature whatsoever and vice versa. The headings used in this guarantee are for convenience only and do not form a part of this guarantee nor are they intended to interpret, define or limit the scope, extent or intent of this guarantee or any provision hereof.

24. *Binding Nature*: This guarantee shall extend to and enure to the benefit of the Creditors and •• their respective successors and assigns and shall be binding on the Guarantor and its successors. The Guarantor may not assign its obligations under this guarantee.

25. *Counterparts*: This guarantee may be executed by the parties in counterparts, each of which shall be deemed an original, and all of which taken together shall constitute one and the same instrument, and delivery of counterparts may be effected by means of a telecopied transmission.

**IN WITNESS OF WHICH**, the Guarantor has caused this guarantee to be duly executed as of the date indicated on the first page of this guarantee.

By: \_\_\_\_\_

Name: •

Title: •

Read and Accepted as of the date indicated on the first page of this guarantee.



**HUMMINGBIRD LTD.,** on its own behalf  
and on behalf of its Related Parties

By: \_\_\_\_\_

Name: •

Title: •

**OPEN TEXT CORPORATION,** on its own  
behalf and on behalf of its Related Parties

By: \_\_\_\_\_

Name: •

Title: •

**6575064 CANADA INC.,** on its own behalf  
and on behalf of its Related Parties

By: \_\_\_\_\_

Name: •

Title: •

## INDEMNIFICATION AGREEMENT

Agreement between Open Text Corporation, a corporation existing under the laws of Canada (the “Company,” which for the purposes of this Agreement shall include any Subsidiary as defined herein), and \_\_\_\_\_ (the “Indemnitee”).

WHEREAS, the Company desires to attract and retain highly qualified individuals, such as the Indemnitee, to serve the Company;

WHEREAS, the Indemnitee currently providing valuable services to the Company and the Company desires the Indemnitee to continue to do so;

WHEREAS, the Company and the Indemnitee recognize the significant risk of personal liability for Personnel (as defined herein) which arises from corporate litigation practices;

WHEREAS, the Company and the Indemnitee further recognize that liability insurance for the Company’s Personnel, when available, is often available only at significant expense and provides for coverage of limited scope and that competent and experienced persons are often unable or unwilling to serve as Personnel unless they are protected by comprehensive liability insurance and indemnification;

WHEREAS, the Indemnitee is willing to continue to serve the Company, subject to certain conditions, including execution and delivery of this Agreement by the Company in order that the Indemnitee be furnished the indemnity provided for herein;

WHEREAS, the Company’s Articles of Continuance (“Articles”) and By-Laws do not prohibit or restrict contracts between the Company and its Personnel with respect to indemnification of such Personnel; and

WHEREAS, in view of such considerations, the Company desires to provide, independent from the indemnification to which the Indemnitee is otherwise entitled by law and under the Company’s Articles and By-Laws, indemnification to the Indemnitee and the Expense Advances (as defined herein), all as set forth in this Agreement to the maximum extent permitted by law;

NOW, THEREFORE, to induce the Indemnitee to continue to serve the Company and in consideration of these premises and the mutual agreements set forth in this Agreement, as well as other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Company and the Indemnitee hereby agree as follows:

1. Definitions. For the purposes of this Agreement,

(a) Change in Control. “Change in Control” means that after the date of this Agreement any of the following shall occur: (i) any “person” (as such term is used in Sections 13(d) and 14(d) of the U.S. Securities Exchange Act of 1934, as amended (the “Act”), other than a trustee or other fiduciary holding securities under an employee benefit plan of the Company acting in such capacity or a corporation owned directly or indirectly by the shareholders of the Company in substantially the same proportions as their ownership of stock of

the Company, becomes the “beneficial owner” (as defined in Rule 13d-3 under the Act), directly or indirectly, of securities of the Company representing 25% or more of the total voting power represented by the Company’s then outstanding voting securities; (ii) during any period of two consecutive years, individuals who at the beginning of such period constitute the board of directors of the Company (the “Board of Directors”) cease to be a majority thereof (otherwise than through death, disability or retirement in accordance with the Company’s normal retirement policies); (iii) the shareholders of the Company approve a merger or consolidation of the Company with any other corporation, limited liability company, partnership, joint venture, trust or other entity other than a merger or consolidation which would result in the voting securities of the Company outstanding immediately prior thereto continuing to represent (either by remaining outstanding or by being converted into voting securities of the surviving entity) at least 50% of the total voting power represented by the voting securities of the Company or such surviving entity Outstanding immediately after such a merger or consolidation; or (iv) the shareholders of the Company approve a plan of complete or substantial liquidation of the Company or an agreement for the sale or disposition by the Company of (in one transaction or a series of related transactions) all or substantially all of the Company’s assets.

