OGILVY RENAULT

LLP / S.E.N.C.R.L., s.r.l.

Direct Dial: (416) 216-2045
Direct Fax: (416) 216-3930
tkernahan@ogilvyrenault.com

SENT BY E-MAIL/ORIGINAL BY MAIL

Toronto, April 4, 2007

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

Patricia Leeson
Co-Chair of the CSA's Prospectus Systems Committee
Alberta Securities Commission
4th Floor
300-5th Avenue S.W.
Calgary, Alberta T2P 3C4
patricia.leeson@seccom.ab.ca

Anne-Marie Beaudoin
Directrice du secretariat
Autorité des marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246, 22e étage
Montréal, Québec H4Z 1G3
consultation-en-cours@autorite.qc.ca

Heidi Franken
Co-Chair of the CSA's Prospectus Systems Committee
Ontario Securities Commission
20 Queen Street W.
Suite 1903, Box 55
Toronto, Ontario M5H 3S8
hfranken@osc.gov.on.ca

Dear Mesdames:

**RE: Comments on Proposed National Instrument 41-101 – *General Prospectus Requirements* ("Proposed NI 41-101") and Companion Policy 41-101CP – *General Prospectus Requirements* ("Proposed CP 41-101) and Related Amendments**

This letter is submitted in response to the request for comments made by the Canadian Securities Administrators ("CSA") on the above proposed amendments and is being submitted by the

Securities Law Group of Ogilvy Renault LLP. We appreciate the opportunity to comment on these important proposals.

Our comments are as follows:

1. ***Harmonization of General Prospectus Requirements***

We welcome a harmonized instrument setting out the general prospectus requirements applicable across Canada. We are, however, disappointed that complete harmonization has not been fully achieved in Proposed NI 41-101 as a result of Ontario not participating in certain requirements.

The lack of harmonization in securities legislation in general and in particular, the certification requirements for prospectuses in Proposed NI 41-101 undermines the MRRS system and may result in investors in different jurisdictions having varying rights and opportunities. This is not an enviable result. For example, where an issuer files a prospectus under National Policy 43-201 *Mutual Reliance Review System for Prospectuses and Annual Information Forms* and Ontario is designated as its principal regulator, Ontario is directed by National Policy 43-201 to review the prospectus in accordance with its local requirements. Depending on the circumstances of the offering, it may not require enhanced certification as set out in Proposed NI 41-101. Other jurisdictions in light of the enhanced certification requirements will, in the same circumstances, require such certification. If the enhanced certification provided is addressed to investors in provinces and territories other than Ontario, investors in Ontario will not be provided with the same rights. In addition, the lack of uniform liability may result in Ontario being a favoured forum for offerings to avoid the enhanced certification requirements with the result that investors in other jurisdictions will not be provided with similar investment opportunities other than through the secondary market. We would urge the adoption of uniform rules to avoid such anomalies arising.

2. ***Certification***

Subsection 5.13(5) requires that a prospectus contain a certificate signed by each "substantial beneficiary of the offering". A "substantial beneficiary of the offering" is defined in subsection 5.13(2) to be any person or company, acting alone or in concert with others, that, directly or indirectly, holds or held within the year preceding the prospectus a) control of the issuer or a significant business of the issuer; or b) 20% or more of the voting securities of the issuer; and who is expected to receive, directly or indirectly, 20% or more of the proceeds of the offering of securities under the prospectus, whether as consideration for property or services, payment of debt or otherwise, other than by virtue of its ownership of voting securities of the issuer. The basis of requiring a substantial beneficiary of the offering to certify the contents of the prospectus is the CSA's views that people in such a position have knowledge of the business of the issuer and should take responsibility for any misrepresentations contained in the prospectus.

While we recognize the need to address the certification issues arising in income trust offerings and in spin-offs of businesses by an initial public offering both as described in the Request for

Comments, we are concerned that the definition of "substantial beneficiaries of the offering" may be too broad and will inadvertently require certification by parties who enter into arm's length transactions with the issuers and who may not be invested with particular knowledge of the affairs of the issuer as of the date of the offering.

