September 11, 2002

Mr. Purdy Crawford
Osler, Hoskin & Harcourt LLP
Barristers & Solicitors
Box 50, 1 First Canadian Place
Toronto ON M5X 1B8

Dear Mr. Crawford:

Re: Draft Report of the Five Year Review Committee – Securities Act (Ontario)

This letter is submitted in response to the request for comment dated May 29, 2002 by the Five Year Review Committee ("the "Review Committee") appointed by the Minister of Finance to review the *Securities Act* (Ontario) (the "Act").

This submission is provided by the Securities Subcommittee (the "OBA Subcommittee") of the Business Law Section of the Ontario Bar Association (the "OBA"). The members of the OBA Subcommittee are listed in the attached Appendix. Please note that not all of the members of the OBA Subcommittee participated in or reviewed this submission, and that the views expressed are not necessarily those of the firms and organizations represented by members of the OBA Subcommittee.

General

We wish to commend the Review Committee for an ambitious and well thought out draft report. As unpaid volunteers, the members and staff of the Review Committee deserve the gratitude of those who participate in Ontario's securities market for their efforts.

While the draft report includes many worthwhile recommendations, the wide-ranging nature of the draft report provides a particular challenge to the Minister of Finance and the Ontario Securities Commission (the "Commission"), who must determine how to go about implementing change in a number of areas while preserving and enhancing harmonization of rules with other Canadian jurisdictions. In a similar vein, the Review Committee acknowledged the difficulty that the Commission faces in trying to "do too much", with its recommendation (on page 48 of the draft report) that the Commission "limit the number of projects that it takes on and focus its resources on fewer critical policy issues". We therefore believe that the Review Committee should include in its final report some guidance as to the priority that should be given to various recommended initiatives.

Set out below are some more specific comments on the draft report (cross referenced to the headings and paragraph numbers in the Executive Summary of the draft report).

Part 1: The Role of the Commission in Capital Market Regulation

1. **Single national securities regulator:**
2. **Enhanced harmonization of securities legislation:** We agree with the Review Committee that ideally Canada should have a single national securities regulator. However, given current political realities (including the skepticism or outright hostility to the suggestion by certain key provinces), we believe that it would be more productive in the short to medium term to concentrate on enhanced efforts toward harmonization. We therefore strongly support the Review Committee's recommendations in support of providing securities regulators with legislative authority with respect to inter-delegation of responsibilities and mutual recognition.

3. **U.S. GAAP financial statements:** We support the recommendation that qualified Canadian issuers be permitted to prepare financial statements in accordance with U.S. GAAP, but question whether it is necessary for all classes of issuers to have a transition period during which reconciliation to Canadian GAAP is mandated (or for the period to be as long as two years, as proposed in draft National Instrument 51-502). For example, there may well be no significant benefit in requiring reconciliation to Canadian GAAP in the case of some large-cap issuers that are well followed by financial analysts and whose comparators are large U.S.-based or international issuers.

5. **Uniform securities transfer legislation:** We agree that uniform securities transfer legislation across Canada on the U.S model would be desirable and support the Review Committee's recommendation is this regard.

Part 2: Flexible Regulation

8. **Additional principles of regulation:** While we agree that the principles set out are desirable, we are concerned that adding them will make the Act unwieldy. How should the Commission prioritize the various principles? There may also be conflicts between principles with respect to particular issues. This will become a greater concern if subsequent committees recommend additional principles reflecting the major concerns of the day.

10. **Streamlining the Act:** We strongly agree that the Act should set out the basic principles and fundamental rules and have the detailed requirements in Commission rules. This approach will make the overall system much more flexible and responsive. However, the Commission's rulemaking authority should not be such that it has the power to effectively alter or revoke a statutory provision, unless express authority is given and limits are put on that power. It is increasingly difficult for lawyers to understand the law, let alone advise clients, when the statue no longer reflects the rules actually in force. For example, the Act continued to refer to a private placement threshold of $97,000 for years after the amount was increased by regulation and many Commission rules provide that provisions still in the Act no longer apply. While an argument can be made that this approach was necessary because the detailed provisions of the Act made the regulatory regime inflexible, it is not as persuasive an argument if the Act is limited to core principles and fundamental rules, which should be less susceptible to the need for change and which should be of such importance that any change should be carefully considered by the government.