(b) Claim. “Claim” means any threatened, pending or completed action, suit, proceeding, arbitration or alternative dispute resolution mechanism, or any hearing, inquiry or investigation, whether conducted by the Company or any other party, which the Indemnatee believes in good faith might lead to the institution of any such action, suit, proceeding, alternative dispute resolution mechanism, hearing, inquiry or investigation, whether civil, criminal, administrative, investigative or any other type whatsoever, with respect to an Indemnifiable Event.

(c) Expenses. “Expenses” means all costs, charges, expenses and liabilities of any type or nature whatsoever (including, without limitation, all attorneys’ fees, retainers and related disbursements and other out-of-pocket costs, judgments, awards, fines, penalties and amounts paid in settlements) paid or incurred by or imposed upon the Indemnatee in the investigation, defence, settlement or appeal of, or otherwise in connection with, a Claim (including, without limitation, being a witness) or in establishing or enforcing a right to indemnification under this Agreement, the Company’s Articles or By-Laws, applicable provisions of the Canada Business Corporations Act or otherwise, and any federal, provincial, state, local or foreign taxes imposed on the Indemnatee as a result of the actual or deemed receipt of any payments under this Agreement.

(d) Expense Advance. “Expense Advance” means a payment to the Indemnatee of Expenses in advance of the settlement of or final judgment or award on any Claim.

(e) Indemnifiable Event. “Indemnifiable Event” means any event or occurrence related to the fact that the Indemnatee is, or was, a Personnel or by reason of anything done or not done, or allegedly done or not done, by the Indemnatee in the Indemnatee’s capacity as a Personnel.

(f) Independent Legal Counsel. “Independent Legal Counsel” means an attorney or firm of attorneys, selected in accordance with the provisions of Section 8(a), whether or not in the event of a Change in Control.

(g) Personnel. “Personnel” means any person who (i) is or was a director, officer, employee, trustee or other Personnel or fiduciary of the Company; (ii) is or was serving at the request, for the convenience, or to represent the interests, of the Company or a Company employee benefit plan, its participants or its beneficiaries, as a director, officer, employee, trustee or other Personnel or fiduciary of another corporation, limited liability company, partnership, joint venture, trust or other entity (including, without limitation, any employee benefit plan); or (iii) was a director, officer, employee, trustee or other Personnel or fiduciary of a corporation, limited liability company, partnership, joint venture, trust or other entity which was a predecessor of the Company, or was a director, officer, employee, trustee or other Personnel or fiduciary of any other such entity at the request of such predecessor. The use of the term “Personnel” shall not be construed to alter the legal relationship between a Personnel, as defined herein, and the Company.

(h) Potential Change in Control. “Potential Change in Control” means that after the date of this Agreement any of the following shall occur: (i) any person or entity publicly announces an intention to take or to consider taking actions which if consummated might result in a Change in Control; or (ii) the Company’s Board of Directors adopts a resolution to the effect that, for purposes of this Agreement, a Potential Change in Control has occurred.

(i) Reviewing Party. “Reviewing Party” means the person or body appointed by the Company’s Board of Directors pursuant to Section 12(c) and in accordance with applicable law, which person or body shall be either (i) members of the Company’s Board of Directors who are not interested in the particular Claim; or (ii) Independent Legal Counsel. If there has been a Change in Control or Potential Change in Control, the Reviewing Party shall be Independent Legal Counsel.

(j) Subsidiary. “Subsidiary” means any corporation, limited liability company, partnership, joint venture, trust or other entity of which more than 50% of the outstanding voting securities are owned directly or indirectly by the Company, by the Company and one or more other Subsidiaries, or by one or more other Subsidiaries.

2. Agreement to Serve. The Indemnitee agrees to continue to serve the Company as a Personnel, at its will (or under separate agreement, if such agreement exists), in the capacity in which the Indemnitee currently serves as such Personnel, or such other capacity as the Indemnitee is appointed or elected to from time to time, so long as the Indemnitee is duly appointed or elected and qualified in accordance with the Articles and By-Laws of the Company, or until such time as the Indemnitee tenders the Indemnitee’s resignation in writing; provided, however, that nothing contained in this Agreement is intended to create any right to continued service by the Indemnitee.

3. Basic Indemnification. Subject to the terms of this Agreement:

(a) Claims Other than Derivative Claims on Behalf of and in Favour of the Company. Subject to subsection 3(b), as to all Claims other than derivative Claims on behalf of and in favor of the Company, the Company shall indemnify the Indemnatee against all Expenses.

(b) Derivative Claims on Behalf of and in Favour of the Company. As to all derivative Claims on behalf of and in favor of the Company, the Company shall indemnify the Indemnatee against all Expenses, provided that no indemnification shall be made as to such derivative Claim if the Indemnatee has been finally adjudged to be liable to the Company in connection with such Claim or any claim, issue or matter therein, unless and only to the extent that the court in which the Claim was brought shall determine that, despite the adjudication of liability but in view of all the circumstances, the Indemnatee is fairly and reasonably entitled to indemnity for such Expenses which such court shall deem proper.

