March 30, 2007

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission

c/o Ontario Securities Commission
20 Queen Street West, Suite 1903, Box 55
Toronto, Ontario M5H 3S8

Attention: Heidi Franken
Co-Chair, CSA Prospectus Systems Committee

Dear Sirs and Mesdames:

Re: Proposed National Instrument 41-101 *General Prospectus Requirements*

This submission is made by the Securities Law Subcommittee of the Business Law Section of the Ontario Bar Association (the "OBA Subcommittee") in reply to the request for comments published December 22, 2006 on proposed National Instrument 41-101 ("NI 41-101").

Our comments are presented in the following order: general comments, comments in answer to specific requests contained in the request for comments (and which are reproduced below in italics and numbered to correspond to the notice), and additional comments on certain aspects of NI 41-101.

General Comment

We are supportive of the Canadian Securities Administrators' harmonization initiative relating to prospectus requirements. We are concerned however that the exclusion of Ontario from the application of certain provisions of NI 41-101 will result in significant differences between the requirements applicable to prospectuses filed in Ontario and those filed elsewhere. In this respect, the introduction of NI 41-101 may result in a less harmonized regulatory scheme than is currently the case.

While we understand that the *Securities Act* (Ontario) may not at this time contain rule making authority to permit uniform application of NI 41-101, we would hope that the members of the CSA will seek to harmonize their rule making authority to

ensure that CSA projects requiring the adoption of harmonized rules can be implemented uniformly across Canada. In particular, we urge the Ontario Securities Commission to move as quickly as possible to obtain the rule making authority needed to allow it to eliminate the Ontario exceptions.

Specific Comments

The following are our comments on certain of the specific questions set out in the request for comments, which are repeated below (*in italics*).

Certificate requirements

1. (a) We believe a person or company that controls the issuer or a significant business has the best information about the issuer or significant business. Do you agree?

We do not agree with the above proposition. We are of the view that the persons who are responsible for the management of a business are those that "have the best information" about that business. Although in certain circumstances the shareholders who control the business are also the managers of that business, that is not necessarily the case.

We submit that the CSA's proposition is inconsistent with the obligations imposed on directors and officers of a corporation under the *Canada Business Corporations Act*. The implication of the CSA's proposition is that control persons have better information about an issuer than management, which is inconsistent with our views.

(b)Such a person or company who also receives proceeds from the distribution should be liable for any misrepresentations in the prospectus about the issuer or significant business. Are the definitions of substantial beneficiary of the offering and significant business broad enough to cover this class of persons and companies?

Canadian securities legislation generally imposes liability for misrepresentations in a prospectus on persons who directly receive proceeds from the distribution of securities. This approach is reflected in section 130 of the *Securities Act* (Ontario) which codifies a cause of action against "a selling security holder on whose behalf the distribution is made".

In addition, securities regulatory authorities have in certain circumstances effectively imposed civil liability on parties that indirectly receive distribution proceeds. In particular, National Policy 41-201 - *Income Trusts and Other Indirect Offerings* states that "a vendor that receives, directly or indirectly, a significant portion of the offering proceeds as consideration for services or property in

connection with the founding or organizing of the business of an income trust issuer, is a promoter and should sign the prospectus in that capacity." Even though this statement arguably goes beyond what may be supported by the current legislative definition of "promoter", securities authorities have relied on subsection 58(6) of the *Securities Act* (Ontario) and equivalent provisions to require a promoter's certificate in these circumstance.

The proposal in NI 41-101 is to expand the class of persons subject to liability in respect of a prospectus to include "substantial beneficiaries of the offering". The definition of the term "substantial beneficiary of the offering" in NI 41-101 may be summarized to mean any person or company that (a) controls the issuer or significant business of the issuer or holds, held or will hold voting securities carrying 20% or more of the voting rights of the issuer, and (b) together with its affiliates and associates, is reasonably expected to receive, directly or indirectly, 20% or more of the proceeds of the offering of securities under the prospectus, whether in consideration for property or services, repayment of debt or otherwise, other than by virtue of its ownership of voting securities of the issuer.

