THE ADVISORY GROUP ON CORPORATE RESPONSIBILITY REVIEW

(Alcan Inc., BCE Inc., Canadian National Railway Company, EnCana Corporation, Royal Bank of Canada and TransCanada PipeLines Limited)

September 25, 2003

Delivered via email

John Stevenson, Secretary
Ontario Securities Commission
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and

Denise Brosseau, Secrétaire
Québec Securities Commission
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Dear Mr. Stevenson and Ms Brosseau:

Proposed Multilateral Instrument 52-109 ("Certification Instrument") and Proposed Companion Policy 52-109CP ("Certification Policy") - Certification of 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

The Advisory Group on Corporate Responsibility Review is a coalition of six of Canada's largest corporations whose shares trade on both Canadian and US exchanges and who are subject to both the new US corporate governance measures and Canadian federal, provincial and stock exchange requirements. The following represent the Group's comments on the Certification Instrument and the Audit Committee Instrument. While our comments cover many of your questions in the Notices of Request for Comments, we have structured this submission under

various headings based on subject matter. A diskette containing this submission is being delivered to you under separate cover.

A. Certification Instrument and Certification Policy

General Comments

We are strongly supportive of the participating securities regulators' efforts to have the proposed Canadian CEO and CFO certification requirements "closely parallel" the US Sarbanes-Oxley section 302 certification requirements. While we have some specific comments, in overall terms we believe your approach demonstrates how to efficiently deal with the regulation of a Canadian marketplace in which a number of significant participants are subject to US securities laws and where all participants can benefit from what will be perceived internally and externally as measures which are as robust as the counterpart US requirements. Your approach should help instil confidence in Canadian capital markets and facilitate the ability to seek accommodations for Canadian issuers from the SEC and US exchanges. It will also simplify compliance for interlisted issuers and avoid the confusion and market discounting that could arise if investors found themselves having to understand and compare a set of Canadian certification measures that were markedly different from the US requirements.

We note that around the time that you released the proposed Certification Instrument, the SEC made further changes to the US requirements. We have in our comments on the Certification Instrument only addressed these US changes in a few limited circumstances, because we have assumed, given your stated objective of harmonization with the US requirements, that you will make whatever changes may be appropriate to maintain consistency and ensure that the exemptions for US compliant interlisted issuers work effectively. Similar observations with respect to the need for harmonization with recent US measures would apply to any possible forthcoming Canadian measures that address the related issue of auditor attestation of management's assessment of internal controls.

As a further set of general observations, we are supportive of the decision to not impede business flexibility by defining internal controls and disclosure controls and procedures in the Certification Instrument. We agree with your observation that "these considerations are best left to management's judgment", which in turn will be influenced by audit standard setters, US definitions for interlisted issuers and the best practices relevant to each differently situated Canadian issuer. We also believe the approach and rationale for not including executive compensation disclosure and an interim management evaluation of the effectiveness of disclosure controls and procedures and internal controls reflect sound policy choices. As for the "timing gap" relating to the AIF referenced at page 4 of the Notice of Request for Comments, the possible concern appears to have been diminished by the provisions of NI 51-102 relating to the timing of AIF filings.

Some of the foregoing comments respond to specific questions you raised in the Notice of Request for Comments. In addition, with respect to the remaining questions and other issues we have the following comments:

Transition Period and Timing

It is not entirely clear from the documents you provided when the proposed Certification Instrument is to take effect and what initial annual and interim financial disclosure documents the transition period will apply to. As a starting observation, the Certification Instrument and contemplated transition periods should not take effect before the counterpart elements in the US provisions are effective. For example, we note that Canadian interlisted issuers will not need to address in their US certifications the evaluation of internal controls for financial periods ending before April 15, 2005. Not harmonizing implementation timing with the US measures would unnecessarily defer the proposed Certification Instrument's exemption for US compliant interlisted issuers and create near term inconsistencies.

