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SENT BY E-MAIL

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

Dear Sirs/Mesdames:

Proposed Multilateral Instrument No. 52-109

I am writing in response to the request for comments pursuant to a notice (the "Notice") dated June 20, 2003 issued in respect of proposed Multilateral Instrument 52-109 regarding Certification of Disclosure in Companies' Annual and Interim Filings (the "Instrument").

Before responding to the questions set out in the notice accompanying the Instrument, we have a few comments we would like to make respecting the Instrument.

Certification of Consolidated Financial Results

The Instrument does not appear to address how the requirement to certify annual and interim corporate filings should apply to issuers whose consolidated financial results for public reporting purposes

include the financial results of publicly traded subsidiaries which are subject to equivalent public reporting and certification requirements.

By way of background, Power Corporation of Canada ("Power Corporation") is an international management and holding company with several publicly traded subsidiaries. It holds a 67.1% interest in Power Financial Corporation ("Power Financial") which in turn holds a 70.6% interest and a 56.0% interest, respectively, in Great-West Lifeco Inc. ("Great-West") and Investors Group Inc. ("Investors"). In addition, Great-West directly and indirectly holds an additional 3.5% interest in Investors and Investors holds a 4.2% interest in Great-West.

Each publicly traded subsidiary will have its own governance arrangements, disclosure controls and procedures and internal controls and will be subject to the oversight of an elected board of directors and an independent audit committee. Under the Instrument, the CEO and CFO of each publicly traded subsidiary will be required to certify its annual and quarterly filings and, in due course, to certify disclosure controls and procedures and internal controls. These structures and procedures are intended to enhance investor confidence, including the confidence of the publicly traded parent, in the integrity of the public subsidiary's annual and quarterly filings. A publicly traded parent company and its officers should, therefore, be entitled to rely on the certificates provided by the CEO and CFO of its publicly traded subsidiaries. Indeed, not only would it be unnecessarily duplicative to require the CEO and CFO of a publicly traded parent company undertake the same diligence process as the CEO and CFO of the publicly traded subsidiary, it may not be possible for them to do so. We note, for example, that proposed Multilateral Instrument 52-110 as presently drafted would not even permit the CFO of the publicly traded parent to be a member of the Audit Committee of the publicly traded subsidiary.

We strongly urge that the Instrument be amended to state that, in providing their required certificates, the CEO and CFO are entitled to rely on the certificates provided by the CEO and CFO of a publicly traded subsidiary (with respect to such subsidiary and its consolidated subsidiary entities) which is subject to certification requirements which are substantially similar to those set out in the Instrument (including U.S. certification requirements) unless they have knowledge that the certificates provided by the CEO and CFO of the publicly traded subsidiary are false.

Scope of Potential Liability of CEOs and CFOs

We read with interest the comments on liability for false certification contained in the Companion Policy to the Instrument. **However, we think that the matters considered in the Companion Policy would benefit from further consideration, especially in connection with the interaction of the Instrument and the proposed introduction of statutory civil liability as contemplated in Ontario Bill 198.**

As noted in the request for comments, certification is a personal obligation of the certifying officers. As such it will clearly enhance the enforcement remedies available to regulators. However, the existence of personal certification also substantially lowers the bar for plaintiffs who will seek to pursue claims under common law against the CEO and the CFO for allegedly false certifications. Canada has been fortunate in that Canadian issuers have been able to operate free of the threat posed by U.S.-style -strike suit litigation. In these days of increasing judicial activism, however, extra caution is warranted before implementing legislative changes which have the effect of handing new opportunities to the plaintiffs' bar. In this regard, we note that while plaintiffs who pursue such common law proceedings will not benefit from the deemed reliance provisions in Bill 198, they will also not need to contend with the protections against frivolous and vexatious lawsuits included in Bill 198.

We also have concerns respecting the potential interaction between certification and statutory civil liability as contemplated in Bill 198. First, we note that the personal nature of responsibility for the matters certified does not fit well with the collective responsibility of those who may be held responsible for a responsible issuer's continuous disclosure statements. We agree that under Bill 198 the personal certifications given by the CEO and CFO will constitute "documents" which may give rise to potential civil liability under section 138.3(1) of Bill 198 in the event that they are false in any respect. However liability for a false certificate will also lie against not only the officer who provided the certificate, but also against the responsible issuer and each director of the responsible issuer, subject only to the burdens of proof and defences contemplated in Bill 198. Second, we note the strong potential for multiple misrepresentations and the doubling or tripling of caps on liability contemplated in Bill 198 arising (i) from a misrepresentation in a certificate and in the document referenced in the certificate and (ii) from the fact that the Instrument contemplates separate certificates being provided by the CEO and CFO, each of which would constitute a "document" under Bill 198. We doubt

whether a court would treat claims based on all such documents as a single misrepresentation, especially considering the distinction noted above between the personal nature of the CEO's and CFO's responsibility for the matters certified versus the collective responsibility of those who may be held responsible for a responsible issuer's continuous disclosure statements.

