POWER CORPORATION OF CANADA
751 VICTORIA SQUARE, MONTRÉAL, QUÉBEC, CANADA H2Y 2J3

EDWARD JOHNSON
VICE-PRESIDENT, GENERAL COUNSEL
AND SECRETARY
TELEPHONE (514) 286-7415
TELECOPIER (514) 286-7490

October 1, 2003 **DRAFT**

SENT BY E-MAIL

Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Commission des valeurs mobilières du Québec
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. 52-110 – ERRATUM

I wish to draw your attention to a small error in my letter to you of September 25, 2003. On page 4 in the first paragraph under “Application of the Instrument to Reporting Issuers That Are Subsidiaries”, I talk of London Insurance Group as a reporting issuer with preferred shares listed for trading. This no longer true of London Insurance Group, but it is true in respect of our subsidiary, The Great-West Life Assurance Company. Would you therefore kindly read the paragraph as referring to “The Great-West Life Assurance Company” instead of “London Insurance Group”.

I apologize for any difficulty that this correction may cause.

Yours very truly,

SIGNED BY

Edward Johnson

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September 25, 2003

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Dear Sirs/Mesdames:

Proposed Multilateral Instrument No. 52-110

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 52-110 regarding Audit Committees (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 and its application to the Power Group of companies.

Application of the Instrument to Controlled Companies

We welcome the opportunity to share with you the concerns of controlling shareholders with respect to the Instrument. As you are

aware, many of Canada's successful public companies have controlling shareholders. Like other shareholders, a controlling shareholder has a reasonable expectation that its interests will be represented on the board of the companies in which it holds a controlling position. We strongly believe that a controlling shareholder, especially a controlling shareholder which itself is a public company, has a compelling interest in ensuring effective oversight of financial reporting and the audit process and should not be precluded from participating on the Audit Committee.

The impact of the Instrument on controlling shareholders affects many of the Power Group of companies. 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 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. Power Corporation has had controlling shareholders since its beginnings in 1925 and its present controlling shareholder holds in the aggregate, directly or indirectly, or holds voting power over shares carrying approximately 64.6% of the votes.

On the boards of certain of the companies in our group there are directors who sit on the audit committees of two or more affiliates, but who would otherwise be considered independent with respect to each affiliate. Similarly, we have had a long-standing practice with respect to some of the controlled subsidiaries in our group of including an officer of an upstream public company on the Audit Committee of the controlled subsidiary. It would be important to the continued effective governance of companies in our group that such relationships and interlocking directorships continue to be permitted.

The exemption provided in section 3.3 of the Instrument is helpful in that it clarifies that otherwise independent directors may participate on the Audit Committees of two affiliates. **However, the exemption does not address our concern that a controlling shareholder which is a public company should be permitted to have an officer participate on the Audit Committee of the controlled subsidiary.**

Clauses 1.4(3)(a) and (f) of the Instrument would preclude parent company officer representation on the audit committee of the subsidiary because such clauses apply not only to employees of sister

companies and downstream affiliates, but also to employees or officers of parent companies. We submit that an employment relationship with the parent company should not, by itself, result in the individual not being considered to be independent on the board of the 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.

In addition, there are advantages to including, for example, the Chief Financial Officer of the controlling parent 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. Moreover, the effectiveness of the Audit Committee of the parent company may be enhanced if the Chief Financial Officer of the parent is a member of the Audit Committee of the subsidiary. We acknowledge that there would be cause for concern if the Audit Committee of the subsidiary were to be dominated by executives of upstream companies. However, establishing the architecture of corporate governance necessarily involves a balancing of considerations with a view to permitting issuers a field of manoeuvre within which they can make a design choice which facilitates their ability to function effectively (thereby facilitating good performance) while at the same time meeting public expectations both in terms of the perception of director independence as well as in fact. **We believe that the proposed prohibition of any representation by an officer of a parent company on the Audit Committee of the controlled subsidiary imposes an unfair and unnecessary constraint on companies such as ours.**

We note that this view is also shared by Ontario Teachers' Pension Plan Board, a large institutional investor with strongly hold publicly-stated views on corporate governance matters. Their submission notes that the senior employees of controlling shareholders often provide valuable assistance on audit committees, have the interests of the shareholders very much in mind and are very independent from management and their submission also urges that the CSA allow employees of controlling shareholders to be considered for the audit committees of companies with which they have very large share positions.