11. **Basket rulemaking authority for the Commission:** Most members of the Subcommittee disagree with this recommendation, as it would give the Commission virtually unfettered rulemaking authority. The Legislature or the Cabinet should determine whether the Commission should have rulemaking authority for a particular issue or activity. If the Review Committee's recommendation to streamline the Act is adopted, the Commission will have much broader rulemaking authority than it does today, making the argument for a basket rulemaking power less compelling. Although the report notes that the U.S. Securities and Exchange Commission has a similar power to the one proposed for the Commission, the SEC is subject to much greater and more active government (Congressional) oversight than the Commission, which tempers its rule- and policymaking. One Subcommittee member expressed support for giving the Commission basket rulemaking authority provided that the level of government oversight was strengthened (for example, requiring affirmative ministerial approval, and not simply non-disapproval, of new rules).

12. **Reducing the comment period from 90 to 60 days:** We believe that the existing system works well and does not need to be changed. The Review Committee's report refers to the long time needed to make a rule, but the most significant part of that time is taken up with developing the rule and obtaining consensus among the various commissions involved. With the increasing volume of proposals and reports published by the various commissions and SROs for comment, it is difficult enough for someone interested in the capital markets to analyze the implications of a given proposal and write a coherent and thoughtful response within the current timeframe. If the timeframe is too short, most people will not bother and only those with the most to gain or lose from a particular proposal will respond.

13. **Remove the requirement to republish a rule for minor changes:** We do not object to the recommendation, but are not convinced that it is necessary, given that the Commission only has to republish if it proposes material changes. The report states that the Alberta and B.C. securities commissions only have to republish if *the Commission considers* the proposal to be a material change. The report states that this is a different test, but in either case the commission must make a determination of materiality when making a decision whether to republish. To the extent that there is a problem, it would appear to be that the Commission is overly cautious in determining whether a particular change is "material," and this may not change even if the Review Committee's proposal is adopted. We also believe that a rule should be republished if a significant period of time has elapsed (for example, more than two years) from the date it was originally published, even if no changes have been made. Even if unchanged, the rule may no longer be needed or effective given subsequent changes in the marketplace or new rules adopted in the interim.

17. **Give the Commission the power to adopt blanket rulings:** We support this recommendation, provided it only allows the Commission to approve transactions that otherwise would not be permitted under the contemplated terms and does not allow the Commission to deny or impose additional conditions on transactions that are otherwise permitted. We also agree with the proposed three-year sunset period, provided the Commission's power to extend that period by enacting a new blanket ruling is circumscribed.

18. **Publish exemptive orders under securities rules:** We agree with this recommendation (subject to the applicant's ability to request confidentiality on usual grounds) since it will assist securities practitioners and their clients, particularly as the Review Committee recommends that the detailed requirements be the subject of rules rather than legislative provisions. We also agree with the proposal to publish decisions not to allow exemptive

relief and the reasons for the refusal in cases where the decision has potential precedent value. However, we believe that the rules should provide that the identity of the party requesting relief that has been refused should be kept confidential (unless the Commission determines that such disclosure is in the public interest) since in the normal case there would be no compelling interest in disclosing the applicant's identity.

Part 4 – The Closed System and Secondary Markets

33. Continuous disclosure reviews: We support the Review Committee's recommendation provided that the amendments provide not only for the right of the Commission to undertake reviews of continuous disclosure documents but also to provide for a comprehensive statutory framework addressing the following:

- process to be followed by the Commission;
- circumstances giving rise to sanctions by the Commission; and
- right of the issuer to a hearing before the Director and the Commission.

40. Use of derivatives and other monetization structures to reduce hold periods: Although we agree that the Commission should examine the use of derivatives and other monetization structures to circumvent restrictions otherwise applicable in respect of trade and securities, we believe that any regulation of such activities should be by way of rule rather than "guidance" or proceedings under Section 127 of the Act. The rule-making process under the Act is comprehensive in terms of public input and ministerial approval and would avoid enforceability issues associated with guidance by staff or the limitations inherent in proceedings under section 127 of the Act.

