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September 25, 2003

DELIVERED

Ontario Securities Commission
Alberta Securities Commission
Manitoba Securities Commission
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice, Government
of the Northwest Territories
Securities Commission of Newfoundland and Labrador
Nova Scotia Securities Commission
Commission des valeurs mobilières du Québec
Saskatchewan Financial Services Commission
Office of the Attorney General, Prince Edward Island
Registrar of Securities, Legal Registries Division, Department
of Justice, Government of Nunavut
Department of Justice, Securities Administration Branch,
New Brunswick

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8

and Denise Brosseau, Secretary
Commission des valeurs mobilières du Québec
Tour de la Bourse
800, square Victoria
C.O. 246, 22e étage
Montréal, Québec
H4Z 1G3

Dear Sirs/Mesdames:

**Re: Requests for Comment
Proposed MI 52-109 *Certification of Disclosure in Companies'*
*Annual and Interim Filings and MI 52-110 Audit Committees***

We are providing this letter in response to the Request for Comment of the Canadian Securities Administrators (the "CSA") on proposed Multilateral Instrument 52-109 *Certification of Disclosure in Companies' Annual and Interim Filings* ("MI 52-109") and proposed Multilateral Instrument 52-110 *Audit Committees* ("MI 52-110"), each published on June 27, 2003. These comments do not necessarily represent the views of our firm's clients.

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Our comments relate primarily to issues in the proposed Multilateral Instruments particular to reporting issuers that do not have conventional corporate or management structures, such as income trusts; however, we have also included comments regarding other matters of more general application.

Multilateral Instrument 52-109

1. We refer to the discussion in the CSA's Request for Comment under the heading "Application of the Proposed Instrument to Certain Classes of Reporting Issuers". As noted in the Request for Comment, many income trusts carry on business through one or more subsidiary entities (an "Opco") in the place of, or in addition to, the income trust. Opco may have its own management personnel, or may be managed externally by a third party management company pursuant to a management agreement. As a result, in some income trust structures, the income trust itself will not have a CEO or CFO. Instead, the CEO and CFO functions will be performed for the trust by the CEO and CFO of Opco or of an external management company.

We are of the view that the language of Item 3 in each of Sections 2.1 and 3.1 of proposed MI 52-109 is broad enough to accommodate a typical income trust organizational structure. Where the executive management in respect of an income trust's business resides at the Opco level or in an external management company, Opco or the management company will generally be responsible for preparing the income trust's annual and interim financial statements and other securities law filings. We think that, in such cases, the CEO and CFO of Opco or the management company are persons who perform similar functions in respect of the income trust reporting issuer as a CEO or CFO. Such persons would therefore be permitted (and required) to provide the certificate required in respect of the income trust under proposed MI 52-109.

2. In the Request for Comment, the CSA raise a number of related concerns about a business structure in which all or a majority of a reporting issuer's business is operated through subsidiary entities. This structure is typical in income trusts, but could also arise in relation to other issuers such as public holding companies. We comment on the expressed concerns in turn below:

- (a) *We believe that for certain types of issuers, such as issuers that are income trusts, it may be the case that the certificate filing requirement should apply to more than one issuer, or to an issuer other than the reporting issuer ... Requiring certificates only from the CEO and CFO of the income trust may not be sufficient. For example, the CEO and CFO of Opco may not be the same as the CEO and the CFO (or their equivalents) of the income trust.*

We do not believe this should be of particular concern to the CSA. Where an income trust does not have a CEO and CFO, for the reasons outlined in paragraph 1, above, the language of Item 3 of Sections 2.1 and 3.1 should be

sufficient to require certificates from the appropriate people who perform the CEO and CFO functions in respect of the income trust. In many cases where an income trust has a CEO and a CFO, those positions would likely be held by the persons who are also the CEO and CFO of Opco. In any event, even if the CEO and CFO of the income trust (the reporting issuer) are not the same as the CEO and CFO of Opco, we feel that certification by the CEO and CFO of the reporting issuer (or persons “who perform similar functions” for the reporting issuer) of financial statements of the reporting issuer that are prepared on a consolidated basis should be sufficient (see our comments in paragraph 2(c), below).

