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BY FAX AND BY COURIER

Five Year Review Committee
c/o Purdy Crawford, Chair
Osler, Hoskin & Harcourt LLP
Barristers & Solicitors
Box 50, 1 First Canadian Place
Toronto, Ontario M5X 1B8

Dear Ladies and Gentlemen:

Draft Report of the Five Year Review Committee

We have had the opportunity to review the Draft Report (the "Draft Report") of the Five Year Review Committee (the "Committee") on the status of Ontario securities laws and we commend the Committee on its thorough and exhaustive work and thank it for the opportunity to respond to its views and recommendations, many of which we strongly support. While we believe that comments on many of the Committee's recommendations would best be made in the context of a specific proposal from the staff of the Commission made in response thereto, we welcome the opportunity to make the comments set out below. Capitalized terms used but not defined herein have the meanings given to them in the Draft Report.

Chapter 1 – Need for a Single Regulator

We strongly endorse the Committee's views that Canada requires a single securities regulator and that this is the most pressing securities regulation issue in Ontario and across Canada. We are of the view that the complexity of provincial regulation and the pace of change of securities laws in many jurisdictions, primarily those independently pursuing rule-making initiatives, have placed a heavy burden on issuers seeking to engage in multi-jurisdictional transactions (particularly through increased professional fees and other compliance costs and significant inefficiencies) and can result in the disparate treatment of issuers and investors in what is increasingly a national, or even global, marketplace rather than a provincial or regional one. We also support what we believe to be the Committee's implicit conclusion that

foreign issuers are becoming increasingly frustrated with the difficulty of doing business in what many of those issuers already perceive as a marginal market. It is therefore very much in the interests of Canadian investors and the Canadian economy to make Canadian capital markets as accessible, streamlined and efficient as possible.

We further agree with the Committee's comments that while governments should work toward the ultimate goal of creating a single regulator, efforts should be made in the meantime to harmonize securities laws and facilitate processes across the country. We are concerned that, particularly with the advent of rule-making power and the enthusiasm with which certain of the provincial regulators have embraced that power, securities laws are in fact moving farther apart rather than closer together. One need look no farther than the state of the prospectus exemption regimes in the various jurisdictions, which have evolved into a series of substantially and substantively different systems both from a policy and a technical perspective and are often difficult to reconcile, making national private placements a much more burdensome process than they have traditionally been – no small feat.

Chapter 2 – Globalization

We generally agree with the Committee's views as to the need to harmonize globally, particularly with the United States. We would urge, however, that any steps toward harmonization be taken cautiously and critically, balancing the need to demonstrate to issuers and investors both domestic and foreign that Canadian securities capital markets are properly regulated and appropriately disciplined with the need to avoid a "bandwagon" approach, particularly in areas where other regulators may have over-reacted to problems in their own capital markets.

We agree that it would significantly ease the burden on Canadian issuers seeking to raise capital internationally and foreign issuers seeking to access the Canadian markets, without jeopardizing the integrity of those markets, if financial presentation in accordance with Canadian GAAP or reconciliation to Canadian GAAP was not required, provided that the relevant financial statements were prepared in accordance with an acceptable set of accounting standards, such as U.S. GAAP or another internationally accepted accounting standard.

Finally, we support the Committee's views that in carrying out its mandate, the Commission should have specific regard to maintaining Canadian competitiveness in global capital markets and believe that harmonization with those markets, particularly the U.S. market, including harmonization of financial reporting standards, is critical to achieving that goal.

Chapter 3 - Functional Harmonization

While we do not disagree with the concept of functional regulation, we believe the far more pressing concern is the national harmonization of securities regulation and, hopefully, the creation of a single national regulator. We believe that province-by-province

efforts to achieve functional regulation may distract from, and may ultimately make more difficult, the process of national securities harmonization.

Chapter 5 – Structure of the Act

We agree with the Committee's view that the Act and accompanying body of regulations, rules and other supplementary materials should be streamlined with a view to (a) separating the fundamental aspects of the law from the detail and (b) ensuring that securities law can be approached in a coherent fashion and readily understood by market participants (including by eliminating inconsistency and redundancy between the Act, regulations and rules). We believe that this sort of "housekeeping" re-vamping of securities laws, without the making of substantive amendments, could reasonably be undertaken on an expedited timetable without waiting for resolution of the larger policy issues around the reformation and harmonization of securities laws generally.

