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Sent By Email

Ontario Securities Commission
Cadillac Fairview Tower
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Attention: John Stevenson, Secretary

Dear Mr. Stevenson:

Proposed OSC Policy 51-604 – *Defence for Misrepresentations in Forward-Looking Information*

We are writing to provide comments on proposed OSC Policy 51-604 *Defence for Misrepresentations in Forward-Looking Information* (the "Policy"). We are making this submission on behalf of Alcan Inc., BCE Inc., the Canadian Bankers' Association ("CBA"), EnCana Corporation, Manulife Financial, Power Corporation of Canada, Royal Bank of Canada and TransCanada Corporation. These companies (the "Companies") (other than the CBA) all have a significant market capitalization and operate in Ontario, across Canada and globally and include the communications, financial services, media, natural resource, oil and gas and metals sectors. The CBA represents Canada's banking industry and it goes without saying that Canadian banks also have significant market capitalizations and operate in Ontario.

These issuers have now been subject to the new civil liability regime for over six months and are therefore well-placed to evaluate the extent to which the Policy addresses the interpretive issues arising out of the new provisions and to suggest further clarification in certain areas.

By way of introduction, we are generally in agreement with the approach taken by the OSC in the Policy to the interpretation of the elements of the defence for misrepresentations in forward-looking information ("FLI") (the "safe harbour"). In particular, we agree with the Policy's recognition of the policy objective underlying the safe harbour– namely, the facilitation of responsible and balanced disclosure about an issuer's anticipated future prospects. We further agree with the manner in which this objective is expanded upon in section 2.2 of the Policy, entitled "Animating Principles",

which focuses upon meeting the policy objective of the safe harbour of ensuring sufficient disclosure to investors, while preserving clarity of presentation and simplicity of language. We agree with the OSC that the interpretation of the safe harbour should be consistent with these principles and that they dictate a pragmatic approach to the defence.

While we believe the proposed Policy provides some much needed clarification on certain key elements of the defence, we have identified certain areas which remain unclear. We would therefore respectfully ask the OSC to provide further clarification in the Policy in relation to these additional issues, which are discussed in detail below. In order to assist the OSC, we enclose a blackline of the Policy that reflects some of the changes that we would propose be made in order to provide this additional clarification.

Harmonization of U.S. and Ontario Practice under Safe Harbour

First, as a general matter, we would welcome a statement in the Introduction to the Policy by the OSC to the effect that issuers may usefully look to practice in the U.S., which has had a civil liability regime in connection with secondary market disclosure for some years, for guidance in complying with the safe harbour. In our view, there is a sufficient degree of similarity between the policy objectives and the wording of the Ontario and the U.S. safe harbour provisions such that reference to the more established U.S. practice and jurisprudence would be of considerable assistance to issuers in determining how best to comply with Ontario's new regime.

It is of particular importance to interlisted issuers that there be as much harmonization as possible between the approaches adopted in Ontario and the U.S., given that many of these issuers will seek to avail themselves of the protection of the safe harbour in their corporate disclosure on both sides of the border. Promoting a consistent approach in both jurisdictions is desirable as it minimizes the need to issue disclosure in one jurisdiction that differs in form and substance from the disclosure furnished in the other jurisdiction. Drawing on the experience developed in the U.S. since the U.S. safe harbour provisions were enacted in the Private Securities Litigation Reform Act of 1995 will also serve to avoid unnecessary litigation that would otherwise simply revisit issues that are the subject of accepted practice in the U.S.

We would therefore encourage the OSC to confirm that the approach to be taken in order to comply with the safe harbour in Ontario is intended to be consistent with the approach taken in the U.S.

Incorporation by Reference of Material Risk Factors and Assumptions

We agree with the contextual approach taken in the Policy to the requirement for the cautionary language accompanying FLI to be "proximate" to the FLI and we welcome the OSC's guidance on this issue.

We note, however, that the Policy currently does not provide any guidance as to whether or when it is permissible to incorporate by reference into a document a more lengthy discussion of the material factors that could cause actual results to differ materially from a conclusion ("risk factors") and the material factors and assumptions underlying the FLI ("underlying factors and assumptions') that are fully set out in another document. This practice is prevalent in both Canada and the U.S. in current secondary market disclosure, in the context of shorter documents such as press releases, slide presentations and interim MD&A. Clarification of this point by the OSC in the Policy is therefore essential in order to ensure that issuers who follow current practice do not have to be concerned that they may be subsequently disentitled to rely upon the safe harbour because incorporation by reference is not viewed as satisfying the safe harbour disclosure requirements.

