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MEMORANDUM

Reference: 00046917/000002
Peter W. Hogg, C.C., Q.C.

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To: Director General
Marketplace Framework Policy Branch
Industry Canada
235 Queen Street, 10th Floor
Ottawa, Ontario K1A 0H5

From: Peter W. Hogg, C.C., Q.C.
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RE: *Canada Business Corporations Act*, Call for Submissions

1. Opinion requested

I am the scholar in residence at this law firm. I am a professor emeritus of the Osgoode Hall Law School of York University, where I taught from 1970 to 2003, serving as dean for the last five years. I am the author of the two-volume treatise, *Constitutional Law of Canada* (Carswell, 5th edition, 2007, annually supplemented).

I have been asked by the Chartered Professional Accountants of Canada (“CPA Canada”) to provide an opinion as to the constitutionality of the modified proportionate liability regime contained in sections 237.1–237.9 of the *Canada Business Corporations Act* (the “MPL Provisions”). CPA Canada is proposing to provide the opinion in support of its comments on the MPL Provisions in response to a call for submissions on the CBCA by Industry Canada.¹ For the reasons set out in

¹ Industry Canada, *Consultation on the Canada Business Corporations Act* (2013). 22515502.2

this memorandum, it is my opinion that the MPL Provisions are constitutionally valid. It is also my opinion that, in cases of conflict between the MPL Provisions and provincial regimes providing for joint and several liability, the MPL Provisions would prevail as the result of the doctrine of federal paramountcy.

2. Executive Summary

Sections 237.1–237.9 of the CBCA (the MPL provisions) were enacted in 2001, introducing a regime of modified proportionate liability for financial loss arising out of an error, omission, or misstatement in financial information concerning a corporation that is required by the CBCA or its regulations. Under this regime, where damages are awarded for a “financial loss” (a defined term) against more than one defendant, the general rule (subject to exceptions) is that each defendant is liable to the plaintiff only for the portion of the damages that corresponds to its degree of responsibility for the loss. I understand that one of the purposes of the MPL Provisions in incorporating a proportionate liability regime is to safeguard the continued availability of auditors to perform their statutory functions, given the huge monetary risks for auditors (and others preparing CBCA financial information) that are caused by the common-law joint and several liability regime under which each defendant is liable to the plaintiff for the entire amount of the loss.

As part of the consultation process that preceded the enactment of the MPL Provisions, CPA Canada (then the Canadian Institute of Chartered Accountants) submitted a constitutional brief authored by Neil Finkelstein and Mark Katz (the “**Finkelstein Brief**”)², to the Standing Committee on Banking, Trade and Commerce.³ The Finkelstein Brief assessed the constitutional implications of amending the CBCA to implement a regime of proportionate liability in respect of the audit function, and concluded that it is within the federal Parliament’s legislative power to enact the MPL

² A copy of the Finkelstein Brief, “Proportionate Liability and Canadian Auditors—Constitutional Aspects”, October 15, 1996, is available on request.

³ The Finkelstein Brief makes reference to a policy brief, “Proportionate Liability and Canadian Auditors”, January 23, 1996, by the Honourable W.Z. Estey Q.C., which was also submitted to the Committee and relied on by the Committee in its decision to reform the liability regime under the CBCA. This brief is also available on request.

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Provisions. The Finkelstein Brief also concluded that, to the extent that a federal MPL regime was inconsistent with provincial laws relating to civil liability, the MPL provisions would prevail due to the doctrine of paramountcy. I have reviewed the Finkelstein Brief and I agree with these conclusions. The reasoning in the Finkelstein Brief is sound, and the law on which the Brief is based remains good law today.

3. The MPL Provisions are constitutional

The creation of civil causes of action and the regulation of civil liability generally fall within the legislative authority of the provinces as part of their jurisdiction over property and civil rights and procedure in civil matters.⁴ As the MPL Provisions purport to regulate civil liability (albeit only in the context of CBCA financial information), the Finkelstein Brief addressed any potential concerns regarding their constitutional validity. The Finkelstein Brief concluded that Parliament's authority to enact the MPL Provisions came from Parliament's power to make laws in relation to the incorporation of federal corporations, which has been held to be part of Parliament's "peace, order, and good government" ("p.o.g.g") power. This head of federal power provides broad legislative authority to enact laws "of a company law character, including laws pertaining to corporate powers, organization, internal management and financing".⁵ It is the head of power under which the CBCA itself has been enacted. The modified proportionate liability regime now contained in the MPL Provisions applies only to financial loss caused by fault in the preparation or review of corporate financial information required by the CBCA. The MPL Provisions are enacted for a corporate purpose—to facilitate compliance with the audit and other requirements of the CBCA respecting corporate financial information—and I am in full agreement with the Finkelstein Brief that the MPL Provisions are validly enacted under Parliament's power to make laws in relation to the incorporation of federal corporations.

