

IN THE SUPREME COURT OF CANADA

IN THE MATTER OF Section 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26;

**AND IN THE MATTER OF a Reference by the Governor in Council
concerning the proposed *Canadian Securities Act*, as set out in
Order in Council P.C. 2010, dated May 26, 2010**

REFERENCE RECORD

(ATTORNEY GENERAL OF MANITOBA MATERIALS)

VOLUME XXVII (Page 1 to 20)

(Pursuant to Rule 46(12) of the Supreme Court of Canada Rule)

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TABLE OF CONTENTS**- VOLUME XXVII -****6. ATTORNEY GENERAL OF MANITOBA MATERIALS**

DESCRIPTION OF DOCUMENTS	Date	Tab	Page
<hr/>			
PART 1 – CERTIFICATE OF COUNSEL			
Certificate of Counsel	Oct. 26, 2010	1	1
PART IV – EVIDENCE			
Affidavit of Donald G. Murray, sworn October 26, 2010		2	2

Court File No. 33718

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CERTIFICATE OF COUNSEL

I, Eugene Szach, counsel for the Intervener the Attorney General of Manitoba, hereby certify that the annexed record contains only so much of the evidence, affidavits and other documents as is necessary to raise the question for the decision of the Court.

And I do further certify that I have closely examined the record and verily believe that it is a true and correct reproduction of the originals and that the same has been proofread.

Dated at Winnipeg, Manitoba this 26th day of October 2010

Signed by:

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AFFIDAVIT OF DONALD G. MURRAY

Sworn the 26th day of October 2010

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AFFIDAVIT OF DONALD G. MURRAY

I, DONALD G. MURRAY, of the City of Winnipeg, in the Province of
Manitoba,

MAKE OATH AND SAY THAT:

1. I am the chair and chief executive officer of the Manitoba Securities Commission (the “Commission”), a position I have held for 13 years.
2. I obtained a Bachelor of Laws (LL.B.) degree from the University of Manitoba in 1976 and was called to the bar in 1977. I then entered private practice, specializing in commercial matters. I was first appointed to the Commission in 1993. In 1994 I was appointed as vice-chair. I left the private practice of law in 1997 upon being appointed chair of the Commission.
3. As chair and chief executive officer, I preside over the meetings of the Commission, sit on hearing panels and represent the Commission as the Manitoba representative at meetings of the Canadian Securities Administrators (“CSA”) and North American Securities Administrators Association (“NASAA”). I am currently the vice-chair of the CSA and am a former member of the Board of Directors of NASAA.

4. I have prepared this affidavit for the purpose of assisting the Court in the Reference regarding the proposed Canadian *Securities Act*. I have personal knowledge of the matters described in this affidavit except where so indicated. Where I do not have personal knowledge or information on any matter, I have been advised by staff members of the Commission or other colleagues in the public service. I believe all of the information set out in this affidavit to be true.

The Manitoba Securities Commission

5. The Commission is an independent agency of the Manitoba government that protects investors and provides for fair and efficient investment and real estate markets in the province. The Commission reports to the Legislative Assembly of Manitoba through the office of the Minister of Finance.

6. Since 1999, the Commission has been a Special Operating Agency of the government. This designation gives the Commission the authority to manage its own operations within the framework of an annual business plan approved by the Treasury Board. As a Special Operating Agency, the Commission maintains the ability to respond to market issues quickly and to adapt its operations as circumstances require.

7. The Commission is established under the provisions of *The Securities Act*, R.S.M. 1988, c. S50. It is responsible for administering and enforcing four provincial statutes: *The Securities Act*, *The Commodity Futures Act*, *The Real Estate Brokers Act* and *The Mortgage Dealers Act*.

8. Although securities regulation in Manitoba goes back to the early years of the twentieth century, the Commission itself has existed as a statutory agency since 1968. Its initial statutory structure has been retained to the present day.

9. The Commission consists of two distinct, but connected, bodies: an administrative branch and a policy-making branch.

10. The administrative branch comprises 37 permanent full-time employees who conduct the day-to-day operations of administration and enforcement.

11. The policy-making branch, also called the “commission members,” comprises a maximum seven members (including the chair) appointed by order-in-council under the provisions of *The Securities Act*. The Commission members meet regularly to deal with policy and regulatory formulation, and to determine whether it is in the public interest to grant various types of orders authorized by the legislation, including exemption orders. The Commission members also perform a quasi-judicial function by sitting as adjudicators at Commission hearings.

