



ANDREW J. KRIEGLER
President and Chief Executive Officer

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Via email to: commentonlegislation@ccmr-ocrmc.ca

Dear Sirs/Mesdames:

Re: Comments on the consultation draft of the Provincial Capital Markets Act (PCMA)

Thank you for this opportunity to provide comments on the *Consultation Draft of the Provincial Capital Markets Act* (the “Draft PCMA”). IIROC is committed to working closely and collaboratively with all members of the Canadian Securities Administrators (“CSA”), and we look forward to the same relationship with the participating jurisdictions in the Cooperative Capital Markets Regulatory System (the “Participating Jurisdictions”).

As a national self-regulatory organization, IIROC recognizes the importance of its role in protecting investors and strengthening public confidence in the capital markets. More importantly, we understand the need to carry out those roles efficiently, effectively and with a view to advancing the public interest. We are pleased that section 11 of the Draft PCMA now makes explicit the commitment to the public interest which our organization has always pursued.

This letter is intended to provide a focused discussion and recommendation regarding a provision of the proposed legislation which is of particular relevance to IIROC: good faith immunity from civil actions.

IIROC and its directors, officers and employees are potentially exposed to the threat of legal action by individuals or entities that are not members of IIROC when making decisions in the course of carrying out its public interest mandate (even where their

actions are taken in good faith)¹. This risk of personal liability may hinder IIROC's ability to take appropriate action in circumstances where the public interest is advanced but private interests may be affected. This potentially impacts the overall effectiveness and efficiency of the regulatory system. A statutory immunity provision not only allows IIROC to seek and retain quality staff, directors and officers, but it more importantly allows these individuals to do their jobs without fear of lawsuits.

The fear of virtually unlimited exposure to private claims, which may tax the resources of our Dealer Members and have a chilling effect on our employees, is a sufficient policy consideration which, in our view, warrants statutory immunity.²

Relevant Provisions of the Draft PCMA

Subsections 201(1) and (2) of the Draft PCMA provide for complete immunity from lawsuits for regulatory decisions made in good faith. However, these subsections, as currently drafted, apply only to the Authority, Tribunal members and a recognized auditor oversight organization. The Canadian Public Accountability Board (CPAB) is currently the only recognized auditor oversight organization under provincial securities laws.

In contrast, subsection 201(3) provides only a *limited* immunity for self-regulatory organizations ("SROs") where the organization is exercising a specific delegated power (with the same 'good faith' requirement). For IIROC, this immunity applies only where IIROC is exercising powers or performing duties in the course of its delegated registration functions under Part 4 of the Draft PCMA. This statutorily delegated function, while important, constitutes only one element of IIROC's overall responsibilities, which cover a broad range of member and market regulation which have been *effectively* delegated to IIROC by the Participating Jurisdictions.

¹ Section 14.1 of IIROC By-law No. 1 provides that no regulated person shall be entitled to commence or carry on any action against, *inter alia*, the Corporation, its Board or any of its employees, officers or agents.

² This was the view of the Supreme Court of Canada who held that "the fear of virtually unlimited exposure of the government to private claims, which may tax public resources and chill government intervention" was a policy consideration which worked to negate a private duty of care owing by a public body performing statutory duties (thereby providing immunity from claim): *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24 at para. 74

Moreover, IIROC already has immunity from actions brought by regulated persons relating to registration matters and also by applicants for registration through the IIROC By-law noted above.

IIROC requests that subsection 201(3) of the Draft *PCMA* be amended so as to provide a recognized self-regulatory organization with the same immunity as that granted to the other entities identified in section 201. The support for this recommendation is threefold:

- i. Given the explicit mandate of IIROC, as set out in the Draft *PCMA*, to regulate in the public interest, it should receive the corresponding statutory immunity to protect its good faith actions taken in furtherance of that mandate;
- ii. There is no basis to treat self-regulatory organizations differently than auditor oversight organizations with respect to immunity; and
- iii. IIROC and the Participating Jurisdictions are increasingly operating together in the same regulatory sphere, with IIROC addressing issues that would otherwise be the purview of the Participating Jurisdictions. As a result, IIROC should receive the same immunity as the Participating Jurisdictions.

i. The Draft *PCMA* mandates IIROC to act in the Public Interest

The majority of the various provincial *Securities Acts* provide for a self-regulatory organization to regulate the operations, standards of practice and business conduct of its members or participants, in accordance with *its by-laws, rules or other regulatory instruments*. The key distinction between these provisions and section 11 of the Draft *PCMA* is that the latter now imposes the broader statutory requirement for an SRO to regulate *in the public interest*. This is an appropriate reflection and codification of IIROC's current role.

The immunity of IIROC (specifically, its predecessor, the Investment Dealers Association, or "IDA") has been considered by the Ontario courts, which recognized that the IDA was

required to act in the public interest as its duties are owed to the public as a whole³. On that basis, the court granted common law immunity from suit in that case, for actions undertaken by the IDA in good faith.

Although the common law in Ontario currently provides for this immunity, its application beyond the facts of the case and outside Ontario may be limited. There have been no further cases which develop the law in this area specifically with regards to SROs⁴. Moreover, the introduction of a limited immunity clause in the *PCMA* may impact the application of *Morgis*, based on the argument that the legislature specifically intended SROs to have immunity only in respect of actions taken pursuant to the specifically delegated powers.

The provision of statutory immunity for IIROC would also put it on equal footing with other professional regulators in Canada which have similar immunity provisions in their own statutes – i.e., various provincial law societies, the health profession colleges in Ontario and Alberta, and various provincial associations of engineers, among others.