⁴ The *Constitution Act, 1867*, ss. 92(13) and 92(14).

⁵ Finkelstein Brief, note 2, above, p. 12.
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The Finkelstein Brief, which was prepared in 1996, relied on a line of cases in which federal heads of constitutional power have been held to extend to the creation or regulation of civil causes of action. That line of cases has since been re-affirmed by the Supreme Court of Canada in *Kirkbi v. Ritvik Holdings* (2005),⁶ which was a constitutional attack on a civil remedy in the federal Trade-marks Act. The remedy was an action for passing off against a competitor which branded its goods in a way that caused confusion with the trade-mark holder's goods. The defendant pointed out that the remedy was not materially different from the tort (or delict) of passing off that exists in the common law (or civil law) of the provinces, and the defendant argued that the federal remedy was an unconstitutional intrusion into the provincial power over property and civil rights. The Court agreed that, if the remedy stood alone, it would be incompetent to the federal Parliament, but it did not stand alone: it was part of the federal Trade-marks Act, which was a law enacted under Parliament's power over trade and commerce. The Court held that the remedy was "sufficiently integrated into the federal scheme" to be a valid law in relation to trade-marks.⁷ The constitutionality of the remedy was upheld. This case reinforces the reasons provided in the Finkelstein Brief, and is a close precedent for the MPL Provisions, which in my opinion are also sufficiently integrated into the federal scheme of the CBCA to be a valid law in relation to the incorporation of federal corporations.

4. The MPL Provisions take priority over provincial laws by virtue of federal paramountcy

The Finkelstein Brief also addressed potential concerns about situations where the MPL Provisions might conflict with provincial (joint and several) liability regimes.⁸ The Finkelstein Brief concluded that, to the extent that the MPL provisions and provincial liability regimes might conflict in a given case, the doctrine of paramountcy would apply. This is clearly correct. Under the doctrine of paramountcy, where an otherwise valid provincial law is inconsistent with a valid federal law, the provincial law is rendered inoperative to the extent of the inconsistency. This means that, in any

⁶ [2005] 3 S.C.R. 302.

⁷ *Id.*, paras. 35-36.

⁸ Finkelstein Brief, note 2, above, pp 25 - 28.
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case where damages are sought for a financial loss arising out of an error, omission or misstatement in corporate financial information required by the CBCA, the modified proportionate liability regime of the CBCA would apply. If a plaintiff attempted to rely on the joint and several liability regime of the common law, the trial court (and appeal courts) would have no choice but to hold that the two regimes were inconsistent, and the federal regime would prevail by virtue of federal paramountcy.

I understand that, since the introduction of the modified proportionate liability regime in the CBCA, the provinces have all amended their securities acts to introduce proportionate liability for misrepresentation in secondary market disclosure. On the other hand, so far at least, none of the provinces has followed the federal lead and amended its principal business corporate statute to introduce a regime of proportionate liability there in place of the common law of joint and several liability. In a federal country, it is not unusual for one jurisdiction (or more than one) to adopt a new law to deal with an issue that other jurisdictions have resolved differently, and sometimes the resulting differences may appear to be confusing. However, in the case of the MPL Provisions, it is important to emphasize that *there is no legal confusion*. Where an action for damages is for a “financial loss” as defined in the CBCA (paraphrased in the previous paragraph), then it is the MPL Provisions that prevail. Any attempt by a party in any court to avoid the modified proportionate liability regime and argue for a reversion to joint and several liability would be blocked by the doctrine of federal paramountcy.

5. Conclusions

First, in my view, the modified limited liability regime contained in the MPL Provisions is constitutionally valid. The MPL Provisions fall within Parliament’s broad jurisdiction over the incorporation of federal corporations: they serve the corporate purpose of facilitating compliance with the CBCA’s audit and other requirements respecting the financial information of federally incorporated corporations; and they are integrated into the CBCA, which is undoubtedly a valid statute.

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Second, there is no room for legal confusion as to whether the MPL Provisions or provincial liability laws would apply in a given case. The MPL Provisions would apply whenever the claim was for damages for a “financial loss” as defined in the MPL Provisions of the CBCA, and any inconsistent provincial liability regime would be rendered inoperative by the doctrine of federal paramountcy.

* * * * *

I hope that this memorandum will be of assistance to Industry Canada in its consideration of the constitutional and paramountcy aspects of the modified limited liability regime contained in the CBCA.



Peter W. Hogg