The Mission and Mandate

12. Although *The Securities Act* contains no express purpose clause, the mission and mandate of the Commission are set out on the Commission’s website (www.msc.gov.mb.ca) as follows:

MISSION

The mission of The Manitoba Securities Commission is to protect and promote the public interest by facilitating dynamic and competitive capital and real estate markets that contribute to the economic

development of Manitoba while fostering public confidence in those markets.

MANDATE

The mandate of the Commission is to act in the public interest to protect Manitoba investors and to facilitate the raising of capital while maintaining fairness and integrity in the securities marketplace. Similarly, its real estate industry mandate is to regulate brokers, salespeople and mortgage dealers to ensure adequate standards are maintained for the protection of the public.

13. The Commission views both the mission and mandate as reflecting the two guiding principles of its operations: protecting Manitoba investors and promoting efficient capital markets in Manitoba.

Protecting Manitoba investors

14. Manitoba was the first jurisdiction in Canada to enact “blue-sky” legislation to protect investors from unscrupulous business promoters. *The Sale of Shares Act*, enacted in 1912, generally prohibited the sale of securities of any company that was not incorporated in the province unless the dealer obtained a certificate from the Public Utility Commission (also styled “the Commissioner”), and the dealer’s agent obtained a licence. In 1914, the legislation was amended to make the certification and licensing requirements applicable to any company selling securities in the province. A further amendment in 1915 authorized the Commissioner to revoke the certificate of any company, and the licence of any of its agents, if the company appeared to the Commissioner to be insolvent, to be conducting its business in an unsafe, inequitable or unwise manner, to be jeopardizing the interest of its securities holders, or not to be complying with its statutory filing requirements.

15. The goal of investor protection established by these legislative provisions continues to be a fundamental operating principle of the Commission to the present day. While the distribution of securities may be national and international in scope, individual sales of investment products to members of the public are effected locally and the protection of investors remains a local issue.

16. Manitoba is the headquarters of several very large issuers, who have invested approximately \$15.2 billion in the exempt market in 2009. Nonetheless, the majority of securities trades in Manitoba involve the retail market and the main focus of the Commission is the protection of individual Manitobans who invest in that market.

17. The Commission will presumptively exercise its regulatory authority in every instance of the sale of a security to a Manitoba resident, regardless of the location of the issuer, dealer, or other party involved in the sale. For example, where securities are to be sold in Manitoba with a prospectus, *The Securities Act* requires the prospectus to be filed in Manitoba, regardless of where the issuer is located. Further, where securities are required to be sold in Manitoba through a dealer, the dealer and its representatives are required to register in Manitoba – again, regardless of whether the dealer is located outside Manitoba or indeed outside Canada. The passport system (discussed below) permits the Commission to defer regulatory oversight of many such dealers and their representatives to other securities regulators in Canada, but does not affect either the requirement to register in Manitoba or the authority of the Commission to regulate the activities of extra-provincial entities in Manitoba in order to protect the interests of Manitoba investors.

18. Securities rules and regulations in Manitoba also permit the sale of securities to investors in Manitoba in limited circumstances without requiring the issuer to file a prospectus or sell the securities through a registered dealer. These “exemptions” from the registration and prospectus requirements of the *The Securities Act* reflect the realities of the local market in Manitoba. Not all offerings of securities are large enough to make it economically feasible for an issuer to file a prospectus or retain a dealer to sell its securities. Although the offering of securities using an exemption does not trigger the protections afforded by a prospectus, the rules prescribe limits on who is eligible to purchase these securities, the dollar amounts that may be purchased and how such securities may be sold. The issuers and promoters must also file reports on their activities when relying on certain exemptions. Again, these obligations apply to all offerings of securities to Manitoba investors, regardless of where the issuers or promoters are located.

19. In 2009, the Commission initiated the Advertising Surveillance Project as a proactive effort to identify and eliminate securities-related advertising that is fraudulent, misleading or improper. This includes daily monitoring of online advertising in *Kijiji Winnipeg*, *Craigslist Winnipeg*, *Winnipeg Backpage*, *The Winnipeg Sun*, *The Winnipeg Free Press*, Manitoba community newspapers and other sources. The goal is to protect Manitoba investors by having such advertising removed as soon as possible - the same day or next day in many cases. Where securities have been traded illegally to Manitoba investors by registrants, non-registrants or other persons engaged in fraudulent activities, the Commission takes proactive steps to protect the public by issuing public investor alerts and/or cease trade orders. The Commission and other securities regulators in Canada also regularly issue reciprocal orders for cease trades or orders denying exemptions from statutory prospectus and registration requirements.