Chapter 6 – Rulemaking

While we make no particular comment with respect to the Committee's views as to the need to streamline the rule-making process, we agree with the Committee's comments that the Commission should take a more focused approach to rule-making in order to deal with each specific area in a thorough and well thought through manner. We also believe that the Commission should be encouraged to provide more detailed updates as to the status of those initiatives, as occasionally draft instruments have been published for comment and then lay dormant for many months or years, causing confusion as to the Commission's policy views or intentions with respect to particular matters.

We agree that the Commission's power to issue blanket rulings should be reinstated to eliminate the inefficient use of financial and human resources in applying for and obtaining (or, from the Commission's perspective, considering and issuing) relief that has become routine. We would hope, however, that an appropriate level of focussed attention and thoughtfulness in the rule-making process would eliminate the need for a morass of blanket rulings that would work against efforts to streamline and rationalize Ontario securities laws.

We agree that the Commission should publish exemption orders granted in respect of rules, particularly given that so may of the important aspects of securities law, including matters that previously would have been enshrined in the Act or regulations, are now contained in the rules.

We believe that the Commission should be extremely cautious in determining whether to publish notice of exemptive relief applications not granted and the reasons for the refusal, bearing in mind in particular any potential prejudice that may result to the applicant or the subject transaction (where, for example, the failure to obtain relief either prevents an issuer from proceeding with a transaction or delays that transaction), particularly where the applicant is named or if the applicant or the transaction is otherwise identifiable. We do not believe that

other regulators, including the SEC, routinely publish their refusals to grant relief and are of the view that the form and scope of any such disclosure policy would have to be carefully considered before proceeding in this direction.

Chapter 8 – Registration

We agree with the Committee's recommendation that the registration requirement be amended such that registration will be required only where a person is "engaged in the business" of trading but we strongly agree that such a change should be made only if it can be made on a harmonious basis across the country.

We also strongly support the Committee's recommendation that Ontario's universal registration scheme be eliminated. We believe that universal registration has been largely ineffective in achieving goals relating to increased investor protection and that, consistent with the approach that we would hope the provincial regulators take in all areas of securities laws, national harmonization should be a top priority where no compelling reason to preserve unique features of any particular province's securities laws has been shown.

Chapter 10 – Continuous Disclosure

The Committee has endorsed the adoption of the CSA proposals on the creation of a civil liability regime for Ontario based largely on the Allen Report. Without commenting on whether civil liability for secondary market disclosures is generally appropriate, but recognizing that Canadian securities law seems to be moving inevitably in that direction, we reiterate the concerns we expressed in commenting on the interim draft of the Allen Report with respect to the basic tests for the imposition of liability and, in particular, the absence of a requirement for a finding of scienter comparable to the requirement of a 10-b5 action in the United States. If, as seems to be the case, some form of civil liability is determined to be appropriate, we would urge that further consideration be given to a form of liability based on 10-b5 concepts (with which, we note, the capital markets are quite familiar and to which many Canadian issuers are already subject) before moving to adopt the largely untested framework set forth in the Allen Report and seemingly favoured by the CSA.

Chapter 11 – The Closed System

We strongly agree with the Committee's views that the closed system has become grossly inefficient and complex and that the continuing divergence of regulatory approach in the various provinces is only serving to exacerbate the problem. We believe that, subject to a few amendments to Rule 45-501 that are urgently needed in Ontario, including the restoration of the private company exemption, the Commission should cease trying to develop and refine its own prospectus exemption and resale rules and should instead focus on harmonization and simplification.

Chapter 12 – Disclosure Standards

We agree with the Committee's recommendation that the timely disclosure provisions under the Act should not be amended to require disclosure of "material information" and with the reasons cited by the Committee in arriving at its recommendation. In particular, we are concerned that by requiring issuers to continuously provide material information, which would essentially require the continuous dissemination of prospectus-level disclosure, a significant burden would be imposed on issuers that would be very difficult to satisfy and which would be of even greater concern should proposals for statutory civil liability in respect of such disclosure be adopted. Further, we are not aware of any evidence that the barrage of information that would be disseminated to the marketplace as a result of a such change would be useful or beneficial to investors.

We agree with the Committee's recommendation that the existing materiality standards should be changed for all purposes to a "reasonable investor" standard. We believe that the "market impact" test may allow issuers to take too formulaic an approach in determining what is material. In fact, in practice, the reasonable investor standard is often put to issuers when advising them as to whether or not they have an obligation to disclose a particular change as a material change, in some instances because issuers have reporting obligations in jurisdictions which have adopted this standard, and in other instances because it is useful in moving issuers away from taking a purely mathematical approach to the issue. Further, we are of the view that the market impact test is subsumed in the reasonable investor standard and would inevitably serve as one important consideration in gauging whether or not information is material.