Secondly, we fully agree with the observation on page 2 of the Notice of Request for Comments that you "do not think it appropriate to require certification of matters relating to financial periods ending prior to the implementation of the Proposed Instrument" (Jan. 1, 2004). We are also of the view that in no event should any interim certificate be required for a period not covered by an annual certificate requirement, nor should any "full" interim certificate be required for any period that is part of a financial year to which a transition period or "bare" annual certificate requirement applies. There is ambiguity elsewhere in the documents but the approach that would be consistent with the foregoing and our observations regarding US implementation in the preceding paragraph would be to have issuers with calendar year financials file their transition period or "bare" interim certifications beginning with the Q1 2004 statements and their "bare" annual certifications beginning with the filing of the 2004 annual financials in 2005. Because the US "full" certification requirements do not apply to financial periods ending before April 15, 2005, the first interim period "full" certification should begin with the Q1 2006 statements and the first "full" annual certification should begin with the filing of the 2005 annual financials in 2006. We do not believe the initial "full" annual filing should precede the US implementation date.

The US Filing Exemption

Since a majority of interlisted issuers are not required to file interim certificates in the US but may be doing so voluntarily on Form 6-K, it would be helpful to clarify in the Section 4.1(3) exemption that it applies to "voluntarily" furnished interim certificates by Form 20-F and Form 40-F filers.

Conceptually, the "single certification" approach for interlisted issuers that underlies Section 4.1 should not be compromised by an issuer's release of additional Canadian GAAP based financial statements where US certificates have been furnished for their US GAAP based statements. As drafted, the Section 4.1 exemption would not be available to an interlisted issuer that certified its US GAAP based statements if it also produced Canadian GAAP based statements and did not file them with the SEC. There is no good reason to deny the exemption for US GAAP reporting interlisted issuers that prepare but then do not also file or furnish Canadian GAAP based statements with the SEC. Such issuers will have already certified the accuracy of their financial statements prepared on a basis recognized by Canadian securities authorities (NI 52-107) and should not be penalized for producing additional information that uses a somewhat different accounting standard language to cover the same financial information they have already

certified. Disallowing the exemption would be counter-productive and encourage such issuers to not produce the additional Canadian GAAP statements.

Form and Filing of Certificates

Part 2 of the Certification Policy is somewhat ambiguous for those intending to rely on the US filing exemption but seems to contemplate that in some situations more than the freestanding US certificate must be filed on SEDAR under the applicable category. The recent US changes provide for US certificates to be filed as "exhibits" to various documents. The reason for this change was to make the certificates readily accessible and easier for investors to find on EDGAR by electronically separating them from the associated document. To require the associated document to be filed with the certificate under SEDAR would run directly contrary to this objective. If as a result of the US changes all that will need to be filed on SEDAR is the freestanding exhibited certificate then the issue that Part 2 of Certification Policy was trying to address may have been superceded. If this is not the case and filing the associated US document with the certificate on SEDAR were to continue to be required, it is difficult to understand what purpose this would serve. Most of the interlisted issuers' 20F or 40F documents would have been filed under other SEDAR categories (NI 51-102 is of similar effect). Moreover, this would be inconsistent with what is required of Canadian only listed issuers, would add to the repetitive bulk of material on SEDAR and as discussed below could give rise to additional civil liability concerns.

There are also some inconsistencies between the contents of Forms F1 and F2 and the recently revised US certificates – in our view the form of the Canadian and US certificates should be the same except where there are clear reasons to differ. In the interests of consistency we suggest, for example, that the introduction to paragraph 5 should read "I have disclosed, based on my most recent evaluation *of internal controls*". Also, "could adversely affect" in paragraph 5(a) should read "which *are reasonably likely to* adversely affect", and in paragraph 6 "significantly" should be changed to "*materially*". Finally, we draw your attention to the fact that in the revised form of the s. 302 certificate, the words "or in other factors" and "including any actions taken to correct significant deficiencies and material weaknesses in the issuer's internal controls" have been deleted from paragraph 4.