20. In the case of securities activity having extra-provincial characteristics, the Commission routinely exercises its discretion to co-operate with other securities regulators in the interests of efficiency and non-duplication. The nature of that co-operation will depend on how closely the activity in question is connected to the other jurisdiction(s) and the extent to which it affects the interests of Manitoba investors. For example, if the Commission receives information about potential misconduct by an issuer located in another jurisdiction, the Commission will conduct a risk assessment to determine the potential impact on Manitoba investors. The risk assessment will involve consideration of the number of Manitobans who have purchased the issuer's securities, and the dollar value of those purchases. If the risk to Manitobans is significant, the Commission will contact the regulator in the other jurisdiction to work out the most efficient mechanism for regulatory intervention. This intervention may take the form of a joint hearing, or alternatively the sharing of information with an agreement that one jurisdiction or the other will have primary regulatory responsibility.

Mechanisms for Protecting Investors

21. *The Securities Act* establishes two distinct mechanisms to protect Manitoba investors. The "administrative" process, which may involve summoning a dealer, salesperson or other person to a disciplinary hearing before the Commission, contemplates various remedial orders by the Commission, including suspension or loss of registration or licence, loss of exemption from the prospectus and registration requirements, a cease trading order, and an administrative monetary penalty. It also provides for the possibility of a compensation order, a Manitoba innovation discussed below.

22. The second enforcement mechanism involves the “penal” process. Under section 136(1) of *The Securities Act*, a person or company that makes false or misleading statements in required information or documents, contravenes the *Act* or its rules and regulations, or fails to comply with an order, direction or other requirement under the *Act* or regulations is guilty of an offence and may be prosecuted in the Provincial Court. Conviction may result in a fine of up to \$5,000,000 or imprisonment for up to five years less a day, or both. The court is also authorized to make a restitution order against the offender.

23. The Commission is responsible for the conduct of prosecutions in the Provincial Court for violations of *The Securities Act*. Any illegal securities activity conducted within Manitoba may lead to prosecution under the *Act*. For example, prosecutions by Commission staff since 2008 have led to six jail sentences for individuals convicted of the illegal distribution of securities to Manitoba investors. In one recent case, a non-resident was being tried in Manitoba for illegal distribution in Manitoba. He absconded, and the presiding judge issued a bench warrant for his arrest. With the co-operation of commission staff in his home jurisdiction, he was arrested and returned to Manitoba. He was ultimately convicted and currently is serving a jail sentence in Manitoba.

24. The goal of investor protection has led the Manitoba legislature to amend *The Securities Act* to provide the Commission with an innovative administrative remedy known as a “compensation order.” This is an order for repayment to an investor of his or her financial losses arising from illegal or improper conduct in the trading of securities. The original amendment set a limit of \$100,000 on a compensation order made for the benefit of an individual investor. Reflecting the success of this remedy and the protection it provides, the

Act was amended in 2009 to increase the maximum amount of a compensation order to \$250,000 per investor.

25. The availability of a compensation order provides investors in Manitoba with an attractive alternative to the civil court system. A compensation order may be made at the conclusion of an administrative hearing, if there is a finding that a market participant has failed to comply with his or her regulatory obligations in respect of dealings with an aggrieved investor. By providing investors with the option to seek a compensation order, the *Act* offers the investor (and, by extension, the dealer or agent) the opportunity to have all regulatory and financial loss matters resolved in a single proceeding.

26. Staff in the compliance division of the Commission assists in the investigation of investor complaints by providing financial analysis of trading records and other financial information. In addition, since the advent of the compensation order as a potential remedy, the compliance section provides a financial analysis of investor claims for financial loss, thus determining what dollar amounts can be presented to a hearing of the Commission for the possible issuance of a compensation order.