Although the Draft *PCMA* speaks of self regulatory *organizations*, these organizations are made up of people who work hard every day in furtherance of the public interest and to protect the capital markets in Canada. In order to continue to attract and maintain high quality staff, IIROC needs the benefit of the same immunity afforded to the employees of the Authority, the Tribunal and CPAB.

The institution of a *statutory* immunity clause for SROs in the *PCMA* will ensure that:

- (a) those who regulate pursuant to the *PCMA* receive uniform treatment across the country, in the true spirit of a cooperative capital markets regulatory system;
- and

³ *Morgis v. Thomson Kernaghan & Co.*, [2003] O.J. No. 2504 (CA), leave to appeal to S.C.C. refused [2003] S.C.C.A. 400

⁴ In contrast, we note that while FINRA (and its predecessors the NASD and NYSE) does not have statutory immunity from prosecution, the law has been developed in this area, and U.S courts have, in numerous decisions, held that the SROs have absolute immunity from civil damages for conduct undertaken as part of their statutorily delegated adjudicatory, regulatory, and prosecutorial authority.

- (b) all those with a mandate to govern in the public interest are free to do so vigorously and without fear of being sued.

This will help to ensure consistency and fairness across the country in the joint pursuit of our public interest mandate.

ii. IIROC and CPAB both Govern in the Public Interest

Given their similar mandates, IIROC should have the same broad immunity granted to auditor oversight organizations in the Draft *PCMA*.

IIROC and CPAB are both corporations under the *Not-for-profit Corporations Act*. CPAB is not a statutory body and does not exercise a specifically delegated power under the Draft *PCMA*.

The authority for the bulk of IIROC's activities (apart from registration matters), and all of CPAB's activities is found in sections 11 and 15(1) of the Draft *PCMA*:

Duty of recognized self-regulatory organizations, recognized exchanges

11. A recognized self-regulatory organization or a recognized exchange must, with a view to pursuing the public interest, regulate the operations, standards of practice and business conduct of its members or participants and their representatives.

* * *

Powers and duties of recognized auditor oversight organization

15. (1) A recognized auditor oversight organization must, with a view to pursuing the public interest, regulate the operations, standards of practice and business conduct of its members or participants as they relate to the audit or review of financial statements that must be filed under capital markets law.

Although this is not a strict *delegation* of powers to an SRO, the word "must" imposes an absolute requirement to act. Full immunity should flow to IIROC as it, like CPAB, is mandated by statute to act in the public interest.

Legislation in several provinces currently provide for immunity for CPAB for acts done in good faith⁵. These provisions are similar to the provision contained in the Draft *PCMA*. The provision grants CPAB immunity from the risk of civil action brought against it by its participating audit firms, public issuers, and the public generally.

IIROC faces the risk of a similarly sized pool of potential litigants - members of the public at large in connection with IIROC's regulation of its members (as was the case in *Morgis*). While IIROC has by-laws which prohibit its members and regulated persons from suing it, as noted above, these provisions do not protect against claims by individuals or entities that are not otherwise subject to the by-laws of IIROC.

We believe that both CPAB and IIROC are subject to similar exposure to private claims which argues in favour of consistent treatment with respect to statutory immunity.

iii. The Participating Jurisdictions and IIROC Operate in the Same Regulatory Sphere

The need for this immunity is also supported by the reality that the Participating Jurisdictions and IIROC are increasingly operating together in the same regulatory sphere, with IIROC addressing issues that would otherwise be the purview of the Participating Jurisdictions. Where the Participating Jurisdictions' forbearance results in IIROC performing certain functions, IIROC should receive the same statutory immunity as the Participating Jurisdictions would for performing those same functions.

There has also been continuing cooperation between the Participating Jurisdictions and IIROC in joint or parallel reviews, investigations or proceedings. In these cases, IIROC and its staff work together with the Participating Jurisdictions and their staff. Often, the outcome is either joint or parallel proceedings involving the same respondents (and thus, affecting the same investors). The public interest would be best served if, in the conduct of those common reviews, investigations or proceedings, both IIROC and the Participating Jurisdiction received the same full statutory immunity.

⁵ BC *Securities Act*, s. 170; ON *Canadian Public Accountability Board Act (Ontario)*, 2006, s.15; Sask. *Securities Act*, s. 153; NB *Securities Act*, s. 44.

In a similar vein, and specifically with respect to IIROC's market regulation function, IIROC makes decisions and undertakes actions which impact market participants who are not directly within IIROC's jurisdiction – (for example, when varying or cancelling trades that are “unreasonable”, or investigating potential insider trading). As noted above, these actions may affect individual or institutional investors that are not subject to IIROC's jurisdiction and by-laws. As the Participating Jurisdictions rely on IIROC to perform this function, IIROC would benefit from the same immunity as that afforded to the Participating Jurisdictions, were they to perform this function themselves.

Conclusion

For the reasons noted above, and in particular for parity with the status afforded to CPAB, IIROC recommends that subsection 201(3) of the Draft *PCMA* be redrafted so as to grant SROs the same full statutory immunity provided in subsections 201(1) and (2).

We would be pleased to meet with representatives of the Participating Jurisdictions to further discuss this or any other issue central to our common goal of enhancing the efficiency and effectiveness of the regulatory system and the overall protection of investors.

Yours very truly,



Andrew J. Kriegler
President and Chief Executive Officer