In our view, to provide a meaningful exemption for controlled companies, section 3.3 ought to provide an exemption not only for directors of affiliates who are otherwise independent, but also for up to one officer of an upstream public company who is otherwise independent with respect to the controlled subsidiary. If the Instrument should provide an exemption to permit an officer of an upstream public company to be a member of the Audit Committee of a controlled subsidiary, we would not object to making the disclosure contemplated in section 4 of Form 52-110F1. **We submit that permitting a single upstream public company officer to participate on the Audit Committee of a controlled subsidiary together with disclosure of the existence of the individual's relationship to the upstream public company and an assessment of whether, and if so, how, such reliance could materially adversely affect the ability of such a director to act independently and to satisfy the other requirements of the Instrument ought to be sufficient to address any concerns with respect to such an individual's independent judgement.**

On the other hand, there should be no requirement to disclose whether an issuer is relying on the exemption from the Audit Committee independence requirement contained in section 3.3 with respect to a director who is a member of the Audit Committees of two affiliates but who is otherwise independent. Nor should there by any requirement to disclose an assessment of whether, and if so, how, such reliance could materially adversely affect the ability of such a director to act independently and to satisfy the other requirements of the Instrument as contemplated in section 4 of Form 52-110F1. Such disclosure is not required under SEC rules respecting standards relating to listed company audit committees. Such a director ought to be considered to be independent and, therefore, disclosure of reliance on the exemption should be unnecessary. If made, such disclosure could have the unwarranted result of calling into question the individual's independence and could leave the impression that the issuer is not fully compliant with the independence requirements of the Instrument.

Application of the Instrument to Reporting Issuers That Are Subsidiaries

Under subsection 1.2(d), the Instrument is not applicable to reporting issuers that are subsidiary entities if (i) the subsidiary entity does not have equity securities displayed for trading on a marketplace, and (ii) the parent of the subsidiary entity is subject to the requirements of the Instrument. London Insurance Group, an indirect wholly-owned

subsidiary of Power Corporation, is a reporting issuer and has non-convertible, non-participating preferred shares which are listed for trading. Although such preferred shares enable London Insurance Group to meet its minimum capital requirements, they are substantially equivalent to subordinate debt. There is no definition of “equity securities” in the Instrument. However, for at least certain purposes under Canadian securities legislation “equity securities” is defined quite broadly as “any security of an issuer that carries a residual right to participate in the earnings of the issuer and, upon the liquidation or winding up of the issuer, in its assets”.[1] Non-convertible, non-participating preferred securities are expressly excluded from the definition of “equity securities” in the corresponding exemption under the rules of the SEC relating to listed company audit committees. **We request that subsection 1.2(d) of the Instrument be modified in the same fashion as the SEC rules in order to avoid inadvertently applying the requirements of the Instrument to London Insurance Group.**

Timing

The proposed timing of the implementation of the Instrument is ambiguous in that the Instrument will apply to issuers commencing on the earlier of the first annual meeting of the issuer after the implementation date and, June 30, 2004. We assume that it is not intended that issuers with fiscal year ends prior to the implementation date will be required to take the Instrument into consideration in preparing their annual proxy materials during the 2004 proxy season, but it would be helpful if some clarification were to be provided.

Pre-Approval of Non-Audit Services

The Instrument only requires pre-approval of non-audit services, unlike in the U.S. where pre-approval of audit services is also required. Form 52-110F1, however, distinguishes between audit fees, audit-related fees and other fees and it is not clear whether non-audit services includes “audit-related” services or not.

Specific Requests for Comment

1. *Independence is defined in subsection 1.4(1) of the Proposed Instrument as the absence of a material relationship between the issuer and the director. Subsection 1.4(2) provides that a material relationship is one that that could, in the view of the board of directors, reasonably interfere with the*

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[1] See, for example, Section 89(1) of the *Securities Act* (Ontario).

> *exercise of a member's independent judgement. Do you consider this definition of independence appropriate?*

The definition of "independence" in section 1.4 requires the member to have no direct or indirect material relationship with the issuer and then states that a material relationship is 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. As the original Report of The Toronto Stock Exchange Committee on Corporate Governance and in the commentary to the NYSE proposed rules both make clear, the focus of corporate governance rules is to ensure that the board is able to exercise judgment which is independent from 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, it would be helpful to state in the Instrument or the Companion Policy that the focus of the board's inquiry should be to assess whether the individual's judgement is independent from management.

2. Notwithstanding the definition of material relationship in subsection 1.4(2), subsection 1.4(3) deems certain categories of persons to have a material relationship with the issuer. As a result, these individuals are precluded from serving on the issuer's audit committee.

(a) Do you think that the categories of precluded persons are appropriate? Are there other categories that should be added?

(b) Certain of the categories reference a "cooling off" period (or a "prescribed period") of up to three years. Is this period appropriate? Is it too long? Too short?

(c) Certain individuals may be precluded from serving on an audit committee as a result of their employment, or the employment of an immediate family member. Should these categories be restricted to individuals earning a minimum monetary amount (e.g., $75,000)?

(d) Some categories contained in subsection 1.4(3) were derived from U.S. legislation (i.e., SOX), while others were based upon the listing requirements of the New York Stock Exchange. Do you believe that all of these categories should be incorporated into the Proposed Instrument, given their differing levels of authority in the United States?

In light of the existence of a general obligation for the board of directors to assess whether any relationships that a director may have could reasonably interfere with the exercise of the director's independent judgement, it should be unnecessary to include deeming provisions. If deeming provisions are to be included, however, they

should not be any broader than the corresponding provisions under proposed Audit Committee rules of the SEC and the NYSE. Unfortunately, in some instances the deeming provisions under the Instrument are broader.

