September 25 , 2003

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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

Dear Sirs & Mesdames:

Proposed Multilateral Instrument 52-109 ("Certification Instrument") and Proposed Companion Policy 52-109CP ("Companion Policy") – Certification and Disclosure in Companies' Annual and Interim Filings

Proposed Multilateral Instrument 52-110 ("Audit Committee Instrument") and Proposed Companion Policy 52-110 ("Audit Committee Policy") – Audit Committees

This letter is in response to the request for comments ("Request for Comments") relating to the proposed Multilateral Instruments 52-109 and 52-110. Defined terms used in the respective Requests for Comments will be used in this comment letter. As requested, a diskette containing a copy of this letter is enclosed.

Certification Instrument and Companion Policy

We have the following comments and recommendations with respect to the Certification Instrument and Companion Policy. As a general matter, we assume that changes which were made to the corresponding U.S. requirements shortly before the date the draft Certification Instrument was issued will be reflected in the next draft of the Certification Instrument where necessary to maintain consistency between the U.S. and Canadian requirements, particularly with respect to the implementation timetable and transitional matters.

1. Transition Period and Issue of Timing

The Certification Instrument and Companion Policy fail to make it completely clear as to when the proposed Certification Instrument will take effect. For example, as we read the Certification Instrument, if it comes into force January 1, 2004 it will apply to all filings made after that date. Thus, reporting issuers with financial year ends of December 31, for example, will be filing their annual financial statements for fiscal 2003 after January 1, 2004 and the CEO and CFO will have to certify those statements. Even though the certificate will be the "bare version" certificate (omitting the paragraphs relating to internal controls), we are still deeply concerned with requiring CEOs and CFOs to provide any certification of documents covering periods during which appropriate controls and procedures had not yet been put in place because those periods predated the Certification Instrument.

A related concern is that the currently proposed effective dates for the certifications relating to internal controls are prior to the dates on which the counterpart requirements in the U.S. come into place. In this regard, we note that interlisted issuers will not, for the most part, need to address the evaluation of internal controls over financial reporting for financial periods ending before April 15, 2005. A failure to harmonize implementation timing with the U.S. measures would create significant and prejudicial inconsistencies between the Canadian and U.S. requirements. We assume that it is intended that the implementation dates will be harmonized with those currently prescribed under the *Sarbanes-Oxley Act of 2002*.

2. Clarification of Application to Non-corporate Entities

Reporting issuers that are structured as income trusts should be explicitly entitled to satisfy the certification requirements by delivering certifications from the CEO and CFO of the underlying operating business, provided that they reference the trust on a consolidated basis. This would account for income trusts that do not have a CEO or CFO of the actual trust, or whose CEO and CFO are titular and are effectively non-executive officers. This clarification should also be provided for partnerships, noting the obligation would be on the general partner to provide the certifications where the issuer is a limited partnership. Accordingly, we would recommend that the Certification Instrument be amended to properly reflect the organizational structure of non-corporate entities.

3. Possibility of Difficulties Meeting Filing Deadlines After Major Transactions

We note that the Certification Instrument provides no relief for certifying a period immediately following a major transaction – for example, a significant business acquisition. Due to the potential problems that issuers could face in completing and verifying the requisite information in order to meet the certification requirements after certain transactions, we would suggest that some form of relief from the timing or usual content of the certificates be added to the Certification Instrument.

4. Scope of Potential Liability

The Certification Instrument is not clear as to whether the certification requirements also apply to prior year or prior period comparative financial information included in the interim and annual financial statements. Presumably it is not intended that certification should be required for comparative financial information contained in current period financial statements when that comparative information was prepared prior to the Certification Instrument coming into force. If so, the attestation in paragraph 2 of Form 52-109F1 will need to be revised.

The Companion Policy addresses certain matters relating to possible liability of CEOs and CFOs for certifications made under the Certification Instrument. However, it does not expressly consider the interaction of the Certification Instrument and the proposed introduction of statutory civil liability as contemplated in Ontario Bill 198. Bill 198 was drafted prior to the Certification Instrument so the potential civil liability consequences of a personal certification requirement for CEOs and CFOs could not have been fully considered. We are concerned that unless Bill 198 is further amended, or additional protections are otherwise made available to CEOs and CFOs, the combined effect of Bill 198 and the Certification Instrument could result in unintended, inappropriate and disproportionate potential liability. We would be pleased to provide you with further analysis of this point if it would assist your deliberations.

A further concern is that liability for a false certificate under Bill 198 will 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.

5. Form 52-109 F1

Paragraphs 4(a) and 5(a) conclude with the phrase "within the time periods specified under applicable provincial and territorial securities legislation". This attestation exceeds the certifications required by the *Sarbanes-Oxley Ac of 2002* and we do not believe Canadian certification requirements should differ in this respect.