- (b) *Also, in some jurisdictions it may be unclear in certain circumstances whether Opco is a “subsidiary” of the income trust for the purposes of the Proposed Instrument.*

The certification requirement in paragraph 4(a) of Forms 52-109F1 and 52-109F2 states (in part) as follows: “... to provide reasonable assurances that material information relating to the issuer, *including its consolidated subsidiaries*, is made known to us by others within those entities, ...”*[italics added]*. The concept of “subsidiary” as outlined in subsection 1(4) of the *Securities Act* (Ontario) and equivalent legislation in other provinces refers to incorporated entities and does not refer to other entities such as partnerships or trusts. In this regard, we believe that the concept of a “subsidiary” in relation to the proposed MI 52-109 needs to be expanded to include non-corporate entities. Such an expanded definition would be relevant not only to income trusts, but other issuers which hold interests in partnerships or trusts as well. We suggest that the use of a concept such as the “subsidiary entity” concept found in subsection 1.3(2) of proposed MI 52-110 should be considered.

- (c) *It may be arguable that the “business” of the income trust -- to act as a passive holding/distributing entity -- is different from the business of Opco. Consequently, if certificates were required only from the CEO and CFO of the income trust, the controls being certified might be those of a “passive” investor rather than the controls that would be necessary in relation to Opco.*

We do not consider this to be a concern. A typical income trust does not hold a portfolio of investments (in contrast, for example, to an investment fund, as defined in proposed MI 52-109), but instead holds (and usually controls) one or more Opcos that carry on a particular business, and prepares consolidated financial statements that reflect the underlying assets and operating results of that business. In this respect, the position of a typical income trust does not differ from that of a public holding company which carries on business through one or more operating subsidiaries. In such circumstances, we suggest that the internal controls required to provide reasonable assurances about the consolidated financial statements would by necessity include appropriate internal controls

relating to the business conducted by subsidiary Opcos. In our view, there should not be a requirement for certification by CEOs and CFOs of subsidiary operating entities of an income trust or other reporting issuer.

3. Proposed MI 52-109 requires an issuer's CEO and CFO to certify that they have designed or caused to have been designed disclosure controls and procedures and internal controls. These certification requirements do not appear to readily accommodate a situation in which the CEO or CFO of a reporting issuer changes following the design of such controls and procedures. A new CEO or CFO may not have designed or caused to have been designed the applicable disclosure controls and procedures and internal controls for an issuer, although he or she may have supervisory responsibility for such controls upon becoming CEO or CFO. Instead, for example, a new CEO or CFO might arrive at a reporting issuer where such controls are already in place, review such controls, and determine that they are sufficient. It is not clear how this type of situation might be dealt with in the context of the proposed certificates as they are currently worded.

Multilateral Instrument 52-110

4. Unlike the Request for Comment regarding proposed MI 52-109, the Request for Comment regarding proposed MI 52-110 does not specifically request comments on the application of the proposed instrument to less conventional types of reporting issuers such as income trusts. However, we believe there may be some uncertainty in the application of proposed MI 52-110 to certain income trusts.
5. As you know, in many income trust structures the functions typically performed by the board of directors of a public company, including audit committee activities such as review and approval of the income trust's financial statements, are performed by the trustees or directors of Opco. As such, the audit committee in respect of an income trust often exists at the Opco level. Section 3.1(2) of proposed MI 52-110 requires that every audit committee member must be a "director of the issuer". We suggest that the language of Section 3.1(2) of proposed MI 52-110 could be clarified to make it clear that an audit committee constituted at the Opco level will satisfy the requirements of this Section.

* * * * *

We appreciate the opportunity to comment on the proposed Multilateral Instruments. Please contact either Jeff Lloyd (at 416.863.5848) or Brendan Reay (at 416.863.5273) if you would like to discuss these comments.

Yours very truly,

BLAKE, CASSELS & GRAYDON LLP