(c) Standard of Conduct Required for Entitlement to Basic Indemnification. The Indemnatee shall be entitled to indemnification under Sections 3(a) and (b) above if the Indemnatee (i) acted honestly and in good faith with a view to the best interests of the Company or, as the case may be, to the best interests of the other entity for which the Indemnatee acted as Personnel at the Company's request; and (ii) in the case of a criminal or administrative action or proceeding that is enforced by a monetary penalty, the Indemnatee had reasonable grounds for believing that the Indemnatee's conduct was lawful and, in the case of Section 3(b), subject to the exclusion set forth therein. The termination of any Claim by judgment, award, order, settlement (whether with or without court approval), conviction or upon a plea of *nolo contendere* or its equivalent shall not, of itself, create a presumption that (i) the Indemnatee did not act honestly and in good faith with a view to the best interests of the Company or, as applicable, such other entity, (ii) the Indemnatee did not have reasonable grounds to believe that the Indemnatee's conduct was lawful or (iii) a court determined that indemnification is not permitted by applicable law or pursuant to Section 3(b). In addition, neither the failure of any Reviewing Party to have made a determination as to whether the Indemnatee has met the standard of conduct set forth in this Section 3(c) or had any particular belief, nor an actual determination by any Reviewing Party that the Indemnatee has not met such standard of conduct or did not have such belief, shall be a defence to the Indemnatee's right to indemnification or create a presumption that the Indemnatee did not meet any particular standard of conduct or did not have any particular belief. If the Indemnatee acted honestly and in good faith with a view to the best interests of the participants and beneficiaries of an employee benefit plan, the Indemnatee shall be deemed to have acted with a view to the best interests of the Company.

(d) Success on the Merits. To the extent that the Indemnatee has been successful on the merits or otherwise (including, without limitation, dismissal or withdrawal of a Claim with or without prejudice) in defence of any Claim or in defence of any claim, issue or matter therein, the Company shall indemnify the Indemnatee against Expenses in connection therewith.

(e) Proceedings initiated by the Indemnatee. Except as provided in Section 16 of this Agreement, notwithstanding anything to the contrary in Sections 3 and 4, the Company shall not be obligated to indemnify the Indemnatee in connection with a proceeding (or part thereof)

initiated by the Indemnitee unless such proceeding (or part thereof) was authorized in advance, or unanimously consented to, by the Company's Board of Directors.

4. Additional Indemnification. The Company further agrees to indemnify the Indemnitee in connection with any Claim and to make Expense Advances to the Indemnitee, in each case to the fullest extent as may be provided for under the Company's Articles, By-Laws, any vote of the shareholders or disinterested directors and/or applicable law notwithstanding that any such indemnification or Expense Advance is not specifically authorized by the other provisions of this Agreement. It is the intent of the parties hereto that (i) in the event of any change, after the date of this Agreement, in any applicable law which expands the right of a corporation organized under the laws of Canada to indemnify or make Expense Advances to a Personnel to a greater degree than would be afforded currently under the Company's Articles, By-Laws, any vote of the shareholders or disinterested directors, applicable law and this Agreement, the Indemnitee shall enjoy by this Agreement the greater benefits afforded by such change, and (ii) this Agreement be interpreted and enforced so as to provide indemnification and Expense Advances under such circumstances as set forth in this Agreement, if any, in which the providing of indemnification or Expense Advances would otherwise be discretionary. Without limiting the generality of the foregoing, the Company shall use its best efforts to obtain any approval required under the Canada Business Corporations Act or otherwise (including court approval) in respect of any indemnification required, or contemplated, to be made under this Agreement.

5. Exclusions. Any other provision of this Agreement to the contrary notwithstanding, the Company shall not be obligated to indemnify or provide Expense Advances to the Indemnitee:

(a) to the extent any such indemnification or Expense Advance would be unlawful; or

(b) to the extent that the Indemnitee actually received from any other source (including an insurer) amounts otherwise payable hereunder;

provided that notwithstanding the foregoing provisions of this Section 5, the Indemnitee shall be entitled under Section 6 to receive Expense Advances with respect to any Claim unless and until a court having jurisdiction over such Claim shall have made a final determination (as to which all rights of appeal therefrom shall have been exhausted or lapsed) that the Indemnitee is prohibited from receiving indemnification with respect thereto.

6. Expense Advances. Within five business days of receipt by the Company of a notice (the "Notice of Expense Advances"), substantially in the form attached hereto as Exhibit 1, by or on behalf of the Indemnitee to repay the amount of any Expense Advance with respect to any Claim if and to the extent that it shall ultimately be determined that the Indemnitee is not entitled to indemnification for such amount, the Company shall make Expense Advances to the Indemnitee. Any amounts advanced pursuant to the Notice of Expense Advances shall be unsecured and shall bear no interest.