Given the potentially broad scope of liability arising as a result of the Certification Instrument, it is important that there be a clear understanding of what is meant by the words used in the form of the certificate. In this regard, we note that there is no clear understanding as to what is meant by the requirement that the CEO and the CFO certify that the financial statements and related MD&A "fairly present the financial condition" of the issuer. While we acknowledge that the language in the Certification 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. While the language in the Companion Policy respecting the meaning of "fairly presents" is helpful, it clearly would not bind any court (or Commission). Moreover, we note there is no guidance given as to the meaning of "financial condition". 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 Certification Instrument, not the Companion Policy.

As a minor drafting point we would also recommend that the comma after the words "securities legislation" in paragraph 2(c) be deleted.

Audit Committee Instrument and Audit Committee Policy

1. Section 1.1 - Definition of "Financially Literate"

The definition of "financially literate" under the Audit Committee Instrument is less flexible than the approach set out in the April 11, 2003 NYSE proposals (the "NYSE Proposals"). The NYSE Proposals provide the board of directors with the power to determine whether or not a director is financially literate. While the financial literacy NYSE Proposals will not apply to foreign private issuers such as Canadian interlisted issuers, we expect many will wish to voluntarily comply with this aspect of the NYSE Proposals. Consequently, there should be a similarity of approach between the Audit Committee Instrument and the NYSE Proposals. We therefore recommend that this provision be revised to ensure that the board is expressly given the power to determine the requisite level of financial literacy for audit committee members.

2. Section 1.1 – Definition of "Audit Committee Financial Expert"

Paragraph 3 of Form 52-110F1 requires that an issuer disclose the identity of the audit committee financial expert(s), if any, that are serving on its audit committee or, in the absence of any such experts, an explanation of why no financial expert is serving on the audit committee. In the Audit Committee Instrument and Audit Committee Policy's present form, there can be no assurance that an individual identified as an "audit committee financial expert" will not face an increased risk of liability if identified as such. Ultimately, the existence and extent of any liability which may arise as a result of being identified as an "audit committee financial expert" will be up to the courts to determine. We are concerned that a court would hold a person identified as an audit committee financial expert to a higher standard of care than persons not so named. In light of

this risk, it is improbable that anyone will wish to be identified as an “audit committee financial expert” in the issuer’s disclosure. We note that the helpful clarifying views expressed in the Audit Committee Policy are not binding on the courts (or even upon the Commission), and legislative reform will be necessary to achieve the protective goal that the Audit Committee Policy aspires to achieve. Unless and until such legislative reform occurs, we submit that disclosure of the identity of any “audit committee financial experts” should not be mandated.

3. Definitions of “Affiliated Entity” and “Control” – Section 1.3

The definitions of “affiliated entity” and “control” in section 1.3 of the Audit Committee Instrument are borrowed from the U.S. rules but neither the Audit Committee Instrument nor the Audit Committee Policy provides any guidance as to how these terms are supposed to be interpreted and applied in Canada. The definitions of these terms in the Audit Committee Instrument are inconsistent with the definitions accorded these terms in virtually every other rule adopted to date in Canada. Confusion will therefore arise as to whether practitioners and regulators need look to U.S. law in interpreting the meaning of “control” to determine if an entity is an affiliated entity under the Audit Committee Instrument.

The term “affiliate” in the corresponding SEC rules has a very different meaning under U.S. securities law than is presently accorded the term “affiliate” (or “affiliated entity”) under Canadian securities law. For example, we are advised by U.S. counsel that any person or company with more than 10% of the voting stock and a seat on the board of an issuer would be an “affiliate” under the SEC rules. This is not a conclusion that Canadian securities lawyers would likely reach given the definition of “control” in the Audit Committee Instrument, but this would be the result if the CSA follows the U.S. approach when interpreting the term “affiliated entity.”

In Canada, in the absence of any contractual arrangements concerning the voting of an issuer’s securities, securities practitioners would conclude that a person or company would only have the “direct or indirect power to direct or cause the direction of the management and policies” of the issuer if it held more than 20% of the voting securities and no other person or company held a greater number of securities. (See, for example, the provisions dealing with “control block distributions”.) In contrast, we understand that the U.S. securities bar would interpret a holding in excess of 10% of the voting securities coupled with a single board nominee to constitute control for purposes of this particular definition. Given that Canadian reporting issuers tend to be much more closely held than U.S. public companies, we submit that the U.S. interpretation of this definition of “control” would be much too broad and would preclude many relatively passive investors with a board nominee from having a representative on the audit committee of a Canadian reporting issuer.

We strongly urge the CSA to adopt a “bright line” definition for “control” and “affiliated entity” that reflects how these terms are commonly understood in Canada so as to avoid importing into Canada U.S. case law relating to the meaning of “control”.

