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March 19, 2014

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

Dear Sir/Madame:

Re: Canada Business Corporations Act (the "CBCA")

1. Introduction

On behalf of the Chartered Professional Accountants of Canada ("**CPA Canada**"), we are pleased to make the following submission in response to Industry Canada's December 11, 2013 discussion paper (the "**Discussion Paper**") on the CBCA.

CPA Canada is the national organization established to support unification of the Canadian accounting profession under the Chartered Professional Accountant ("CPA") designation. It was created by the Canadian Institute of Chartered Accountants and The Society of Management Accountants of Canada ("CMA") to provide services to the more than 185,000 members of CPA, CA, CMA and Certified General Accountants (CGA) accounting bodies which have unified or are committed to unification. CPA Canada provides resources and expertise to support an independent standard-setting process in Canada for the CPA profession.

CPA Canada appreciates the opportunity to submit feedback on the Discussion Paper.

For the reasons set out below, we strongly recommend that Industry Canada maintain the modified proportionate liability regime currently in the CBCA.

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2. Executive Summary

After over 10 years of consultation and consideration, Parliament, enacted Part XIX.1 of the CBCA (the "**MPL Provisions**") in 2001 as part of a significant modernization of the CBCA through Bill S-11. The MPL Provisions introduced a regime of modified limited liability for financial loss arising out of an error, omission or misstatement in financial information required under the CBCA or its regulations.

The Discussion Paper raises two possible concerns with the MPL Provisions:

1. Because the MPL Provisions apply only to the financial statements issued by corporations incorporated under the CBCA, the scope of the MPL Provisions is "very limited"; and

2. The MPL Provisions may create uncertainty over which liability regime would apply in a case where a concurrent provincial liability regime exists.

We understand that these concerns were raised by only one witness in his testimony before the Standing Committee on Industry, Science and Technology (the "Committee").

For the reasons set out below, it is CPA Canada's respectful submission that both of these concerns are unwarranted. Perhaps even more importantly, as noted in 5 below, a reversion to joint and several liability would leave Canada seriously out of step on this issue with many of its major trading partners.

3. Importance of CBCA Corporations

As noted in the introduction to the Discussion Paper, the CBCA is Canada's principal corporate statute, providing the legal and regulatory corporate governance framework for nearly 235,000 federally incorporated businesses, including almost half of Canada's largest publicly-traded corporations, along with many small and medium-sized privately held corporations.

It is clear, therefore, that, in considering both Canadian capital markets and the Canadian economy, the scope of the CBCA (including the MPL Provisions) is extensive – and definitely not "very limited".

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4. No Confusion

Similarly, contrary to the suggestion made in the Discussion Paper, there is no confusion about the application of the MPL Provisions. In this connection, we attach the opinion dated March 18, 2014 of Blakes scholar-in-residence, Peter Hogg, widely recognized as Canada's leading constitutional lawyer.

For the reasons outlined in his memorandum, it is Professor Hogg's opinion (supported by years of jurisprudence at the Supreme Court of Canada level) that:

1. The MPL Provisions are within the authority of Parliament.
2. To the extent there is an inconsistency between the MLP Provisions and provincial negligence laws, the doctrine of paramountcy makes it clear that the MPL Provisions prevail whenever they apply – that is, when there is financial loss involving a CBCA corporation arising out of an error, omission or misstatement in financial information required under the CBCA or its regulations.
3. There is, therefore, no legal confusion created by the MPL Provisions.

5. Other Comparable Liability Regimes

In his testimony before the Committee, the witness referred to above noted that no province had to date enacted a liability regime similar to the MPL Provisions.

On this point, we bring the following to your attention, all of which is, in our view, strongly supportive of retention of the MPL Provisions:

1. While the provinces have not yet included liability reform in their business corporate statutes, they have all (since the introduction of the MPL Provisions to the CBCA in 2001) done so in their securities legislation. See, for example, Part XXIII.1 of the *Securities Act (Ontario)*, a regime which has been adopted by all Canadian securities administrators. Enacted in 2002, the Part creates a secondary market liability regime for negligent misstatements in documents prepared by reporting issuers. In addition to introducing proportionate liability (see, for example, section 138.6 of the Ontario Securities Act), the Canadian securities

administrators also included a liability cap in their legislation. The cap for an expert (such as auditors) is the greater of $1,000,000 and the revenue that the expert earns from the reporting issuer during the twelve months leading up to the misrepresentation.

2. In 1995, the U.S. government enacted the *Private Securities Litigation Reform Act* (now United States Code – Title 15 – Commerce and Trade – Chapter 2B – Securities Exchanges – Section 78u-4) which significantly restricted the scope of auditor liability and reduced damages paid by auditors. In fact, section 78u – 4(f) established a modified proportionate liability regime which is quite similar (but not identical) to that contained in the MPL Provisions. In addition, many of the larger U.S. states (including New York, Texas, California, Georgia, Pennsylvania, Florida and Illinois) have either eliminated joint and several liability entirely or retained it solely for the defendant which is determined to be (by proportionate liability) the primary defendant.

3. In 2008, the United Kingdom amended its *Companies Act* to enable a company and its auditors to contractually cap auditor liability.

4. In June 2008, the European Commission issued a recommendation that the liability of auditors for negligence should be limited. Many continental EU members have taken steps to limit liability. For example, Germany, Austria and Belgium have created a cap on auditor liability. Spain has introduced proportionate liability for auditors. While France has not established a limit on liability, it enables auditors to limit their exposure by incorporating.

5. In Europe, outside of the EU, Switzerland (emulating France) also enables auditors to incorporate.

6. Australia has introduced proportionate liability, incorporation for auditors and a sliding cap on liability depending on the amount of fees which the auditor earns, all measures aimed at limiting auditor liability.

In summary, this broad global initiative to limit auditor liability demonstrates that the risk to the audit profession and, therefore, to capital markets resulting from unlimited joint and several liability exposure of auditors is widely recognized. Equally, the variety of approaches outlined above indicates both

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that there are several solutions and that a proportionate liability regime falls squarely within the range of solutions which has been adopted. The MPL Provisions were enacted after thorough study by the Senate Banking Committee and are, in our submission, a very reasonable and sensible approach to dealing with this issue.

6. Conclusion

In conclusion, therefore, it is the submission of CPA Canada that the MPL Provisions be retained in the CBCA. They are constitutionally sound and, as Professor Hogg points out in his memorandum, do not create legal confusion. To revert to a joint and several liability regime at this point would put the CBCA out of step with many of its most significant trading partners.

If you have any questions or otherwise wish to discuss this submission, please contact Rob Collins of our office at rob.collins@blakes.com or 416-863-2519.

Yours very truly,

Attachment
Appendix A - Professor Hogg's Opinion

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