Subsection 2.6(3) of the Proposed Companion Policy states that the first part of the definition of substantial beneficiary, namely the requirement to control a significant business or own 20% or more of the voting securities of the issuer, is intended to preclude the inclusion of *bona fide* arms-length commercial lenders to an issuer. However, one can envision other circumstances, including a *bona fide* arms-length commercial vendor of assets to an issuer being required to certify a prospectus by virtue of the operation of the broad definition of beneficiary who does not have knowledge of the whole business of the issuer. For example, a vendor who enters into an agreement to sell certain assets to an issuer within the year prior to an offering could potentially have held control of what is now a significant business of the issuer. If such vendor has negotiated a deferred purchase price, could the rule be interpreted to mean that such vendor was being paid "indirectly" from the proceeds of the offer? That vendor would not, however, be involved in the day-to-day business of the issuer and, as such, should not be required to take responsibility for the contents of the whole prospectus to third party investors. The vendor will have given negotiated representations and warranties in the original agreement and will be responsible to the issuer if such representations and warranties are not correct in respect of the business assets in question.

While the Proposed Companion Policy states that an application for relief from the certification requirements can be made, we believe it is more appropriate to be specific in the rules and state the circumstances which the certification is required to address, namely non arms-length transactions which result in a vendor receiving direct profits from the offering. We would suggest, in the alternative, amending the definitions contained in subsection 5.4(1) *Corporate Issuer* and subsection 5.5(2) *Trust Issuer* to delineate the circumstances in connection with an income trust prospectus offering and a spin-off of a business by way of initial public offering, rather than inserting a broad new category of substantial beneficiary. In the alternative, if the certification by a substantial beneficiary of the offering is to remain in the final version of Proposed NI 44-101, we would suggest that the guidance set out in subsection 2.6 of the Proposed Companion Policy provide further guidance, in addition to that of *bona fide* arms-length commercial lenders, on its application to arm's length transactions. This would be in line with the rationale behind Rule 61-501 (Ontario) and Regulation G-27 (Québec) which address related party transactions. In addition, if the certification requirement is included in the final rule, we would suggest increasing the threshold from 20% of the proceeds to 25% of the expected market capitalization of the issuer.

As a general comment, we are of the view that the CSA should consider the appropriateness of amending the primary offering civil liability regime which is based upon certification to more closely reflect the secondary market civil liability regime recently introduced in Ontario and certain other provinces for continuous disclosure misrepresentations. The CSA should consider the appropriateness of joint and several liability in the primary market to a proportionate liability

scheme especially given the fact that the substantial beneficiary certification is tied to receiving a percentage of the proceeds of the offering. In the US, the civil liability regime applies regardless of whether the purchase is made in the primary or secondary market.

3. ***Material Contracts***

Part 9 of the Proposed NI 41-101 requires an issuer to file with its preliminary long-form prospectus any material contract, other than a contract entered into in "the ordinary course of business". Subsection 9.1(1) sets out certain contracts which will be considered not to be contracts entered into in the ordinary course of business. The list of contracts is broad and includes credit agreements. We are of the view that including all material credit agreements will result in many contracts being filed which will not provide a corresponding benefit to securityholders. Corresponding changes are being proposed to Part 12 of National Instrument 51-102 – *Continuous Disclosure*.

As a starting point, we are of the view that contracts are generally negotiated in the context of particular circumstances (i.e. between two or more commercial parties) and the representations and warranties are specifically negotiated in that context and are not disclosure documents that can be read by an investor in isolation. An investor should be receiving the necessary information regarding an issuer's material contracts through the requirements to make true, plain and full disclosure in its prospectus regarding such contracts.

The term "ordinary course of business" is generally understood to mean a contract of the type that may generally be entered into by a particular business or industry from time to time. In section 3.6(1) of the Proposed Companion Policy it is stated that whether a contract is entered into in the ordinary course of business is a question of fact which must be considered in the context of the issuer's business and industry. While a credit agreement may be in respect of a material amount of debt, it may also be a standard contract for the business carried on by an issuer. It would not, in the absence of unusual provisions, normally be filed under NI 51-102 as it would be made in the ordinary course. To now consider any credit agreements of a material amount to be out of the ordinary course of business and require them to be filed may represent significant work for issuers in meeting the disclosure obligations, including the necessity to redact certain information contained in the agreement, without a corresponding benefit to shareholders.