4. Definition of “Subsidiary Entity”

The definition of “subsidiary entity” is inconsistent with the definition ascribed to this term elsewhere in Canadian securities legislation and securities rules. This inconsistency arises because a different definition of “control” is used for purposes of the Audit Committee Instrument and, therefore, the definition of “subsidiary entity”. At the very least, the definition of “subsidiary entity” in the Audit Committee Instrument will include any entity over which a person or company has effective control through voting securities or otherwise. If U.S. legal principles are applied to determine the meaning of “control” in the Audit Committee Instrument, a holding of voting securities over 10% combined with a board representative would have the effect of making an entity a “subsidiary entity” of a person or company. We do not think that this is the result that the CSA intended. Accordingly, we recommend that a different definition of control should be used for purposes of the definition of “subsidiary entity”.

5. The Meaning of Independence – section 1.4

We have some serious reservations about the application and scope of the proposed definition of “independence”.

(a) Independence from Management

The term “independence” is defined in the Audit Committee Instrument in relation to a relationship which could, in the view of the issuer’s board of directors, reasonably interfere with the exercise of a member’s independent judgement. It is clear from the original Report of The Toronto Stock Exchange Committee on Corporate Governance and in the commentary to the NYSE Proposals for corporate governance purposes, that the focus is on the ability of the board to exercise judgment which is independent from management. Since the definition of “material relationship” does not specifically exclude shareholdings and there is no reference to independence being considered to be independence from management, there is a possibility that nominees of significant shareholders could be viewed as having an indirect material relationship with the issuer that would interfere with the exercise of judgment since they would not be independent of the significant shareholder (even though their judgment may be very independent of management). To assist boards of directors in assessing whether a director is free of a relationship which could reasonably interfere with the exercise of the director’s independent judgement, the Audit Committee Instrument or the Audit Committee Policy should include a statement that the focus of the board’s inquiry should be to assess whether the individual’s judgement is independent from management.

(b) Use of Definition in Other Contexts

We note that U.S. stock exchanges apply a definition of "independent director" for a variety of purposes, and only in the case of prescribing audit committee composition requirements incorporate the additional restrictions under U.S. securities laws. We would be extremely concerned if the CSA or Canadian corporate lawmakers were to apply the more onerous definition of "independent director" for audit committee purposes in other contexts – i.e., in establishing the minimum number of independent directors that must be on a board or on other board committees.

(c) Controlling Shareholders

We believe that a controlling shareholder has a compelling interest in ensuring strong oversight of financial reporting and the audit process and reasonably ought to expect that its interests will be represented on the board and on the audit committee of the companies in which it holds a controlling position. The exemption provided by section 3.3 of the Audit Committee Instrument fails to adequately address the interests of controlling shareholders since its application is limited solely to a director who is otherwise independent of each affiliate on which the director sits.

The exemption in section 3.3 should be broadened to permit employees of the controlling company to participate on the audit committee of the controlled subsidiary. In light of the controlling parent company's ability to cause management of the subsidiary to be replaced, there is adequate assurance that an officer of the parent who is a director of the subsidiary will be able to exercise judgement that is independent of management of the subsidiary. Moreover, there are advantages to including, for example, the Chief Financial Officer of the controlling company as a member of the audit committee of the controlled subsidiary. Such an individual can be expected to be more interested in, and to have greater familiarity with, the accounting issues which may affect the subsidiary than most audit committee members.

There should be no requirement to disclose whether the issuer is relying on an exemption from audit committee independence requirements with respect to a director of two affiliates who is otherwise independent with respect to each affiliate. Such disclosure is not presently contemplated under the proposed rules of the NYSE or the SEC's final audit committee rules. On the other hand, if an exemption were to be provided for employees of a controlling company with respect to the audit committee of the controlled subsidiary such disclosure may be appropriate.

(d) Employment Relationships of Family Members

A particular problem in the scope of the family relationship test in section 1.4 is the fact that no minimum threshold exemption is available. In their deeming provisions, the NYSE Proposals are very clear that only directors who are employees or officers or who have family members

who are officers are deemed to not be independent. A director who has an immediate family member who is an employee will still be considered to be independent for purposes of the NYSE Proposals.

The Audit Committee Instrument, however, deems directors with family members who are low level employees to not be independent. This would pose problems for many Canadian issuers, and particularly larger issuers, where it is not unusual to have a director whose family members occupy non-executive positions with the issuer. It serves no useful purpose to have a rule that requires people to have to quit their jobs or their family member to have to resign as a director. The NYSE Proposals use a US$100,000 remuneration threshold test to address this concern and a similar approach could be followed in the Audit Committee Instrument. Alternatively, the determination of whether a particular family member's relationship could interfere with a director's independent judgement could be left to the board.