7. Non-Exclusivity; Continuation. The indemnification and Expense Advances pursuant to this Agreement shall not be deemed exclusive of any other rights to which the Indemnatee may be entitled under the Company's Articles or By-Laws, any vote of the Company's shareholders or disinterested directors, any other agreement, any law or otherwise, both as to actions in the Indemnatee's official capacity and as to actions in another capacity while a Personnel. All agreements and obligations of the Company contained in this Agreement shall continue as to the Indemnatee while the Indemnatee is a Personnel and after the Indemnatee has ceased to be a Personnel.

8. Change in Control; Potential Change in Control.

(a) The Company agrees that if there is a Change in Control, then with respect to all matters concerning the rights of the Indemnatee to indemnification and Expense Advances under this Agreement, the Company's Articles or By-Laws, any vote of the Company's shareholders or disinterested directors, any other agreement, any law or otherwise, the Company shall seek legal advice only from Independent Legal Counsel. Such Independent Legal Counsel shall be such person or firm selected by the Indemnatee and approved by the Company (which approval shall not be unreasonably withheld) which has not otherwise performed material services for the Company or the Indemnatee within the prior three years (other than in connection with such matters). The Independent Legal Counsel shall, among other things, render its written opinion to the Company and the Indemnatee as to whether and to what extent the Indemnatee is permitted to be indemnified and receive Expense Advances. The Company agrees to pay the fees and expenses of the Independent Legal Counsel relating to its engagement pursuant to this Agreement.

(b) In the event of a Potential Change in Control, the Company may, at its sole discretion, create a trust for the benefit of the Indemnatee and from time to time fund such trust in such amounts as the Company's Board of Directors may, at its sole discretion, determine to satisfy Expenses reasonably anticipated or proposed to be incurred or paid from time to time in connection with any Claims. The terms of any trust established pursuant hereto shall provide that upon a Change in Control (i) the trust shall not be revoked or the principal thereof encroached upon, without the written consent of the Indemnatee, (ii) the trustee shall advance (solely to the extent of trust assets), within two business days of a request by the Indemnatee and upon receipt of a Notice of Expense Advances by or on behalf of the Indemnatee, all Expenses to the Indemnatee (and the Indemnatee hereby agrees to reimburse the trust under the circumstances under which the Indemnatee would be required to reimburse the Company under Section 6), (iii) the trustee shall promptly pay (solely to the extent of trust assets) to the Indemnatee all amounts for which the Indemnatee shall be entitled to indemnification pursuant to this Agreement or otherwise, and (iv) all unexpended funds in such trust shall revert to the Company upon a final determination by the Reviewing Party or a court of competent jurisdiction, as the case may be, that the Indemnatee has been fully indemnified (or is not entitled to be indemnified) under the terms of this Agreement as to all Claims. The trustee shall be a person or entity reasonably satisfactory to the Indemnatee. Nothing in this Section 8(b) shall relieve the Company of any of its obligations under any other provision of this Agreement.

9. Partial Indemnification. If the Indemnatee is entitled under any provision of this Agreement or otherwise to indemnification or Expense Advances by the Company for a portion, but not all, of any Expenses incurred by the Indemnatee, the Company shall indemnify or provide Expense Advances to the Indemnatee (as the case may be) for the portion thereof to which the Indemnatee is entitled.

10. Contribution. If indemnification is unavailable by reason of a court decision described in Section 12(d) based on grounds other than that set forth in Section 5(a), then in respect of any Claim in which the Company is jointly liable with the Indemnatee (or would be if joined in such Claim), the Company shall contribute to the amount of the Indemnatee's Expenses in such proportion as is appropriate to reflect (i) the relative benefits received by the Company and by the Indemnatee, respectively, from the transaction from which such Claim arose, and (ii) the relative fault of the Company and of the Indemnatee in connection with the events which resulted in such Claim and/or Expenses, as well as any other relevant equitable considerations. The relative fault of the Company and of the Indemnatee shall be determined by reference to, among other things, the parties' relative intent, knowledge, access to information and opportunity to correct or prevent the circumstances resulting in such Claim and/or Expenses. The Company agrees that it would not be just and equitable if contribution pursuant to this Section 10 were determined by pro rata allocation or any other method of allocation which does not take account of the foregoing equitable considerations.

11. Insurance. The Company confirms that it has purchased directors' and officers' liability insurance as approved by the Board of Directors covering its directors and officers, which insurance also includes reimbursement for all Expenses as permitted under Section 6 hereof. Subject only to the provisions of this Section 11, the Company agrees for so long as an Indemnatee shall have consented to serve or shall continue to serve as a director of the Company and also for the period which is seven (7) years following the date the Indemnatee ceases to serve as a director of the Company (such Indemnatee, a "Departing Director"), the Company shall use all commercially reasonable efforts to maintain in effect for the benefit of the Indemnatee or the Departing Director, as the case may be, one or more valid, binding and enforceable policies of directors' and officers' liability insurance providing, in all material respects, coverage both in scope and amount which is no less favourable than that provided as of the date hereof.]