Paragraph 6 of Forms F1 and F2 requires that "significant changes in the issuer's internal controls or in other factors that could significantly affect internal controls" be disclosed in the MD&A. We see the choice of the MD&A as an awkward fit and believe there should be greater flexibility in allowing issuers to select the location of such disclosure provided the certificate clearly references where the information can be found. The Certification Policy could list acceptable alternate locations in the issuer's public documents for reporting this information, and the words "*or (specify location)*" could be inserted in paragraph 6 after the word "MD&A".

Civil Liability Implications

The Certification Policy discusses the Commissions' views of what the secondary market civil liability consequences under Bill 198 would be if an issuer filed a certificate that turned out to be wrong. We think it is helpful that you included this commentary as it will focus public attention on the Certification Instrument and on its relationship with the new secondary market civil

liability provisions in Ontario. We recognize that the Commissions' interpretation in the Certification Policy is not binding on Ontario courts, although it could have some influence on their interpretation.

If the Commissions' interpretation is upheld by the courts, the net effect would appear to be that the liability caps for CEOs and CFOs will be doubled unless a court exercises the discretion that is conferred on it by s. 138.3(6) to treat the misrepresentation in the certificate and the misrepresentation in the document referenced in the certificate as having sufficiently common content to constitute a single "misrepresentation".

Moreover, the characterisation in the Certification Policy of the interim and annual certificates as not being "core" documents under the secondary market civil liability provisions (assuming a court shares that view) seems to be premised on the treatment of the certificates as free-standing or separate documents. If Part 2 of the Certification Policy were to continue to require the SEDAR filing to include the document associated with the certificate in order for the US compliance exemption to apply, the filing would fall within Bill 198's definition of a "core document". This would put interlisted issuers in the position of having prepared US documents that were consistent with US secondary market civil liability standards (proof of "*scienter*" for 10b-5 claims and proof of reliance for s.18 claims), only to find that the same documents were vulnerable to Ontario Bill 198's far more plaintiff friendly liability standards and burden of proof provisions. While this problem also arises with respect to US documents filed under other SEDAR categories and should be addressed by legislative amendments to Bill 198, it should not be compounded by the Certification Policy requiring the filing of the associated document with the US certificate.

B. Audit Committee Instrument and Audit Committee Policy

General Comments

We are also strongly supportive of the participating securities regulators' efforts to establish audit committee requirements that will have the same positive effects that we noted above with respect to the Certification Instrument – regulatory efficiency, internal and external market confidence, etc.

Harmonization

As we have noted throughout this commentary, we regard the effort to closely harmonize the Canadian measures with the counterpart U.S. measures as very positive. We see the exemption for US compliant issuers in Part 7 of the Audit Committee Instrument as a viable and practical approach given the over 170 Canadian issuers whose shares are listed on US stock exchanges – as a result of section 7.1, a US compliant Canadian issuer would only have to include in its AIF the disclosure required by paragraph 5 of Form 52-110F1 (board not adopting audit committee recommendation). You should, however, be aware that there appears to be an incorrect cross reference in paragraph 4 of Form 52-110F1 which seems to suggest that those relying on the Part 7 exemption would also need to disclose how reliance on the US compliance exemption could adversely affect the ability of the audit committee to act independently. This would be corrected if the cross reference in paragraph 4 of the Form was to Part 8 and not Part 7.

While the Audit Committee Instrument addresses US harmonization, it leaves unresolved two issues of Canadian harmonization. Firstly, the instrument is not national in scope – it is disappointing to see B.C. not participating and we urge those involved to resolicit the interest of that province's securities administrators. Secondly, it is not clear how the TSX listing requirements and the TSX Guidelines relating to audit committees (which are in the process of being revised) tie into the Audit Committee Instrument. Because the proposed instrument is more comprehensive and because there is no value to be served by duplication, we suggest you work with the TSX with a view to having it defer to the Audit Committee Instrument and withdraw its audit committee related listing requirements and guidelines. The announcement of the TSX decision should precede or coincide with the release of the final Audit Committee Instrument.