Under section 138.4(9.1) of the *Securities Act*, it is permissible in connection with oral statements containing FLI to identify that FLI will be provided and to make reference to another document containing a full discussion of the risk factors and the underlying factors and assumptions. The Policy recognizes in section 3.2 that this flexible approach to disclosure in oral statements is intended to address the fact that it would be unwieldy to require full disclosure of all risk factors and underlying factors and assumptions in the context of an oral statement. By contrast, the provisions relating to written disclosure are silent with respect to the ability for issuers to adopt a similar practice in the context of shorter documents such as press releases, slide presentations and interim MD&A, which, like oral statements, do not necessarily lend themselves to full discussion of the risk factors and underlying factors and assumptions.

The Legislature's silence with respect to incorporation by reference in the context of documents could be interpreted by a court as deliberate, when viewed in juxtaposition to the express authorization of this practice in connection with oral statements. Such a conclusion would, however, be contrary to current practice in Canada and the U.S., and without justification in the absence of any compelling policy basis to limit the practice of incorporation by reference to oral statements. Requiring issuers to provide full disclosure of all risk factors and underlying factors and assumptions in each and every press release issued (for example) would be unwieldy and would not materially assist in achieving the policy objectives of the safe harbour – namely, preserving clarity and simplicity of language while providing disclosure that is sufficiently informative to the investor.

Permitting shorter documents, such as news releases and interim MD&A, to provide a brief synopsis of the underlying factors and assumptions (together with relevant risk factors) and then to incorporate by reference a more detailed discussion of risk factors and underlying factors and assumptions contained in another document such as an AIF or annual MD&A, would be consistent with the treatment of the safe harbour in relation to oral statements. Moreover, the *Securities Act* currently permits incorporation by reference of the required disclosure in the primary market in the context of short-form

prospectuses – to which liability for misrepresentation could also attach – which supports its application in the secondary market as well. Furthermore, permitting incorporation by reference would not impose a burden on investors because the documents containing the full disclosure required under the safe harbour would be readily available to investors in the same way that they are available in relation to a short-form prospectus, or an oral statement.

Adopting this approach would also be consistent with U.S. practice and jurisprudence. As outlined in the memorandum from Shearman & Sterling LLP that is attached to these submissions, we draw the OSC's attention to the well-developed practice among senior issuers in the U.S. of using incorporation by reference of cautionary statements and risk factors from other documents to satisfy the requirements of the analogous U.S. safe harbour provisions. Furthermore, over the last decade, the vast majority of U.S. courts that have considered the issue have sanctioned the practice of incorporation by reference in the context of shorter disclosure documents. An express recognition in the Policy of the acceptability of this practice in Ontario would avoid the necessity for issuers in Ontario to clarify this issue through years of costly and time-consuming litigation, as has occurred in the U.S.

We recognize that issuers will have to exercise a degree of independent judgment in determining when incorporation by reference will satisfy the requirement under the safe harbour to provide adequate disclosure to investors. We further recognize that incorporation by reference should only be acceptable to the extent that the full disclosure in the more lengthy document to which the shorter document refers is itself sufficient to satisfy the requirements of the safe harbour. Within these parameters, we would urge the OSC to make clear that incorporation by reference is generally an acceptable approach in shorter disclosure documents in the interests of preserving clarity and readability in corporate disclosure, for the benefit of both issuers and investors.

Meaning of "Material Factors or Assumptions"

We welcome the guidance that the OSC has provided in sections 2.4 and 2.5 of the Policy with respect to the interpretation of the requirement for issuers to disclose the material risk factors and of the "relevance" and "materiality" aspect of the requirement for underlying factors or assumptions to be disclosed. As explained below, however, we submit that there is a residual lack of clarity with respect to important concepts found in these provisions.