12. Procedures.

(a) Notice. Promptly after receipt by the Indemnatee of notice of the commencement, or the threat of commencement, of any Claim, the Indemnatee shall, if the Indemnatee believes that indemnification or Expense Advances with respect thereto may be sought from the Company by the Indemnatee pursuant to this Agreement, notify the Company of the commencement or threat of commencement thereof; the Indemnatee's notice to the Company may, but need not, be substantially in the form attached hereto as Exhibit 2. Any failure of the Indemnatee to provide such notice to the Company shall not, however, relieve the Company of any liability which it may have to the Indemnatee unless and to the extent such failure causes a material adverse impact upon the interests of the Company. If, at the time it receives such notice from the Indemnatee, the Company has directors' and officers' liability insurance in effect, the Company shall give prompt notice of the commencement, or the threat of commencement, of



such Claim to the insurers in accordance with the procedures set forth in the respective applicable insurance policies. The Company shall thereafter take all necessary or desirable action to cause such insurers to pay, on behalf of the Indemnitee, all amounts payable as a result of such Claim in respect of indemnifiable Expenses in accordance with the terms of such policies; provided, that no such payments by such insurers shall relieve the Company of any liability or obligation which it may have to the Indemnitee, except as and to the extent expressly provided under this Agreement.

(b) Assumption of Defence. If the Company shall be obligated to pay Expenses arising in connection with any Claim against the Indemnitee, the Company shall be entitled to assume the defence of such Claim, with counsel reasonably satisfactory to the Indemnitee, upon the delivery to the Indemnitee of notice of its election to do so. After delivery of such notice, satisfaction with such counsel by the Indemnitee and the retention of such counsel by the Company, the Company will not be liable to the Indemnitee under this Agreement for any fees and expenses of counsel subsequently incurred by the Indemnitee with respect to the same Claim, provided that (i) the Indemnitee shall have the right to employ the Indemnitee's own counsel in connection with any Claim at the Indemnitee's expense; (ii) if (A) the employment of counsel by the Indemnitee shall have been previously authorized by the Company, or (B) the Indemnitee shall have reasonably concluded that there may be a conflict of interest between the Company and the Indemnitee in the conduct of such defence, and the Indemnitee shall have employed counsel to assume the defence of such Claim, in each such case the fees and expenses of the Indemnitee's counsel shall be paid by the Company; and (iii) the Company shall not settle any Claim in any manner which would impose any penalty, limitation or unindemnified Expense on the Indemnitee, or which would reasonably be expected to result in a material loss or diminishment of the Indemnitee's reputation, without the Indemnitee's consent (which consent shall not be unreasonably withheld).

(c) Determination of Entitlement to Indemnification. In the event of any demand by the Indemnitee for indemnification under this Agreement or otherwise, the Board of Directors of the Company shall promptly designate a Reviewing Party. The Reviewing Party shall determine that indemnification is proper if it finds that the Indemnitee has met the required standard of conduct set forth in Section 3(c) and that indemnification is not prohibited pursuant to Section 5. If the Reviewing Party is a body consisting of members of the Company's Board of Directors, it shall act by a majority vote. If the Reviewing Party is Independent Legal Counsel, the determination of the Reviewing Party shall be rendered in the form of a written legal opinion. Subject to Sections 12(d) and 13, any indemnification under Sections 3 and 4 (unless ordered by a court or pursuant to Section 3(d)) shall be made by the Company only as authorized in the specific case and upon the determination of the Reviewing Party that the Indemnitee is entitled to indemnification in the circumstances because the Indemnitee has met the standard of conduct set forth in Section 3(c) and that indemnification is not prohibited pursuant to Section 5. The Indemnitee's demand for indemnification shall create a presumption that the Indemnitee is entitled to indemnification and the Reviewing Party shall have 30 days from the date of receipt of the Indemnitee's demand in which to render in writing and deliver to the Indemnitee its determination. If the Reviewing Party makes no timely determination, the Reviewing Party shall be deemed to have determined that the Indemnitee is entitled to the indemnification demanded. If

the Reviewing Party determines, which determination shall be based upon clear and convincing evidence sufficient to rebut the aforesaid presumption of entitlement, that the Indemnitee is not entitled to indemnification, in whole or in part, in the circumstances because the Indemnitee has not met the standard of conduct set forth in Section 3(c) or because the indemnification is prohibited pursuant to Section 5, the Indemnitee shall (i) be entitled to obtain a favorable determination or to appeal such negative determination in the manner provided in Sections 12(d) and 13, and (ii) not be required to reimburse the Company for any Expense Advances or Expenses theretofore paid to or on behalf of the Indemnitee until a final determination has been made with respect to the Indemnitee's legal entitlement to indemnification (as to which all rights of appeal therefrom shall have been exhausted or shall have lapsed).