27. As of March 31, 2010, the Commission had issued 31 compensation orders having a total value of \$689,110.50. More significantly, however, the authority of the Commission to make a compensation order also creates a strong incentive for market participants to resolve investor complaints involving financial losses at an early stage, often avoiding the need for the investor to make a complaint to the Commission or to incur the significant expenses involved in taking a claim to the courts.

28. The availability of the compensation order as an administrative remedy in Manitoba has also resulted in better protection of retail investors who purchase guaranteed investment certificates. There has been concern from time to time about irregularities involving deposit brokers who sell guaranteed investment certificates to Manitobans. *The Securities Act* in Manitoba is unique because, unlike other jurisdictions, the term “security” includes a guaranteed investment certificate. This statutory definition makes the compensation order available to the Commission as a possible remedy against financial institutions whose representatives contravene the rules of the Commission or the requirements of the legislation with regard to the offering or selling of guaranteed investment certificates.

29. The value of the compensation order as an innovative and effective investor protection tool has been recognized by its subsequent adoption into the securities legislation of Saskatchewan, New Brunswick and Nova Scotia (although the Nova Scotia provision has yet to be proclaimed).

Promoting Efficient Capital Markets in Manitoba

30. The Commission recognizes the benefit to the Manitoba economy and the public in providing an environment that encourages the development of businesses and the raising of business capital. The percentage of businesses that access financing through capital markets is understood to be consistently higher in Canada than in the United States, reflecting the importance of having rules that provide a variety of financing options to support new and developing businesses.

31. The Commission strongly supports the harmonization initiative enshrined in the 2004 *Provincial-Territorial Memorandum of Understanding Regarding Securities Regulation*. The Preamble to that *Memorandum* recognizes the importance of effective securities regulation to both investor protection and “efficient, vibrant and competitive national and local capital markets.” Much of the success of the harmonization initiative in Canada has occurred through the efforts of the CSA and the Council of Ministers of Securities Regulation established under the *Memorandum*. The Commission has been represented on numerous CSA committees and continues its commitment in this regard.

32. Some specific harmonization initiatives in which the Commission has participated are as follows:

National Registration Rule

The national registration rule (National Instrument 31-103) describes the requirements to obtain and maintain registration to trade in securities or advise in the trading of securities. In addition, the rule also sets out circumstances where a trade in securities can be conducted without the need to be registered. The rule is in effect in all provinces and territories, which means that a registrant has a single set of rules to follow when conducting business in a province or territory. Staff of the CSA meets regularly to review the rule and its operation to ensure that it is being consistently applied in all jurisdictions.

Passport System

A passport system has been implemented in four areas: registration, prospectuses, exemptions and continuous disclosure.

In the area of registration, for example, passport significantly improves the efficiency of the Canadian securities regulatory system by permitting one regulator to make a decision regarding registrations that has application in other provinces and territories. A firm or individual in Manitoba can apply to the Commission for the necessary approvals to operate in other provinces and territories. There is no longer a need to obtain separate approvals from each jurisdiction.

Although the Ontario Securities Commission does not currently participate in the passport system, registration processes have been coordinated with Ontario to make the approval process required to access the Ontario market as efficient as possible.

Continuous Disclosure Review Program

The Commission has implemented its own continuous disclosure review program and is participating with other members of the CSA in a national program to ensure that all reporting issuers are subject to ongoing review, and that the reviews are performed efficiently and consistently. The CSA continues to work towards implementing a national continuous disclosure review program.

Over 90% of all trades take place in the secondary market, a fact that is revealed by the requirement imposed on issuers to make continuous disclosure. The quality and timeliness of information disclosed to capital market participants by reporting issuers is of the utmost importance to the market. Commission staff continues to review prospectus offerings, but equal importance is placed on the review of continuous disclosure filings.

National Electronic Filing Systems

The Commission continues both to utilize and to participate in the ongoing development of various electronic filing systems. Each of these systems provides market participants with a single entry point for filing information required by all securities regulators in Canada, while also facilitating increased co-ordination among the regulators themselves:

- * **SEDAR** – A System for Electronic Document Analysis and Retrieval (SEDAR) has been in use since January 1, 1997 and permits the simultaneous electronic filing of securities-related documents with the Commission and other CSA jurisdictions. SEDAR provides for secure electronic communication between issuers and regulators. It has greatly enhanced the efficiency of Canadian capital markets and, when combined with the passport system, has resulted in Canadian capital markets being among the most efficient in the world. In addition, through its website at www.SEDAR.com, it facilitates the timely dissemination of information to the public.
- * **SEDI** – The System for Electronic Disclosure by Insiders (SEDI) is a national insider reporting database. The system simplifies reporting of securities trades by insiders of reporting issuers. It also provides public access to insider trading information.