Independence and Committee Composition

The definition of "independence" in the Audit Committee Instrument is a hybrid that combines elements of the Sarbanes-Oxley section 301 definition (see sections 1.4(3)(e) and (f) and sections 1.4(6) and (7) of the Instrument) and the definitions in the NYSE listing requirements and the TSX Guidelines that relate to directors generally (see sections 1.4(1), (2), (3)(a) to (d) and (5) of the Instrument).

There are several problems with this approach. Firstly, it results in a definition of independence that in some respects is more restrictive than the US requirements. In principle, a director of an interlisted issuer should not be independent for US purposes but not independent for Canadian purposes. If there were a case for divergence it would be for the Canadian definition to be the less restrictive one given the smaller pool of director candidates in Canada. Secondly, there is a real risk that once this hybrid and restrictive definition is established in the Audit Committee Instrument, it will become confining – there will be a strong inclination for securities administrators and other Canadian corporate lawmakers and regulators to use the same restrictive definition in other contexts – for example in establishing the minimum number of independent directors that must be on a board or on other board committees. The US securities laws only address the definition of independence in the special context of the audit committee, while the definitions of independence in the US stock exchange listing requirements apply in other governance contexts. We see value in a similar dual pronged approach in Canada – the Audit Committee Instrument should track the special definition for audit committee independence in Sarbanes-Oxley and a more general definition of independence should be developed by the securities administrators, corporate law makers, the TSX or other regulators at the appropriate time for independence related governance rules outside the audit committee context. For the purposes of the Audit Committee Instrument, this result could be achieved by having the section 1.4 definition of independence include only the text of the sections that have been drawn from Sarbanes-Oxley (sections 1.4(3)(e), (f) and 1.4(4), (6) and (7)). We would add that these sections should also be brought up to date to coincide with the SEC Final Rule (Listed Company Audit Committee) including the length of cure periods and the limitation that the indirect acceptance of a compensatory fee would not include, for the purposes of section 1.4(3)(e), fees received by an entity in which the audit committee member is not a partner, manager or executive officer.

Should you nevertheless be inclined to address director independence generally and import the NYSE based tests referenced in sections 1.4(1), (2) and (3)(a) to (d) of the Audit Committee Instrument, we believe that it would be most appropriate to limit the definition to only what is set

out in sections 1.4(1) and (2) (the board determining that there is no relationship that could reasonably interfere with the exercise of the member's independent judgment) and not include the blackline categories in sections 1.4(3)(a) to (d). This would serve as a solid general definition of director independence that without being unduly restrictive could be adopted in the interests of consistency by other Canadian lawmakers and regulators. If some additional guidance were still thought necessary, the blackline tests in sections 1.4(3)(a) to (d) could be moved to the Audit Committee Companion Policy and set out as examples of circumstances that would be likely to constitute a material relationship that boards would need to closely consider.

As for specifics, the scope of the family relationship tests in section 1.4 that would make a director not independent is too broad – for many Canadian issuers, and particularly larger issuers, it would not be unusual for a director to have family members who occupied non-executive positions with the issuer – this is not just a matter of someone's offspring working as a summer student for the issuer but could extend for example to a daughter-in-law who was a highly paid technology or engineering specialist with no ability to influence corporate decisionmaking. It serves no useful purpose to have a rule that requires such people to have to quit their jobs or for their family member to have to resign as a director. The NYSE uses a US $100,000 remuneration threshold test for family members who are officers to address this concern. While a similar approach might be followed in the Audit Committee Instrument, it would be far more preferable for the test of whether a particular family member relationship could interfere with a director's independent judgment to be left to the board.

Financial Experts

The Audit Committee Instrument and Form 52-110FI take a disclosure based approach to having a financial expert on the audit committee. Issuers are not required to have such an expert, but if they do not, they are required to explain why.