Language Used in the Form for Certificates

"Fairly Presents the Financial Condition"

In light of our concerns with respect to the potentially broad scope of liability arising as a result of the Instrument, we are particularly concerned with the requirement for the CEO and the CFO to certify that the financial statements and related MD&A "fairly present the financial condition" of the issuer in the absence of any prescribed standards as to what such a statement means. While we acknowledge that the language in the Instrument parallels the SEC's certification requirement, we note that the SEC's rules reflect the requirements of the *Sarbanes-Oxley Act of 2002* and have not benefited from reasoned analysis.

The language in the Companion Policy respecting the meaning of "fairly presents" is helpful but does not articulate clearly the standard to be applied. Moreover, we note that the views expressed in the Companion Policy (as opposed to the provisions set out in the Instrument) respecting the meaning of "fairly presents" would not be binding on any court (or, indeed, any commission). **We think the standard to be applied by CEOs and CFOs when providing the required certifications should be clearly articulated and should be set out in the Instrument, not the Companion Policy.**

No guidance has been included in the Instrument or the Companion Policy as to the meaning of "financial condition". While the term "financial position" has some relevance in the accounting context, the term "financial condition" is not an accounting term and is not so well understood. **We believe that the vagueness of the term "financial condition" substantially increases the exposure of the CEO and CFO to potential unwarranted litigation.**

Disclosure to the Auditors and the Audit Committee

Paragraph 5 of each form of certificate effectively requires the CEO and the CFO to certify that, except as has been disclosed to the issuer's auditors and audit committee, there is <u>no</u> significant deficiency or

material weakness in the design operation of internal controls that could adversely affect the issuer's ability to disclose information required to be disclosed within the requisite time frames and there is no fraud, whether or not material, involving management or other employees with a significant role in the issuer's internal controls. This is an unreasonably high standard to impose on these individuals and is inconsistent with the other requirements of the certificate which, for example, speak to the signing officer's "knowledge" or to disclosure controls and procedures and internal controls which are designed and implemented to provide "reasonable assurances". **Paragraphs 5(a) and (b) of each certificate should be modified to reference all significant deficiencies or material weaknesses in the design operation of internal controls known to the CEO or CFO, as applicable, that could adversely affect the issuer's ability to disclose information required to be disclosed within the requisite time frames and all fraud, whether or not material, known to the CEO or CFO, as applicable, that involves management or other employees with a significant role in the issuer's internal controls.**

Contrast with US Certification Requirements

We understand that in the interests of increased harmonization with US securities laws it is proposed that the requirements of the Instrument closely parallel US certification rules. **However we note that in several respects, the certification requirements under the Instrument are more onerous than those contemplated under the corresponding SEC rules.** We submit that it would not be appropriate to impose more onerous requirements on Canadian issuers than US issuers would face, especially if interlisted Canadian issuers are exempt from complying with the Instrument by complying with less onerous US certification requirements.

Several of the differences between US certification requirements and the provisions of the Instrument result from changes from the SEC's proposed which were reflected in the final SEC rules published on July 17, 2003, shortly before the Instrument was issued for comment. We note the changes made by the SEC as reflected in the final SEC rules and hope that conforming changes will be made to the Instrument. Examples of these differences include:

(a) The Instrument requires the internal controls to provide reasonable assurance "that the issuer's financial statements are fairly presented in accordance with

generally accepted accounting principles" while the SEC's final rule requires reasonable assurance "regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with generally accepted accounting principles";

(b) in the Instrument the officers must certify that there has been an evaluation of both disclosure controls and procedures and internal controls as of the end of the period covered by the annual filings (clause 4(c) of Form 52-109F1) and that their conclusions respecting the effectiveness of both disclosure controls and procedures and internal controls as of the end of such period have been publicly disclosed (clause 4(d) of Form 52-109F1), although references to internal controls in both cases were deleted in the final SEC rule;

(c) the disclosure required with respect to changes in internal controls in the final SEC rule no longer references (i) changes in other factors that could significantly affect internal controls or (ii) disclosure of any actions taken to correct significant deficiencies and material weakness in internal controls and in its final rule the SEC replaced the phrase "significant changes in the issuer's internal controls" with "any change in the issuer's internal control over financial reporting that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting"; and

(d) the final SEC rule now uses the term "internal controls over financial reporting" rather than the term "internal controls".

In addition to the foregoing, it appears that the Instrument also imposes a few substantive certification requirements in addition to what is required in the U.S. No rationale is articulated in the Instrument for why CEOs and CFOs of reporting issuers in Canada should be subject to these additional requirements when U.S. issuers and reporting issuers in Canada who are able to take advantage of the exemption afforded in the Instrument are not. These additional requirements are:

(a) the Instrument requires that the disclosure controls and procedures to be designed by or under the supervision of the CEO and CFO must be designed to provide reasonable assurances "that …material information is disclosed within the time periods specified under applicable provincial and territorial securities legislation"; and

(b) the CEO and CFO must disclose to the auditors and the audit committee all significant deficiencies and material weaknesses in the design or operation of internal controls that could adversely affect the issuer's ability to make required disclosure "within the time periods specified under applicable provincial and territorial securities legislation".