42. Disclosure of "material information": Most responding members of the OBA Subcommittee support the Review Committee's recommendations not to amend the Act to require disclosure of "material information" for the reasons noted in Section 12.1 of the Report.

43. Change of the existing materiality standard to a "reasonable investor" standard: Although some members of the OBA Subcommittee agree with the Review Committee's preference for the "reasonable investor" standard for materiality, we do not believe on balance that a compelling case has been made for a change to the current materiality standard. However, in the interests of uniformity, most members would support a change to the reasonable investor standard if that change is made in all major Canadian jurisdictions.

47. Requiring press releases containing financial or earnings information on SEDAR: We support the Review Committee's recommendation that reporting issuers be required to file press releases containing financial information or earnings information on SEDAR. While we generally support increased access to public disclosure documents, we agree that to mandate the filing of all press releases on SEDAR may result in reduced access since the volume of filings would restrict the ability to search for information efficiently.

Part 5 – Enhancing Fundamental Shareholder Rights

52. Proxy solicitation: We support the Review Committee's recommendation for harmonization of proxy solicitation rules under Canadian corporate and securities statutes,

and also agree that amending the Act to incorporate by reference the proxy requirements of another Canadian jurisdiction is the appropriate way to proceed.

54. Regulation of arrangements and take-over bids: We support the Review Committee's view that take-over bids and other forms of corporate acquisitions (e.g. plans of arrangement or amalgamations) need not be regulated in an identical manner for the reasons articulated in Section 16.1 of the Report.

55. Guidance as to when in a take-over bid a poison pill must be terminated: Now that the Commission has had the opportunity to canvass this issue extensively in the context of actual bids, we agree with the Review Committee's recommendation that it would be appropriate for the Commission in light of its experience to date to provide some general guidance as to the circumstances when a "poison pill" would be terminated by the Commission in the context of a take-over bid.

Part 6 – Enforcement

62. Commission power to require payment of administrative fines/disgorgement of profits:

Administrative Fines: We agree that it may be appropriate for the Commission to have the right to impose administrative fines. However, there is a general concern by members of the OBA Subcommittee that a significant fine of up to $1 million (which may be considered penal in nature) could be imposed without the protection of the court system as would be afforded in proceedings under the *Provincial Offences Act* (Ontario). While one member of the OBA Subcommittee would support giving the Commission authority to levy administrative fines up to a lower maximum amount, most members would not be in favour of granting the Commission authority to levy fines except on a non-discretionary basis (for example, to impose automatic late filing fees).

Disgorgement of Profits: We agree that it may be appropriate for a person who has contravened Ontario securities law to be the subject of a profit disgorgement order. However, we believe that such order should only issue after conviction under the *Provincial Offences Act* (Ontario) (as is the case for conviction under the insider trading provisions of section 76 of the Act) or under the *Criminal Code*. As with a penal fine, an order for the disgorgement of profit may be characterized as "imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity" (*R. v. Wigglesworth* as reproduced in note 288 of the Report).

84. Reduction in the period for filing insider reports once SEDI is fully operational: We recognize the desirability of accelerated reporting by insiders, especially in light of the new U.S. reporting requirements under the *Sarbanes-Oxley Act of 2002*. We note, however, that with respect to certain transactions, it may not be practicable for insiders (or reporting issuers filing on their behalf) to meet an accelerated reporting deadline. For example, option grants are often not communicated to insiders on the day of the grant, and for some issuers with a large number of insiders (such as a financial institution with a large number of "nominal" insiders), a large number of individual insiders will often receive option grants on the same day. Accordingly, we suggest that it would be appropriate for accelerated reporting to apply only with respect to trades initiated by insiders themselves.

We appreciate the opportunity to comment on the draft report. If you have any questions, please do not hesitate to contact Richard Lococo at 416-926-6620 (richard_lococo@manulife.com), Philippe Tardif at 416-307-4085 (ptardif@langmichener.ca) or Tim Baikie at 416-995-7844 (tbaikie@abanet.org).

Yours truly,

Securities Subcommittee
Business Law Section
Ontario Bar Association

Appendix

OBA SECURITIES SUBCOMMITTEE

Members:

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