(e) Compensatory Fees

We note several problems in subsections 1.4(3)(e) and 1.7, largely due to inconsistencies with the U.S. rules that could result in confusing and conflicting applications of the rule. First, the deeming provision relating to an audit committee member directly or indirectly accepting any consulting, advisory or other compensatory fee as proposed in the Audit Committee Instrument includes a look-back which we believe is unnecessarily restrictive and not consistent with the corresponding U.S. rules. Second, subsection 1.4(7) applies to a broader group of individuals than is contemplated in the corresponding SEC rule, and there is no apparent rationale for so expanding the group of individuals to whom this limitation applies. Third, the concept of indirect acceptance is also phrased differently from the U.S. rules, creating a potentially confusing and unintended result. It appears intended to capture a payment to an entity of which the director is a partner, member or executive officer. However, it is instead phrased as payment to a partner, member or executive officer of an entity that provides professional services and there does not appear to be any need for any other relationship between the partner, member or executive officer who received the payment and the director. Finally, we think that the Audit Committee Instrument should include a threshold for determining whether there is a material relationship.

(f) Compensation Test in Subsection 1.4(3)(e)

We have concerns that subsection 1.4(3)(e) could constitute a blanket prohibition against directors receiving any extra compensation, even if it legitimately related to their duties as directors. More specifically, clarification should be provided that any extra compensation paid to a non-executive chair does not run afoul of the compensation test for determining audit committee independence.

(g) Commencement of the "prescribed period"

Issuers should be afforded a reasonable period before the commencement of the "prescribed period" for purposes of assessing director independence. At present, the Audit Committee Instrument states that the "prescribed period" will commence on the effective date of the Audit Committee Instrument, indicated to be January 1, 2004. We believe this is too early to permit Canadian reporting issuers to react to the final form of the Audit Committee Instrument. For example, this date does not provide enough time for any shareholder nominees serving on audit committees whose employers receive any amount of consulting, advisory or other compensatory fees from the issuer or a subsidiary for services provided to terminate such arrangements prior to January 1, 2004 to avoid disqualification of the nominee as an independent director.

This will place reporting issuers and shareholders with board nominees sitting on audit committees in a difficult position because such persons will have very little time, if any, following implementation of the Audit Committee Instrument to ensure compliance. For example, if a service arrangement has to be terminated to ensure that a shareholder service provider with a board nominee can continue to sit on the audit committee, the issuer will be forced to find a replacement service provider on very short notice. At a minimum, we submit that there should be at least a 6 month period following implementation of the Audit Committee Instrument before the prescribed period commences to run.

(h) Use of term "parent" in subsection 1.4(3)(a)

We also note that the reference to "its parent" in subsection 1.4(3)(a) introduces a term that is not defined and/or used with any clear meaning in Canadian securities regulation and legislation. It is likely, however, that interpretations of the term will be redundant to the extent that use of the term "affiliated entities" in the same clause would include the "parent" of the issuer.

6. Ambiguity in Transition Timing

The proposed form of the Audit Committee Instrument and Audit Committee Policy raises several issues with respect to the ambiguity in its effective date and transition timing matters.

First, it is unclear how this rule will apply to disclosure obligations for this year's proxy season. If the issuer's AIF is dated on or after the date of annual meeting, it would appear necessary to include the additional disclosure required under the Audit Committee Instrument. But it also appears that the proxy circular would not have to include a cross reference to the disclosure in the AIF since the proxy circular would be distributed prior to the date of the annual meeting. Practically, this causes confusion and uncertainty in understanding when different sections of the Audit Committee Instrument apply.

Second, a related issue is the ambiguity in how the Audit Committee Instrument will interact with disclosure requirements relating to the first annual meeting. Form 52-110F1 requires that the text of the audit committee's charter be included in the issuer's AIF. It is possible, however,

that an issuer's audit committee charter will have to be amended to meet the requirements of the final Audit Committee Instrument between publication of the AIF and the annual meeting. The proposed Audit Committee Instrument provides no means to address differences that may arise in this interim period and how proper disclosure is to be achieved before and after the Annual Meeting to ensure consistent and current reporting.

7. Non-corporate Organizations

It is not clear how the Audit Committee Instrument is to apply to organizations such as income trusts and limited partnerships. Income trusts often do not have audit committees, and instead employ the audit committee of the underlying business. Reporting issuers structured as trusts should be expressly allowed to satisfy all of the audit committee requirements by using the audit committee of the underlying operating business, provided that it reviews the trust's financial disclosure and controls on a consolidated basis. The Audit Committee Instrument or Audit Committee Policy should likewise address how audit committee requirements are to be met by limited partnerships.

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If you have any questions regarding our comments or wish to discuss them with us, please contact Andrew MacDougall (416-862-4732), Mark Deslauriers (416-862-6709), Robert Lando (212-907-0504) or Janet Salter (416-862-5886).

Yours very truly,

"Osler, Hoskin & Harcourt LLP"