Timing

The proposed timing of the implementation of the Instrument is ambiguous in that the Instrument will apply to issuers commencing January 1, 2004 while the notice accompanying the Instrument states that it will not apply in respect of financial periods prior to the effective date**. It would be helpful if the clarification respecting timing referenced in the notice were to be included in the Instrument.**

In addition, since financial statements must include comparative financial information in respect of prior years, it would be helpful to clarify that certification does not apply in respect of such comparative financial information.

The timing of implementation of the Instrument to coincide with the first quarter 2004 finical statements is especially problematic if National Instrument 51-102 respecting continuous disclosure is implemented so as to accelerate the timing of the first quarter 2004 financial statements. **It would be a herculean task to require issuers to file their first quarter financial statements within a shorter 45 days period and simultaneously require the CEO and the CFO to complete diligence necessary to be in a position to personally certify those financial statements and accompanying MD&A.**

Indeed, we urge the Canadian securities administrators to reconsider proposals to reduce the time frames in which to prepare and filing quarterly and annual financial statements and related MD&A as

contemplated in proposed National Instrument 51-102 in light of the onerous new certification requirements.

Specific Requests for Comment

Part 1 - Do you agree that the proposed one-year transition period is appropriate?

The development, approval and implementation of disclosure controls and procedures and internal controls necessary to achieve the purposes outlined in the Instrument will, at least initially, require a substantial commitment of resources, in terms of both financial resources and the personal involvement of senior management. Assistance from external consultants is likely to be complicated by the fact that all Canadian public issuers will be undergoing this process simultaneously. We think a transition period longer than one year is appropriate in the circumstances.

In our view, because the second and third representations are knowledge-based, it is necessary not only to require CEOs and CFOs to certify (i) the accuracy and fairness of their issuer's filings (representations 2 and 3) but also to require them to certify (ii) as to the informational foundation upon which these representations are based (representations 4 through 6). Do you believe it is appropriate to include representations 4 through 6?

Do you think that there is reason to differentiate between smaller and larger issuers? For example, is there any reason to exclude representations 4 through 6 with regard to smaller issuers?

We have raised our concerns with representations 4 through 6 elsewhere in this letter. We are not aware of any reason to exclude smaller issuers from providing the same certification.

If the AIF and annual financial statements and MD&A are not all filed at the same time, there will be a gap between the time that the earliest of those documents is filed and the time the annual certificate is filed. Is this timing gap problematic?

No.

Should the annual certificate in the Proposed Instrument cover certification of Form 40 executive compensation disclosure? If yes, how should this be done? For example, should the annual certificate cover subsequently filed material in the Form 40 as and when that information is filed?

No.

The U.S. rules require an issuer's CEO and CFO to certify annually and quarterly that they have evaluated, and disclosed their conclusions about, the effectiveness of

their issuer's internal controls and disclosure controls and procedures. While the Proposed Instrument maintains this requirement in the annual certificate, it does not impose this requirement for the certification of interim filings. In our view, maintaining those controls will necessarily require some form of on-going evaluation process, otherwise those controls will become less effective over time due to regulatory changes, changes to generally accepted accounting principles (GAAP), or changes in, among other things, the size or nature of the issuer's business. However, we acknowledge that a formal interim evaluation that is subject to certification will likely be costlier than an informal evaluation. Therefore, we have concluded that from a cost-benefit standpoint, a formal interim evaluation is unnecessary.

Do you agree with this approach?

We agree that more frequent evaluation is not practical, especially in the absence of clear standards for conducting such evaluations.

Do you think that the exemption in section 4.1, as currently drafted, will have the effect of discouraging issuers that prepare their financial statements in accordance with U.S. GAAP from preparing and filing Canadian GAAP financial statements?

Yes.

Should an issuer that is structured such that all or majority of its business is operated through a subsidiary or another issuer of which it materially affects control or direction such as an income trust, be subject to the same certification filing requirements as issuers that offer securities directly to the public?

If certification is to be required, it should apply to all reporting issuers. However, the application of the requirement should take into consideration the structure of issuer. As noted above, for example, CEOs and CFOs of public issuers which consolidate the results of a subsidiary which is a public issuer that is subject to a certification requirement ought to be able to rely on the certificates given by the CEO and CFO of such subsidiary.

Should we formally define: (i) internal controls and (ii) disclosure controls and procedures? If so, what should the appropriate definitions be?

There is no material benefit to defining these terms unless doing so will assist issuers in understanding the standards of performance expected of them to achieve the outcomes that internal controls or disclosure controls and procedures are designed to achieve. We note that the definitions in the SEC rules do not assist issuers in understanding the standards of performance expected of them.

I appreciate the opportunity to comment on the proposal. Should you have any questions or wish to discuss this matter further, please feel free to contact me at (514) 286-7415.

Yours very truly,

SIGNED BY

Edward Johnson