(d) Indemnitee's Rights on Unfavorable Determination. Notwithstanding a determination by a Reviewing Party or any forum listed in Section 13 that the Indemnitee is not entitled to indemnification with respect to a specific Claim, or any claim, issue or matter therein, the Indemnitee shall have the right to apply to any court of competent jurisdiction for the purpose of determining and enforcing the Indemnitee's right to indemnification pursuant to this Agreement or otherwise and the Company hereby consents to service of process and agrees to appear in any such proceeding. The Indemnitee shall be entitled to indemnification unless the Company shall prove by clear and convincing evidence that (i) the Indemnitee did not meet the applicable standard of conduct required to entitle the Indemnitee to such indemnification or that indemnification is prohibited pursuant to Section 5, and (ii) the requirements of Section 3(d) have not been met.

**13. Appeal of a Reviewing Party's Determination of No Right to Indemnification.**

(a) The Indemnitee shall be entitled to select from the following alternatives a forum in which the validity of a Reviewing Party's determination that the Indemnitee is not entitled to indemnification will be heard, which forum shall determine that the Indemnitee is entitled to such indemnification unless such forum determines that there is clear and convincing evidence that (i) the Indemnitee did not meet the applicable standard of conduct required to entitle the Indemnitee to such indemnification or that indemnification is prohibited pursuant to Section 5, and (ii) the requirements of Section 3(d) have not been met:

(A) those members of the Company's Board of Directors who are disinterested parties with respect to the Claim, acting by a majority vote; or

(B) Independent Legal Counsel, in a written opinion.

(b) As soon as practicable, and in no event later than 30 days after notice of the Indemnitee's choice of forum pursuant to Section 13(a), the Company shall, at its own expense, submit to the selected forum in such manner as the Indemnitee or the Indemnitee's counsel may reasonably request, the basis for the determination that the Indemnitee is not entitled to indemnification, and the Company shall act good faith to assure the Indemnitee the opportunity to defend against and appeal such determination.

14. Binding Effect; Successors and Assigns. This Agreement shall bind and inure to the benefit of the successors, heirs, personal and legal representatives and permitted assigns of the parties hereto, including any direct or indirect successor by purchase, merger, consolidation or otherwise to all, substantially all or a substantial part of the business or assets of the Company. The Company shall require and cause any successor (whether direct or indirect, and whether by purchase, merger, consolidation or otherwise) to all, substantially all or a substantial part of the business or assets of the Company, by written agreement in form and substance reasonably satisfactory to the Indemnitee, expressly to assume and agree to perform this Agreement in the same manner and to the same extent that the Company would be required to perform if no such succession had taken place.

15. Assignment. Subject to the requirements of section 14 hereof, this Agreement may be assigned by the Company to any successor (whether direct or indirect, and whether by purchase, merger, consolidation or otherwise) to all, substantially all or a substantial part of the business or assets of the Company. This Agreement may not be assigned by the Indemnitee.

16. Expenses and Expense Advances to Enforce the Agreement. It is the intent of the Company that the Indemnitee shall not be required to incur any Expenses arising from any effort to enforce the Indemnitee's rights under this Agreement because incurring such Expenses would substantially detract from the benefits intended to be extended to the Indemnitee hereunder. Accordingly, if it should appear to the Indemnitee that the Company has failed to comply with any of its obligations under this Agreement or if the Company or any other person or entity (other than a court of competent jurisdiction in a final determination, as to which all rights of appeal therefrom shall have been exhausted or shall have lapsed) takes any action to declare this Agreement or any provision hereof void or unenforceable, or institutes any action, suit or proceeding designed (or having the effect of being designed) to deny or recover from the Indemnitee the benefits intended to be provided to the Indemnitee hereunder, the Company hereby irrevocably authorizes the Indemnitee from time to time to retain counsel of the Indemnitee's choice to represent the Indemnitee in connection with the enforcement of the Indemnitee's rights under this Agreement. If the Indemnitee is successful in whole or in part in enforcing the Indemnitee's rights under this Agreement, the Company shall pay and be solely responsible for any and all reasonable and documented costs and liabilities (including, without limitation, all attorneys' fees and related disbursements and other out-of-pocket costs) incurred by the Indemnitee in connection therewith.

17. Notices. All notices, requests, demands and other communications under this Agreement shall be in writing and shall be deemed duly given (i) when delivered by hand; or (ii) if mailed by certified or registered mail with postage prepaid, on the third business day after the mailing date. Address for notice to the Company shall be as shown on the signature page of this Agreement and the address for notice to the Indemnitee shall be as shown in Company records, or as subsequently modified by the addressee by such written notice.

18. Severability. If any provision or provisions of this Agreement shall be held to be invalid, illegal or unenforceable for any reason whatsoever, (i) the validity, legality and enforceability of the remaining provisions of the Agreement (including, without limitation, all portions of any paragraph of this Agreement containing any such provision held to be invalid,

illegal or unenforceable, that are not themselves invalid, illegal or unenforceable) shall not in any way be affected or unpaired thereby, (ii) to the fullest extent possible, the provisions of this Agreement (including, without limitation, all portions of any paragraph of this Agreement containing any such provision held to be invalid, illegal or unenforceable, that are not themselves invalid, illegal or unenforceable) shall be construed so as to give effect to the intent manifested by the provision held invalid, illegal or unenforceable and (iii) to the fullest extent possible, any such provision held to be invalid, illegal or unenforceable shall be reformed so as to be valid, legal and enforceable and to give effect to the intent manifested by such provision.