Based on the language of the safe harbour provisions, we interpret the safe harbour disclosure requirements to involve two components. The interpretation of the first of these components is somewhat less problematic than the second. The first component, which is also found in the U.S. safe harbour provisions, is a requirement to disclose risk

factors, which we view as requiring a disclosure of external and internal risks to the issuer's business that could cause a particular forecast, projection or conclusion not to come true. The second component, which is not present in the U.S. safe harbour provisions, is a requirement to disclose "material factors or assumptions" underlying the forecast, projection or conclusion.

We submit that there remains a lack of clarity with respect to the interpretation of the second component – namely, the requirement to disclose "material factors or assumptions" underlying the forecast, projection or conclusion. In particular, it would be helpful if the OSC provided guidance on the difference between the concept of a "material factor" and a "material assumption". This is especially important since neither term is present in the U.S. safe harbour, with the result that one cannot look to U.S. cases or practice for guidance.

In this regard, we do not find the scope of the requirement to disclose "material factors" underlying the FLI to be clear. It appears as if this requirement is intended to be different from the requirement to disclose risk factors and from the requirement to disclose material assumptions, based on ordinary statutory interpretation principles which would require each of these terms to be given independent meaning. We would assume that the requirement to disclose "material factors" is intended to require disclosure of historical or established facts with respect to the issuer's manner of carrying on business that were taken into account in developing the FLI. However, it would be very helpful if the OSC could confirm that it shares this interpretation, and that this interpretation captures the full scope of the requirement. Again, this is an area in which issuers will not be able to draw upon U.S. practice for guidance.

We would therefore encourage the OSC to provide additional guidance with respect to the interpretation of the terms "factors" and "assumptions" and with respect to the expectations of issuers in relation to this type of disclosure. Such clarification would assist issuers in making every effort to comply with the safe harbour and in avoiding an after-the-fact determination that their disclosure was inadequate because of a failure to appreciate the scope of the disclosure required under the concept of "material factors or assumptions."

Harmonization of the Policy with NP 51-201

Finally, we submit that the OSC should clarify the manner in which the Policy is intended to fit with the provisions of NP 51-201, which also deals with disclosure related to FLI.

Section 5.5 of NP 51-201 deals specifically with disclosure in connection with earnings guidance, which is now subsumed under the concept of FLI as defined in the *Securities Act* and as explained in the Policy. While there are some similarities between the language of section 5.5 of NP 51-201 and the safe harbour provisions in the *Securities*

Act, as interpreted in the Policy, there are sufficient differences to warrant clarification by the OSC that the express provisions of the *Securities Act*, together with the Policy, are intended to govern the safe harbour and that section 5.5 of NP 51-201 has now been superseded.

For example, we note that section 5.5 of NP 51-201 makes reference to the fact that disclosure might include a sensitivity analysis (section 5.5(3)), and refers to CSA Notice 53-302 - Proposal for Statutory Civil Remedy for Investors in the Secondary Market and Response to the Proposed Change to the Definitions of "Material Fact" and "Material Change." However, the safe harbour, as enacted, does not include the requirement for a sensitivity analysis that was found in early drafts of the legislation. The Appendix to the CSA Notice indicates that the requirement for a sensitivity analysis was eliminated from later drafts of the legislation in response to a comment. We submit that it is important that the OSC's policies in the area of disclosure standards address the wording of the legislation that was ultimately adopted.

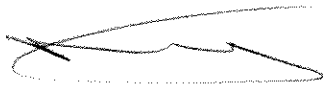
In the absence of clarification from the OSC with respect to the continuing relevance of NP 51-201, we are concerned that the degree to which issuers should be referring to NP 51-201 is unclear and a source of potential confusion. We therefore submit that the OSC should expressly indicate that the Policy supersedes NP 51-201 in relation to the principles applicable to the disclosure of FLI that are necessary in order to satisfy the defence

Matters of Agreement

In closing, we note that we are in agreement with the approach taken in the Policy to the interpretation of the requirement to demonstrate a "reasonable basis" for the particular conclusion, forecast or projection set out in the FLI. In addition, we agree with the treatment of oral statements, particularly the OSC's confirmation that the required disclosure can be provided by a lead speaker on behalf of subsequent speakers. Finally, we are in agreement with the OSC's view that there is no ongoing duty to update FLI beyond existing duties imposed under Ontario securities law or otherwise.

We trust that you will find our submission of assistance. We would be pleased to discuss our submission with you at your convenience if you have any questions or comments.

Yours very truly,



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