We are concerned with the breadth of paragraph (b) of the definition, particularly the possibility that the indirect receipt of proceeds of the offering (regardless of the relationship between the "substantial beneficiary" and the issuer or the purchasers of the securities) could result in that person being subject to liability under a prospectus. Two examples are illustrative: the first, a person that some years before the date of the prospectus divested of a business to the issuer and received share consideration (thereby holding 20% or more of the equity of the issuer) and non share consideration (e.g. cash or promissory notes) and the second, a controlling shareholder who at a similar point in time lends money to an issuer. As cash resources are generally fungible, each may in certain circumstances be characterized as being an indirect recipient of the proceeds of the offering (whether or not amounts due to such shareholder are repaid from the proceeds) notwithstanding that the person may neither be consulted by the issuer in connection with the offering nor have an opportunity to influence the disclosure in the prospectus.

We submit that the inclusion of "substantial beneficiaries of the offering" as a new class of persons required to sign a certificate should be re-thought. We believe that this inclusion, as currently drafted, will result in uncertainty for issuers (and possibly impose additional costs on issuers) who may now be required to obtain consents or acknowledgements from third parties (e.g. the vendor of a business, the controlling shareholder who acts as a lender) to contemplate the possibility that those third parties may in future be required to accept liability for distribution of securities by the issuer.

We also note the inclusion of a "control person" as a class of person which may be required (if requested by the regulator) to sign a certificate to the prospectus (see

section 5.14 of NI 41-101). As would be the case with "substantial beneficiaries of the offering", the inclusion of "control persons" could result in the imposition of liability on persons who have no ability to influence the disclosure of the issuer and do not benefit from an offering in any manner that is different from security holders of the issuer generally.

We agree with the CSA that current requirements relating to certification of prospectuses are problematic and need to be revised. However, in our view, such revisions should be made as part of an overall review of the liability provisions relating to prospectuses rather than in isolation.

Material Contracts

5. Should each type of contract listed in subsection 9.1(1) of Proposed NI 41-101 be excluded from the exemption to file contracts entered into in the ordinary course of business? Are there other types of contracts not listed that should be excluded from the exemption to file contracts entered into in the ordinary course of business? If so, please identify the type of contract and explain why they should be excluded.

Paragraph 9.1 (1)(a) of NI 41-101 may, in practice, require the filing of "any contract to which directors, officers… are parties…". We note that, as a result of the inclusion of the term "officer", an issuer will be required to file employment contracts for a significant number of individuals (unless the issuer can readily conclude that the contracts are not material). These contracts are likely to include contracts which are not required to be disclosed in an information circular under NI 51-102-F6 as the requirement therein is limited to "Named Executive Officers". We submit that the list of contracts with officers which are not considered to be in the ordinary course of business should be limited to contracts with "Named Executive Officers".

6. "Is the list of provisions that are "necessary to understanding the contract" set out in subsection 9.1(2) of Proposed NI 41-101 appropriate? If not, why not?"

NI 41-101 would allow issuers to omit certain portions of the material contract where an executive officer has reasonable grounds to believe that the omitted provisions do not contain information relating to the issuer or its securities "that would be necessary to understanding the contract" (and certain other conditions are satisfied). We are concerned that the terms prescribed as "necessary to understanding the contract" may not necessarily be material to the contract and would otherwise merit omission in accordance with subsection 9.2(a)(iii) of NI 41-101. We suggest that the CSA consider removing the prescriptive list in subsection 9.2(a)(iii) and providing guidance on this point in the Companion Policy.

Distribution of securities under a prospectus to an underwriter

9. Section 11.3 of Proposed NI 41-101 permits compensation options or warrants to be acquired by an underwriter under the prospectus where the securities underlying such compensation options or warrants are, in the aggregate, less than 5% of the number or principal amount of the securities distributed under the prospectus. Is 5% an appropriate limit?

We question whether the introduction of a limit on the number of securities issued as compensation to underwriters and which may be qualified under a prospectus is necessary except perhaps in circumstances where the offered securities will not be traded on a recognized market that imposes appropriate standards of trading oversight. We would suggest that the issue of compensation options would be more appropriately considered in the context of regulation of securities dealers generally by their self-regulatory organization.

Waiting Period

10. Is the minimum waiting period necessary to ensure investors receive a preliminary prospectus and have sufficient time to reflect on the disclosure and the preliminary prospectus before making an investment decision?