19. Modifications, Amendments, and Waivers. No modification or amendment of this Agreement, or waiver of any of the provisions hereof, shall be binding unless executed in writing by both of the parties hereto, in the case of a modification or amendment, or by the waiving party, in the case of a waiver. No waiver of any such provision shall be deemed to constitute a waiver of such provision on any other occasion or a waiver of any other provision.

20. Consent to Jurisdiction. The Company and the Indemnitee each hereby irrevocably consent to the non-exclusive jurisdiction of a court of competent jurisdiction in the Province of Ontario for any purpose in connection with any action or proceeding which arises out of or relates to this Agreement, and the parties hereto hereby attorn and submit to such non-exclusive jurisdiction.

21. Governing Law. This Agreement shall be governed by and construed in accordance with the laws of the province of Ontario and the federal laws of Canada applicable therein, as applied to contracts between Ontario residents entered into and to be performed entirely within Ontario.

22. Subrogation. In the event of payment by the Company under this Agreement, the Company shall be subrogated to the extent of such payment to all of the rights of recovery of the Indemnitee, who agrees, at the sole expense of the Company, to execute all papers reasonably required and to do all other acts and things that may be reasonably necessary on the part of the Indemnitee to secure such rights, including the execution of documents necessary or desirable to enable the Company to bring suit to enforce such rights.

23. Integration and Entire Agreement. This Agreement sets forth the entire understanding between the parties hereto and supersedes and merges all previous written and oral negotiations, commitments, understandings and agreements relating to the subject matter hereof.

24. Counterparts. This Agreement may be executed and delivered (including by facsimile transmission) in one or more counterparts, each of which (including any counterpart received by facsimile transmission) shall be deemed an original and all of which together shall constitute one and the same instrument.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement as of the 7<sup>th</sup> day of September, 2006.

**OPEN TEXT CORPORATION**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Title: \_\_\_\_\_

Address: 275 Frank Tompa Drive  
Waterloo, Ontario  
N2L 0A1

\_\_\_\_\_

Indemnatee – [●]

NOTICE OF EXPENSE ADVANCES

1. This Notice of Expense Advances is submitted pursuant to the Indemnification Agreement dated as of \_\_\_\_\_, between Open Text Corporation, a corporation existing under the laws of Canada (the "Company"), and the undersigned (the "Agreement"). Capitalized terms used but not defined herein shall have the respective meanings set forth in the Agreement.

2. I am requesting certain Expense Advances in connection with a Claim.

3. I hereby undertake to repay such Expense Advances if it shall ultimately be determined that I am not entitled to be indemnified by the Company therefor under the Agreement or otherwise.

4. The Expense Advances are, in general, all related to:

Signed: \_\_\_\_\_

Dated: \_\_\_\_\_

NOTICE AND DEMAND FOR INDEMNIFICATION

1. This Notice and Demand for Indemnification is submitted pursuant to the Indemnification Agreement dated as of \_\_\_\_\_ between Open Text Corporation, a corporation existing under the laws of Canada (the “Company”), and the undersigned (the “Agreement”). Capitalized terms used but not defined herein shall have the respective meanings set forth in the Agreement.

2. I am notifying the Company as to the following Claim:

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3. I am requesting indemnification and Expense Advances with respect to such Claim to the full extent provided for in the Agreement or to which I may otherwise be entitled.

Signed: \_\_\_\_\_

Dated: \_\_\_\_\_

## Corporate Subsidiaries of Open Text Corporation as at August 16, 2006

<u>Corporation Name</u>	<u>Jurisdiction</u>
IXOS Software Australia PTY	Australia
Open Text Pty Ltd.	Australia
IXOS Software (Austria) GmbH	Austria
Open Text Solutions Software GmbH	Austria
Involv International Corporation	Barbados
Lava Systems	Barbados
Molton Systems SRL	Barbados
6575064 Canada Inc.	Canada
2015603 Ontario Ltd.	Canada
2016090 Ontario Inc.	Canada
2016091 Ontario Inc.	Canada
2030928 Ontario Ltd.	Canada
Brokercom Inc.	Canada
Involv Corporation	Canada
Open Text Search Limited	Canada
IXOS Software S.R.O	Czech Republic
IXOS Software Nordic A/S	Denmark
IXOS Software France SAS	France
Open Text SARL	France
Gauss Interprise AG	Germany
IXOS Software AG	Germany
Open Text eGovernment Deutschland GmbH	Germany
Open Text GmbH	Germany
Centrinity Ltd.	Ireland
Open Text KK	Japan
Open Text Mexico, S. de R.L. de C.V.	Mexico
Corechange BV	Netherlands
Gauss Interprise BV	Netherlands
Open Text International BV	Netherlands
Open Text (Asia) Pte Ltd.	Singapore
Gauss Interprise SL	Spain
IXOS Technology SL	Spain
Corechange Svenska AB	Sweden
Gauss Interprise AB	Sweden
Mediaflow AB	Sweden
Open Text AB	Sweden
IXOS Software International AG	Switzerland
Open Text AG	Switzerland