- * **NRD** - The National Registration Database (NRD) permits an individual or company to submit registration information and report changes to information that has already been registered.
- * **National CTO Database** – The CTO database is a central repository for the publication of cease trade orders issued by provincial and territorial securities regulators. This database has proven to be highly effective and gives both members of the public and the securities industry easy access to this information.

Policy Development

Staff of the Commission has been involved in the development and implementation of a number of significant national rules and policies, most recently the following:

- * a proposed point of sale disclosure regime for mutual funds
- * proposed amendments to the rules and policies on continuous disclosure
- * proposed amendments to the rules and policies on prospectuses
- * the impact of the adoption of International Financial Reporting Standards (IFRS) on securities legislation and market participants
- * proposed amendments to prospectus rules with respect to pre-marketing and marketing
- * proposed amendments to the rules and policies on investment funds
- * proposed new regulations for the derivatives market

33. An example of a recent harmonization initiative in Canada was the finalization and implementation of the registration rule in September 2009, and the expansion of the passport system to include registration matters. While the CSA jurisdictions strive for harmonization of rules, Manitoba, along with other western provinces and the territories, determined that it was advisable for the effective operation of their capital markets to maintain certain exemptions that the registration rule would otherwise remove. This was done without affecting the operation of the rule in other provinces or the ability of most registrants operating in multiple provinces and territories to follow a single set of rules. The ability to work within a national system while at

the same time promoting a provincial interest in response to local markets is one of the strengths of the CSA and its regulatory system.

34. One particular market situation in Manitoba that warranted carving out a discrete exemption from the registration rule is the presence of numerous small and medium-sized companies that raise capital through non-registered suppliers of capital colloquially known as “introducers”. These introducers are a vital source of funds to Manitoba businesses, but would not find it cost-effective to undertake the process of registration. Exemption from the registration process permits these firms to offer capital funds to the Manitoba market under the regulatory scrutiny of the Commission. The Commission maintains the ability to remove an introducer from the market by conducting a hearing and revoking its exemption for cause.

35. The treatment of introducers is merely one example of the Commission’s authority to exempt or modify the normally-applicable requirements of *The Securities Act* or securities rules in consideration of the public interest. Another example is the use of community-based development offerings. The Commission periodically receives applications for orders exempting an issuer of securities from the registration and prospectus requirements of the *Act* where a local community group proposes to sell securities to finance a project designed to benefit that community.

36. The amount of money required to be raised by the sale of securities and the limited number of persons required to invest in the project does not generally justify the costs associated with the preparation of a full prospectus. Also, the size and nature of the project and the types of investors may not allow the use of the private placement exemptions and limited offering exemptions contained in the *Act*.

37. These offerings have been used by local communities to finance projects as diverse as grain elevators and hotels. Apart from a similar initiative in Saskatchewan, community-based development offerings are to the best of my knowledge unique to Manitoba and are designed to meet the specific needs of the Manitoba market.

38. The Commission also confers exemptions from prospectus and registration requirements on a situational basis. Such exemptions are generally determined by the nature of the security sold, the dollar amount of the purchase, and the sophistication of the purchaser. For example, “limited offering exemptions” are based on an offering of securities being made to a limited, identifiable group of purchasers, and are used by new businesses that need capital to establish operations. Purchasers of securities in limited offering exemptions either have knowledge of the business in which they are investing or are required to seek independent advice with respect to the investment prior to making the purchase.

39. Stakeholders have told the Commission that these unique “Manitoba options” continue to provide methods to raise capital that balance the interests of businesses and investors, and are well-suited to the Manitoba marketplace. They do not, however, represent the full range of the Commission’s oversight of capital markets in the province. Commission rules also provide capital-raising options that are available throughout most of Canada. Using one of these other rules permits a business to raise capital in a consistent manner in most provinces or territories. Unlike the “made for Manitoba” options described above, these latter rules are highly harmonized throughout Canada.