We support the elimination of a minimum "waiting period" in NI 41-101. We do not believe that a mandatory "waiting period" to ensure "time to reflect on the disclosure" is consistent with the general approach to the regulation of sales of securities in Canada. We submit that the 48-hour right of withdrawal (following confirmation of a purchase of securities qualified by prospectus) provides investors sufficient time period to consider their investment decision. Moreover, we note that the waiting period for securities distributed under a short-form prospectus has been eliminated.

Amendments to a preliminary or final prospectus

11. We are soliciting your comments on whether we should instead be requiring an amendment based on the continued accuracy of the information in the prospectus. What should be the appropriate triggers for an obligation to amend a preliminary prospectus or final prospectus? Should the obligation to amend a preliminary prospectus or a prospectus be determined based on a continued accuracy of the disclosure in the prospectus, rather than changes in the business, operations or capital of the issuer?

We interpret the request for comment as focusing on circumstances which could result in a prospectus containing a misrepresentation at some time during the period of distribution (notwithstanding that it did not contain such a misrepresentation as

of the date of filing) even though no material change occurred in the business, operations or capital of the issuer.

We believe that the requirements relating to obligations to amend prospectus need to be considered in the context of liability for a misrepresentation in a prospectus. Whether liability should arise if a prospectus is found to contain a misrepresentation at any time during the period of distribution or only if a prospectus contains a misrepresentation at the date of the prospectus is an issue which is central to the possible imposition of obligations to amend a prospectus during the period of distribution. We believe that as in the case of prospectus certification requirements, the issue of prospectus amendment "triggers" should be considered as part of an overall review of the liability provisions relating to prospectuses rather than in isolation.

Bona fide estimate of range of offering price for number of securities being distributed

12. We are proposing to require disclosure in the preliminary prospectus of a bona fide estimate of the range within which the offering price or the number of securities being distributed is expected to be set. We are also considering adding a requirement to provide disclosure throughout a preliminary prospectus based on the mid-point of the disclosed offering price range or number of securities. This would require that the consolidated capitalization table, earnings coverage ratios and any pro forma financial information in the preliminary prospectus be calculated and disclosed using the mid-point of the offering range rather than being bulleted. Would such a requirement be appropriate?

Subject to our comments in the next paragraph, we do not object to the presentation of the suggested information in respect of an initial public offering. However, price range information in respect of an additional offering should not be required to be disclosed as the current market price should provide investors with sufficient information relating to possible pricing. We believe that this approach is consistent with the U.S. regime i.e. the requirement to disclose a price range in the preliminary prospectus applies to an IPO but not an additional offering.

We also note that in connection with such a requirement for IPOs, consideration will need to be given to the procedural consequences of a final offering price that falls outside the range indicated in the preliminary prospectus. The corresponding U.S. rules may be instructive, although we understand that they have sometimes been problematic in their application. In any case, we suggest that the requirements make it clear that where the offering price is less than disclosed range, such event in and of itself may not necessarily require an amendment and recirculation of the preliminary prospectus prior to filing a final prospectus (absent a material change to the proposed uses of proceeds).

Other Comments

Investment Fund Issues – Harmonizing across Canada

We support in principle the CSA's initiative in adding a new form for investment funds. We note however that different types of investment funds (exchange traded funds, labour sponsored funds, scholarship plans and non-redeemable funds) have distinct characteristics which may not lend themselves to a common form requirement, absent comprehensive instructions as to when certain items are applicable or not with regard to specific types of securities.

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The above is respectfully submitted by the Subcommittee.

The members of the Subcommittee are listed in the attached appendix. Please note that not all of the members of the 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 Subcommittee.

Thank you for this opportunity to comment. If you have any questions, please direct them to Philippe Tardif (416-367-6060, ptardif@blgcanada.com), Susan McCallum (416-483-6687, simccallum200650@aol.com) or Richard Lococo (416-926-6620, richard_lococo@manulife.com).

Yours truly,

Securities Law Subcommittee
Business Law Section
Ontario Bar Association

c.c. Alberta Securities Commission
Attention: Patricia Leeson
Co-Chair, CSA Prospectus Systems Committee

Autorité des marchés financiers
Attention: Anne-Marie Beaudoin
Directrice du secretariat

Appendix

OBA SECURITIES LAW SUBCOMMITTEE

Members:

Richard A. Lococo (Chair), *Manulife Financial*
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