Artesia Technologies, UK Limited	UK
Centrinity UK Ltd.	UK
Corechange Ltd.	UK
Gauss Interprise UK Ltd.	UK
Information Dimensions Limited	UK
IXOS Software Limited	UK
Open Text UK Ltd.	UK
Artesia Technologies, Inc.	USA
MC2 Learning Systems	USA
Open Text Eloquent Inc.	USA
Open Text Inc.	USA

**CERTIFICATIONS**

I, John Shackleton, certify that:

1. I have reviewed this Annual Report on Form 10-K of Open Text Corporation;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: September 12, 2006

By: /s/ John Shackleton  
**John Shackleton**  
**President and Chief Executive Officer**

**CERTIFICATIONS**

I, Paul McFeeters, certify that:

1. I have reviewed this Annual Report on Form 10-K of Open Text Corporation;
2. Based on my knowledge, this report does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading with respect to the period covered by this report;
3. Based on my knowledge, the financial statements, and other financial information included in this report, fairly present in all material respects the financial condition, results of operations and cash flows of the registrant as of, and for, the periods presented in this report;
4. The registrant's other certifying officer and I are responsible for establishing and maintaining disclosure controls and procedures (as defined in Exchange Act Rules 13a-15(e) and 15d-15(e)) and internal control over financial reporting (as defined in Exchange Act Rules 13a-15(f) and 15d-15(f)) for the registrant and have:
  - a) Designed such disclosure controls and procedures, or caused such disclosure controls and procedures to be designed under our supervision, to ensure that material information relating to the registrant, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which this report is being prepared;
  - b) Designed such internal control over financial reporting, or caused such internal control over financial reporting to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles;
  - c) Evaluated the effectiveness of the registrant's disclosure controls and procedures and presented in this report our conclusions about the effectiveness of the disclosure controls and procedures, as of the end of the period covered by this report based on such evaluation; and
  - d) Disclosed in this report any change in the registrant's internal control over financial reporting that occurred during the registrant's most recent fiscal quarter (the registrant's fourth fiscal quarter in the case of an annual report) that has materially affected, or is reasonably likely to materially affect, the registrant's internal control over financial reporting; and
5. The registrant's other certifying officer and I have disclosed, based on our most recent evaluation of internal control over financial reporting, to the registrant's auditors and the audit committee of the registrant's board of directors (or persons performing the equivalent functions):
  - a) All significant deficiencies and material weaknesses in the design or operation of internal control over financial reporting which are reasonably likely to adversely affect the registrant's ability to record, process, summarize and report financial information; and
  - b) Any fraud, whether or not material, that involves management or other employees who have a significant role in the registrant's internal control over financial reporting.

Date: September 12, 2006

By: \_\_\_\_\_ /s/ Paul McFeeters  
Paul McFeeters  
Chief Financial Officer

**CERTIFICATION PURSUANT TO  
18 U.S.C. SECTION 1350, AS ADOPTED  
PURSUANT TO SECTION 906  
OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report on Form 10-K of Open Text Corporation (the “Company”) for the year ended June 30, 2006 as filed with the Securities and Exchange Commission on the date hereof (the “Report”), I, John Shackleton, President and Chief Executive Officer of the Company, certify, pursuant to 18 U.S.C. (S) 1350, as adopted pursuant to (S) 906 of the Sarbanes-Oxley Act of 2002, that:

(1) The Report fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended; and

(2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

\_\_\_\_\_  
/s/ John Shackleton

**John Shackleton**  
President and Chief Executive Officer

Dated: September 12, 2006

**CERTIFICATION PURSUANT TO  
18 U.S.C. SECTION 1350, AS ADOPTED  
PURSUANT TO SECTION 906  
OF THE SARBANES-OXLEY ACT OF 2002**

In connection with the Annual Report on Form 10-K of Open Text Corporation (the “Company”) for the year ended June 30, 2006 as filed with the Securities and Exchange Commission on the date hereof (the “Report”), I, Paul McFeeters, Chief Financial Officer of the Company, certify, pursuant to 18 U.S.C. (S) 1350, as adopted pursuant to (S) 906 of the Sarbanes-Oxley Act of 2002, that:

(1) The Report fully complies with the requirements of section 13(a) or 15(d) of the Securities Exchange Act of 1934, as amended; and

(2) The information contained in the Report fairly presents, in all material respects, the financial condition and results of operations of the Company.

/s/ Paul McFeeters

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**Paul McFeeters  
Chief Financial Officer**

Dated: September 12, 2006