40. There is one other aspect of capital markets management in which the Commission’s contribution is unique to Canada. The Commission oversees the operations of ICE Futures

Canada, Inc. and its clearinghouse ICE Clear Canada through recognition orders issued under *The Commodity Futures Act*, a provincial statute. ICE Futures is the only agricultural commodities exchange in Canada and has participants from around the world.

41. ICE Futures has received regulatory approvals, under various conditions, to offer its services in jurisdictions throughout the world, including the United States, the United Kingdom and France. Each of these regulatory approvals has been based on the foreign regulator being satisfied that the Commission is providing competent oversight and regulation of ICE Futures and ICE Clear.

Systemic Risk

42. While investment markets have largely rebounded from the downturn of 2008/09, the recovery is far from certain and investors worldwide have had their confidence shaken in the markets and the systems that govern them. There has been a demand for change to ensure that the same issues do not arise again to cause the same problems. The member jurisdictions of the CSA continue to work together and on an international basis to assist with the development and implementation of the G20 and International Organization of Securities Commissions (“IOSCO”) initiatives regarding systemic risk.

43. Manitoba is not a member of IOSCO, but the AMF (Quebec) and the Ontario Securities Commission are full members, and the Alberta Securities Commission and the British Columbia Securities Commission are associate members. Further, the CSA receives IOSCO reports and determines what needs to be done on a practical level to achieve the goal of identifying and combating systemic risk as it relates to securities regulation. Additionally,

international bodies like NASAA have regular discussions regarding systemic risk. The President of NASAA is a non-voting member of the Financial Stability Oversight Council (FSOC), which is charged with coordinating financial regulators in the United States in order to identify systemic risks to that nation's financial stability. The Commission maintains membership in NASAA in part to contribute to the identification of systemic risk within its regulatory mandate.

Co-ordinated Regulatory and Criminal Enforcement

44. The enforcement division of the Commission is involved with an array of groups and organizations for the purpose of monitoring local markets to serve both the financial interests of Manitoba investors and the larger public interest in the detection and prosecution of crimes:

- **Joint Securities Enforcement Regulatory Committee (JSERC):** The object of this committee is to share intelligence and foster cooperation among agencies regarding investment fraud. In addition to the Commission, members of JSERC include the Royal Canadian Mounted Police (RCMP), the Winnipeg Police Service (WPS), Manitoba Justice, the Investment Industry Regulatory Organization of Canada (IIROC) and the Mutual Fund Dealers Association of Canada (MFDA).
- **Criminal Intelligence Service Manitoba (CISM):** This organization is one of ten operating under the umbrella of the Criminal Intelligence Service Canada (CISC). It promotes the integration of intelligence resources and interaction between law enforcement and the intelligence community. It consists of 34 partner agencies, including the Commission, RCMP, WPS, Manitoba Justice, and the Canada Border Services Agency.
- **Association of Certified Forensic Investigators Canada (ACFI), Winnipeg Chapter:**
ACFI is a national forum and governing body for the affiliation of professionals who offer, to the public, governments and employers, their expertise in the area of fraud prevention, detection and investigation. ACFI liaises with other non-profit associations for the purpose of promoting fraud awareness. The Winnipeg Chapter's mission is to provide a format to educate and increase awareness on fraud issues. It conducts monthly meetings hosted by the Commission. In

addition to employees of the Commission, the membership of ACFI includes employees of the WPS, Manitoba Labour and Immigration, the Manitoba Lotteries Commission, the Manitoba Public Insurance Corporation and the Canada Revenue Agency.

- **Canadian Bankers Association – Bank Crime Prevention and Investigative Office (BCPIO):** Members of the investigation staff of the Commission attend an annual meeting organized by the BCPIO.

45. The Commission also has a CPIC (Canadian Police Information Centre) terminal that is used for criminal record searches to assist in Commission investigations and enhance the integrity of the registrations process under *The Securities Act*.

Potential Negative Impact of Proposed Federal Scheme

46. The existing regulatory scheme has capably met the needs of investors, market participants and businesses in Manitoba. I am concerned that a national scheme as contemplated in the proposed Canadian *Securities Act* would have a negative impact on both the ability of small businesses in Manitoba to raise capital and the effectiveness of the innovative investor protection mechanisms available under the existing provincial scheme.

SWORN before me in the)
City of Winnipeg, in the Province)
of Manitoba, this 26th day of)
October 2010.)

DONALD G. MURRAY

A Barrister & Solicitor in and for)
the Province of Manitoba.)