Chapter 13 – Selective Disclosure

We agree with the Committee's view that legislative change is not required in Ontario to address the issue of selective disclosure and its support for the CSA's policy statement and an increased emphasis on enforcement in this area. Existing laws in Ontario have long prohibited selective disclosure and we endorse the CSA's approach to reminding issuers and analysts of their obligations under these existing rules and providing guidance in respect of some of the more difficult areas of selective disclosure. We do, however, agree with the SEC's approach in providing a 24-hour safe harbour under Regulation FD for inadvertent selective disclosure. We would encourage giving further consideration to the creation of a similar legislative safe harbour in Ontario and across Canada.

Chapter 14 – Financial Statement Issues

We do not disagree with the Committee's recommendations with respect to the shortening of periods for the reporting of financial results and are generally of the view that the time frames adopted in Canada should be no less stringent that those adopted in the United States.

We support the Committee's views that steps must be taken with respect to prescribing certain requirements relating to the functioning and responsibilities of audit committees and that the Commission must move forward on the issue of auditor independence. We note the actions recently taken by the Chair of the Commission on the latter point and look forward to the opportunity to comment on a specific proposal from the Commission. We also agree with the Committee's recommendations that review of quarterly financial statements by an issuer's auditors be required and that press releases containing financial or earnings information be required to be filed on SEDAR. In response to the Committee's specific request for comments on whether there are any other categories of press releases that reporting issuer's should be required to file on SEDAR, we recommend that although, as noted above, there ought not to be a obligation on a reporting issuer's part to continuously report "material information", where a reporting issuer does, in fact, provide disclosure of material information to the market by way of press release, it ought to be obligated to file that press release on SEDAR.

Chapter 16 – Take-Over Bid Regulation

We firmly endorse the Committee's views that take-over bids and plans of arrangement should not be regulated in identical fashion and that parties to commercial transactions should have the freedom to structure those transactions to achieve their business purposes. While this letter is not the appropriate context for detailed comment on this point, we are of the view that there is a fundamental difference between a take-over bid and a plan of arrangement that requires detailed regulation of the former that would be both inappropriate and unnecessary in the context of the latter. In particular, a take-over bid can be made on an unsolicited basis and without the benefit, from a shareholder's perspective, of adversarial bargaining involving the target company board of directors, or an independent committee thereof, acting with the advice of legal and financial advisors (given that the target board's powers are limited to its ability to make a recommendation). Further, a take-over bid is the only means of acquisition of a public company that does not involve a vote of shareholders and which will therefore only proceed if determined to be acceptable by a supermajority of those shareholders (and most often a disinterested majority). For these structural reasons, it is appropriate to closely regulate the substance and conduct of take-over bids in a detailed fashion, as there is no participant in the process in a position to protect the interests of shareholders to the extent that they are not statutorily protected. We believe that any move toward imposing substantive new regulation on business combinations, including plans of arrangement, that require a shareholder vote (rather than the every-shareholder–for-itself acceptance of an offer) should be subject to a level of debate and scrutiny that can result only from a specific proposal on the point.

We also strongly agree with the Committee's comment that it is critical that regulation of take-over bids across the country be harmonized, similar to the need to harmonize securities laws across the country generally. We believe that there are relatively few matters of policy that are not currently harmonized and that, given the amendments that have recently been made in most provinces in respect of certain of the timing and procedural aspects of take-over

bids and the administrative position taken by the Quebec Securities Commission on those points, such harmonization should be achievable in the short term and should be a focus of the Commission.

We do not support additional regulation of partial bids as a general matter, particularly as it seems that the only recommendation considered by the Committee would be to prohibit partial bids as inherently coercive in all circumstances. We believe that it will always be a question of fact as to whether any particular bid is coercive and that the most appropriate body to formulate a response to a coercive partial bid will generally be the board of directors of the target; the appropriate role for the Commission in such circumstances may well be to allow the target the freedom to defend itself. To take an extreme example, it may be that the Commission should allow a target company faced with a below-market partial bid from an insider to stand firmly behind a shareholder rights plan rather than following its customary approach of intervening and neutralizing the plan.