Under the proposed rules of the NYSE, only directors who are employees or officers or who have family members who are officers are deemed to not be independent. The Instrument goes further and treats as not independent a director who has an immediate family member who is merely an employee but not an officer. Moreover, the reference to "affiliated entities" in clause 1.4(3)(a) should be deleted. It is either duplicative of clause 1.4(3)(f) or, if it is broader, it extends the deeming provision beyond the requirements in the U.S.

As contemplated in the NYSE's proposed rules, there ought to be a minimum threshold level of compensation received by a director who is not an employee or by an immediate family member of a director before a director is deemed not to be independent.

In incorporating SEC provisions that deem a person who directly or indirectly accepts any consulting, advisory or compensatory fee as not independent, the Instrument is inadvertently more onerous than the corresponding SEC instrument. For example, the SEC rule does not impose a "look back" period. In addition, in considering when acceptance of a consulting, advisory or compensatory fee by a family member constitutes indirect acceptance of such a fee, the definition of "immediate family member" used in the Instrument includes a wider group of persons than is contemplated under the SEC rules. Furthermore, the language in clause 1.4(7)(b) should perhaps be conformed to the language used in the SEC rule. In the U.S., it is clear that the intent is to capture a payment to an entity of which the director is a partner, member or executive officer. However the Instrument instead references a payment to a partner, member or executive officer of an entity that provides professional services, suggesting that a payment to a partner at the same professional firm as the director could result in a director not being independent even if the payment is not included in the professional partnership's income.

3. *Do you believe that the exemption in section 3.3 appropriately addresses the concerns of controlling shareholders?*

Please see comments above and response below.

4. *Section 1.4 provides that a person who is an affiliated entity of the issuer is not independent of the issuer. Section 1.3 defines an "affiliated entity" in*

terms of its ability to control, or be controlled by, the issuer, and specifically includes a director of an affiliated entity who is also an employee of the affiliated entity. In light of this, do you believe that the exemption for controlled companies in section 3.3 is necessary?

A director who is a member of the Audit Committees of two affiliates but is otherwise independent would not be deemed to be a director under section 1.4 of the Instrument. Accordingly, it would be open to the board of directors to conclude that the director is "independent" within the meaning of the Instrument. Given the existence of the exemption in the U.S., however, the absence of such an exemption in Canada could lead directors to reach the opposite conclusion and for this reason we support the inclusion of the exemption.

5. *In your view, does the definition of financial literacy provide sufficient guidance to allow an issuer to adequately assess a member's compliance with the Proposed Instrument?*

Yes.

6. *The exemptions in sections 3.2, 3.4 and 3.5 are designed to address certain transitory circumstances where issuers may find it difficult to comply with the independence and, in some cases, the financial literacy requirements contained in the Proposed Instrument. Do you believe these exemptions are appropriate? Are there additional exemptions that you believe are necessary?*

Such exemptions are appropriate.

7. *An audit committee financial expert, with his or her enhanced level of financial sophistication and expertise, can serve as an important resource for the audit committee as a whole in carrying out its duties. However, because certain issuers may find it difficult to appoint audit committee financial experts to their audit committees, the Proposed Instrument does not require that every audit committee have an audit committee financial expert. Instead, 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. If the audit committee does not have an audit committee financial expert, an issuer must disclose that fact and explain why.*

The disclosure required by Form 52-110F1 encourages issuers to appoint audit committee financial experts to their audit committees. It is not our intention that the designation of the audit committee financial expert should impose on that member any duties, obligations or liability that are greater than the duties, obligations and liability imposed on that member in the absence of the designation. Conversely, we do not intend that the designation of an audit committee financial expert should affect the duties and obligations of other audit committee members or the board of directors. Nevertheless, some concern has been expressed that merely identifying an

individual as an audit committee financial expert may result in increased legal liability for that individual.

In light of the foregoing, do you believe this disclosure requirement is an appropriate alternative to requiring every audit committee to have an audit committee financial expert? Can you suggest other meaningful ways to encourage issuers to appoint audit committee financial experts to their audit committees?

There can be no assurance that an individual identified as an audit committee financial expert will not face increased risk of liability as a result of being so identified. We do not believe that the companion policy will provide sufficient comfort to individuals identified as "audit committee financial experts", especially in this age of judicial activism. There is at least a possibility a plaintiff could argue that an audit committee financial expert ought to be treated as an "expert" for purposes of liability for a misrepresentation in certain disclosure documents. Moreover, a director having a skill or expertise that is different from other directors may under corporate legislation incur liability for failing to meet the standard of care that should be attained by a director possessing that skill or expertise. The identification of an individual as an audit committee financial expert will assist plaintiff's counsel by making it unnecessary to prove that the director ought to be treated as having such expertise. Accordingly, it is unlikely that anyone, regardless of their level of expertise in accounting or auditing matters, will wish to be so identified in any disclosure. In light of the foregoing, it would be particularly difficult for issuers to comply with a requirement to have an audit committee financial expert.

8. Section 5.1 requires that an issuer include in its AIF the information required by Form 52-110F1. Do you think the AIF is the most appropriate location for this disclosure? If not, why not?

It would be preferable to require any such additional disclosure in the AIF, although companies should be given the flexibility to include the disclosure in the annual report or proxy circular provided that the location of the disclosure is referenced in the AIF.

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