Subsection 9.2 provides that certain provisions of the contract may be omitted or redacted if an executive officer has reasonable grounds to believe the disclosure would be seriously prejudicial to the interests of the issuer and the redacted provisions do not contain information relating to the issuer or its securities that would be "necessary to understanding the contract". You have requested comments on whether the provisions that are delineated in subsection 9.1(2) as being "necessary to understand the contract" are appropriate. We note that the definition is non-definitive and therefore creates uncertainty for an issuer as to the meaning of the term. Investors could argue that in order to have a full understanding of the contract, no provisions could be

omitted. Therefore, we would suggest that the definition in subsection 9.1(2) be amended to delete the words "include the following" and replace those words with the meaning "means".

With respect to the appropriateness of the delineated provisions, we note by way of comparison that the required line item for disclosure of material contracts set out that in item 27.1 of Form 41-101 F1 provides that the particulars of contracts should include "the dates of, parties to, considerations provided for in, and general nature of, the contracts". This is the disclosure that the CSA has deemed appropriate for investors in an initial public offering to rely upon with respect to material contracts. However, for the purposes of redaction, the delineated provisions the CSA considers necessary to "understand the contract" are broader and, in some circumstances, may result in the provision of information which may be seriously prejudicial to the interests of the issuer, or which could violate confidentiality provisions. Again we would stress that the more meaningful disclosure on material contracts for securityholders should come from the disclosure provided by the issuer in the prospectus.

### 4. *Amendments to a Preliminary or Final Prospectus*

The *Securities Act* (Ontario) provides that a preliminary prospectus must be amended when there has been a material adverse change. An amendment to a final prospectus must be filed upon the occurrence of a material change. You have requested our comments on whether an amendment should be based upon the "continued accuracy" of the information in the prospectus. We are of the view that the appropriate triggers for an obligation to amend a preliminary or final prospectus are appropriately set out in the *Securities Act* (Ontario). An amendment based on continued accuracy of the information in the prospectus is an inappropriate trigger in that it has no criteria of materiality and will result in unnecessary work and updating for issuers without benefit to securityholders.

### 5. *Distribution of Warrants under a Prospectus to an Underwriter*

Proposed NI 41-101 permits a compensation option or warrant to an underwriter where securities which are the subject of such option or warrant is less than 5% of the securities distributed under the prospectus. We note that the TSX Venture Rules (section 1.9 of Policy 4.2 – *Prospectus Offerings*) provide for a limit of up to 25% and that the market practice is to allow up to 10%. We are of the view that the limit should be extended to 10% for such issuers to facilitate fund raising for smaller issuers.

### 6. *Bona Fide Estimate of Range of Offering Price*

We are of the view that requiring disclosure in the preliminary prospectus of a bona fide estimate of the range within which the offering price is expected to be set would not be appropriate in the case of smaller issuers in Canada as it (i) may effect the ultimate price at which the securities would go to market, and (ii) adversely impact the valuation of such issuers if pricing of the deal falls below such range.

In the event that the CSA decides to require disclosure of a price range in the preliminary prospectuses of certain or all issuers, we would suggest that the CSA consider the U.S. practice of only requiring such disclosure where a preliminary prospectus is disseminated to the public in a marketing campaign.

* * * * * *

This letter has been prepared by the Securities Law Group of Ogilvy Renault LLP. If you have any questions concerning these comments, please contact either Tracey Kernahan (direct line (416) 216-2045), by e-mail at tkernahan@ogilvyrenault.com or by fax at (416) 216-3930 or Christine Dubé (direct line (514) 847-4829), by e-mail at cdube@ogilvyrenault.com or by fax at (514)286-5474.

Yours very truly,

Ogilvy Renault LLP

OR/na