Finally, the Committee has recommended that the Commission consider preparing a policy statement setting out the circumstances in which a shareholder rights plan must be terminated. Not only do we believe that such a policy statement is both unnecessary and inappropriate, but we are of the view that the Commission should rethink entirely its approach to shareholder rights plans. Unlike the SEC and, to a large extent, the U.S. courts, the Commission has chosen to take a highly interventionist approach in respect of rights plans. Through a series of decisions over the last several years, the Commission has indicated that it can be counted upon by bidders to remove a target company rights plan within some reasonably predictable (but arguably not always appropriate) time frame and that the board of directors of a Canadian target will not be entitled to use a rights plan to fend off an inadequate bid and maintain the status quo. Not only has this approach resulted in a situation in which in bids, even inadequate ones, for Canadian companies will most often succeed in the absence of a white knight, but it has put Canadian companies at a serious disadvantage relative to their U.S. counterparts. One need only compare the situation of a Canadian target of a U.S. consolidator (which target may not be able to rely on structural defences to fend off an unwanted advance for more than a brief period of time because of the interventionist approach of the Canadian securities commissions) and a U.S. target of a Canadian consolidator (which may well be able to rely on its structural defences for an extended period or even indefinitely because of the very different approach to unsolicited bids adopted by the SEC). We believe that this unlevel playing field between Canadian and U.S. companies cannot be justified and is an important factor in the "hollowing out" of corporate Canada recently commented upon publicly by the Chief Executive Officer of Royal Bank of Canada. We would welcome the opportunity to make detailed submissions to the Commission on this issue should it be prepared to consider them.

Chapter 19 – What New Powers Should the Commission Have?

Without expressing any view on the constitutionality of such a power in principle or in practice, we generally support the Committee's view that the Commission should have the power to order the payment of administrative fines. (We note, however, that power to impose an

administrative fine would be distinguishable from all of the other powers listed in Section 127 as being the only power not directly related to the functioning of the capital markets and the participation of the offender in those markets. Rather the power to order the payment of fines in excess of the investigation and hearing costs is by its very nature, and irrespective of quantum, arguably a penal power the deterrence aspects of which are its only connection to investor protection.) We further agree that the prescribed maximum amount of such fines, if adopted, should be large enough to provide an appropriate deterrent to even the largest or wealthiest market participants but that the provisions of the Act providing for the imposition of fines should be sufficiently flexible to allow for consideration of all relevant factors in determining the amount of the fine to be ordered in any particular case.

While we do not disagree with the Committee's view that the Commission should have the power to order disgorgement of profits, we would welcome further explanation of why the Committee has determined that the Court's ability to order disgorgement, and the Commission's ability to apply to the Court for such an order, is insufficient. In considering whether it would be appropriate for the Commission to have the power to order restitution or compensation, the Committee did not recommend that the Commission be granted such a power but rather recommended that the Commission consider, in appropriate cases, applying to the Court for such an order. It is not clear to us why the Committee has taken different approaches in respect of the two remedies.

We believe that the Commission should have the flexibility to determine the appropriate application of funds received in respect of an administrative fine or, if a power to order disgorgement is determined to be appropriate, a disgorgement order and that the list of potential applications should include the power to order that funds be held for the benefit of and actually paid to those third parties who have been directly harmed by the conduct of the offender where such third parties can be identified and their entitlements substantiated.

Finally, while we support the Committee's views that the Commission should have the power to enforce undertakings and to impose sanctions in respect of a failure to fulfil an undertaking, we believe that such powers are appropriate only if there is a very clear understanding of what constitutes an undertaking that will be subject to enforcement and sanction. Specifically, we agree with the Committee's comments that only written undertakings should be subject to such powers but we further believe that in order for an undertaking to be subject to such proceedings, it should be expressly stated to be an undertaking within the meaning of the relevant enforcement provisions. We are concerned with the potential for a course of communication to be ultimately determined to have given rise to an undertaking that is subject to enforcement and sanction proceedings in circumstances in which the parties did not intend or appreciate the consequences.

Chapter 20 – Which Existing Powers of the Commission Should be Broader?

We generally agree with the Committee's views with respect to the broadening of the existing powers of the Commission to order that an individual resign as a director or officer

of an issuer and not act as a director or officer of an issuer in the future to include comparable powers in respect of acting as a director or officer of a registrant or mutual fund manager, acting as a mutual fund manager or promoter, or engaging in promotional activities relating to the purchase or sale of securities, the obvious point being to prevent an individual who has engaged in sufficiently serious misconduct from participating in the Ontario capital markets in any capacity whatsoever where such participation could harm investors. We also support the Committee's recommendations that the Commission have the specific power to order compliance with securities laws and that it have the power in the context of a cease trade order in appropriate circumstances to preclude the purchasing as well as the sale of securities.

Chapter 21 – Which Existing Powers of the Court Should be Expanded?