The peer pressure and market pressure to have an audit committee expert falls most heavily on Canadian interlisted issuers because of their exposure to the counterpart US provisions and their participation in the US capital market. Accordingly, there will be competition among the 170 or more Canadian interlisted issuers for candidates in Canada who would be qualified to serve as audit committee financial experts. This raises some issues with respect to the need to have a counterpart Canadian financial expert provision. Because interlisted issuers are already covered by the US provisions, a Canadian regulatory objective of having financial experts on the board will be partially served irrespective of whether there is a counterpart Canadian measure.

The problem with having a similar Canadian measure is that it will place pressure on the very large number of other Canadian issuers to participate in the competition between interlisted issuers for qualified financial experts in Canada. Given the rigorous definition of financial expertise, there is not a large Canadian candidate pool and it would be of questionable value to have the same financial expert serving on a large number of boards. Until the Canadian market for financial experts settles out or the picture becomes clearer, it may be more provident for the Audit Committee Instrument to not include a provision requiring domestic issuers to explain why they do not have a financial expert on their boards.

Secondly, we note the discussion of financial expert liability in the Companion Policy. To the extent that the liability in question arises under corporate law, the determinants of such liability in the first instance are the courts and ultimately the legislatures responsible for corporate statutes. This is a concern for Canadian interlisted issuers whether or not there is a counterpart Canadian financial expert measure. Moreover, that reality will serve as a disincentive for even the limited number of potential Canadian candidates who might qualify for the designation to agree to stand as an audit committee financial expert. To the extent the potential liability is a securities law liability, addressing the issue in the Audit Committee Companion Policy is not sufficient and legislative reform is likely necessary to achieve the insulating purpose referenced in the policy. Finally, and in the event the above referenced legislative reforms are not forthcoming, the Companion Policy should make it clear that the conclusions with respect to minimizing financial expert liability exposure apply as well to financial experts on the audit committees of interlisted issuers that avail themselves of the Part 7 exemption. As a concluding observation on the financial expert provisions, it would also be helpful if the definition were to be harmonized with the SEC Final Rule on Audit Committee Financial Expert and, like the SEC discussion, specify how a person can acquire the requisite attributes.

Pre-Approval Policies

The SEC Final Rule on Auditor Independence expressly allows issuers to adopt policies and procedures for addressing how they will deal with the pre-approval of non-audit services. While Form 52-110F requires the disclosure of an issuer's policies and procedures for approving non-audit service engagements and the Audit Committee Companion Policy at section 5.1 contemplates such policies, the Audit Committee Instrument itself, unlike the SEC rule, doesn't expressly authorize the adoption of pre-approval policies and procedures. Also, if there is an intention that the securities administrators or other authorities will in future address the issue of prohibiting specific kinds of non-audit services, the Audit Committee Instrument or Audit Committee Companion Policy should reference and be made compatible with such measures.

Mechanics and Timing

Form 52-110FI requires that the text of the audit committee's charter be included in the issuer's AIF. It would be preferable to allow, as an option, the posting of the audit committee charter at the issuer's web site with a cross reference to the applicable URL in the AIF. Not only could this give investors more current information when changes were made to the charter between AIF filings, but it would be more cost effective for issuers. And since the AIF is not mailed to shareholders and is most typically viewed at the SEDAR website, there is no inconvenience to investors if they had instead to visit the issuer's web site to see the audit committee charter.

While the Part 7 exemption for US compliant issuers would appear to cover compliance with existing US requirements as well as the new US requirements that will come into force for Canadian interlisted issuers by July 31, 2005, the implementation periods contemplated by the Audit Committee Instrument will impose the new audit committee measures on Canadian domestic issuers well before Canadian interlisted issuers have to comply with the US measures. It would therefore seem preferable to have the implementation dates for the Audit Committee Instrument coincide with the US implementation dates that apply to interlisted Canadian issuers.

We would be pleased to discuss or elaborate on any of the foregoing comments at your convenience.

Yours very truly,

ADVISORY GROUP ON
CORPORATE RESPONSIBILITY REVIEW

By: _____

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