We agree with the Committee's comments that, in the context of a prosecution of a securities-related offence before a court, the available monetary penalties should be increased from $1,000,000 to $5,000,000 for the reasons cited by the Committee, most particularly the need to provide for a truly effective penalty in respect of the most egregious conduct rather than a mere licensing fee to be viewed a cost of doing business where the potential rewards for a breach of securities laws are great. We similarly support the addition of a power on the part of the court to order compensation or restitution not because of a particularly increased deterrent effect but in the interests of attempting to treat fairly the victims of a securities offence where those victims are identifiable and their entitlements quantifiable.

Chapter 22: Other Enforcement Matters

While we agree generally with the concept that the Act should contain express prohibitions on market manipulation and fraudulent activity, it is not clear to us how the Committee intends such prohibitions to work within the context of the Act. Specifically, the Committee has recommended that the Act expressly prohibit fraudulent activity and market manipulation and has criticized the CSA's formulation of such prohibitions, which require that the offender knew or ought reasonably to have known that its conduct caused misleading trading or perpetrated a fraud. The Committee has also commented that a breach of the prohibitions should be a strict liability offence, implying that the defence of a reasonable belief in a mistaken set of facts (which courts have often referred to as a due diligence defence in the context of prosecutions of securities-related offences) should be available. However, we believe that the determination that a particular securities-related offence is a strict liability offence rather than an absolute liability offence has typically been made by a court in the context of an actual prosecution and in reliance on general principles of law rather than on the wording of the relevant statutory provisions. The Committee has clearly stated that the Commission should have the power to enquire into and make orders in respect of alleged breaches of the fraudulent activity and market manipulation prohibitions. The Commission has, however, taken the position in the past (and the court has agreed in at least one circumstance) that a due diligence defence is not necessarily available in respect of a Section 127 proceeding as distinct from a criminal proceeding. It is not clear to us, therefore, that any such defence would be available absent clear language in the text of the prohibitions themselves, with the result that a breach

could be treated as a strict liability offence in a Section 122 prosecution but the equivalent of an absolute liability offence in a Section 127 proceeding. We believe that such a result would be inappropriate and that if the Committee continues to reject the "knew or ought to have known" formulation of the prohibitions proposed by the CSA, it should propose an alternative formulation that provides appropriate thresholds and/or safeguards in respect of an alleged breach. One potential approach which we believe to be with merit would be to adopt the elements of a 10-b5 action, most notably the requirement for scienter.

The Committee has also recommended that the Act be amended to include a provision prohibiting a person or company from making a statement, written or oral, that the person or company knows or ought reasonably to know is a misrepresentation. The Committee has suggested that consideration be given as to whether it is appropriate to limit the prohibition to statements made "with the intent of effecting a trade" in a security, although it has implied that its reaction to such a limitation would be negative. We are very concerned with the potential breadth of any such prohibition, particularly bearing in mind the potential consequences for a breach of the prohibition under Sections 122, 127 and 128 of the Act. As described by the Committee, the prohibition would apply to all communications, written and oral, public and private, irrespective of the relationships between the parties or the nature or purpose of the communication. Breach of the provision would, at least theoretically, subject the offender to all of the remedies and consequences available under Sections 122, 127 and 128. According to the Draft Report, the Committee's recommendation that such a prohibition be included in the Act is based solely on the fact that British Columbia, Alberta, Saskatchewan and Manitoba securities laws contain similar prohibitions. The Committee, however, provided no further analysis of or commentary on the breadth and scope of the proposed prohibition. We are of the view that such further analysis is required, or that the Committee should share in its report the analysis that it has undertaken, before such a prohibition is introduced.

With respect to insider trading issues, the Committee has noted that the Commission tends to pursue alleged insider trading violations as quasi-criminal proceedings under Section 122 of the Act and recommended that, "in appropriate cases", the Commission consider pursuing the alternative enforcement mechanisms available under Sections 127 and 128. This recommendation seems to have been based solely on the comment that Commission proceedings are subject to a lower standard of proof and lesser evidentiary burden. While we cannot disagree that there are circumstances in which a Commission proceeding rather that quasi-criminal prosecution of insider trading matters is an appropriate route, we believe that the Commission should be very careful in concluding that an inability to meet the burden of proof and evidentiary requirements of a quasi-criminal proceeding in any particular case makes in an "appropriate case" for regulatory proceedings.

General

In light of the broad range of issues considered by the Committee and the significant number of recommendations which it has put forth, we suggest that the Committee consider whether it is possible to identify in its final report those matters and recommendations it

believes to be the most urgent or otherwise propose some form of prioritization in an effort to assist those who will have the task of turning those recommendations into legislation.

We are grateful for the opportunity to have provided our comments on the Draft Report, all of which are respectfully submitted.

Yours very truly,

Andrea E. Daly