SENT BY COURIER

September 25, 2003

Ontario Securities Commission
20 Queen Street West
Box 55, Suite 1900
Toronto, ON M5H 3S8

Attention: John Stevenson, Secretary

Commission de valeurs mobilières du Québec
Stock Exchange Tower, 800 Victoria Square
P.O. Box 246, 22nd Floor
Montréal, PQ H4Z 1G3

Attention Denise Brosseau, Secretary

Dear Sir/Madam:

RE: Investor Confidence Proposals

This letter is submitted in response to the request for comments made by the Canadian Securities Administrators ("CSA") on the following proposed multi-lateral instruments:

1. 52-110 *Audit Committees*, and accompanying Forms 52-110F1 and 52-110F2 and Companion Policy 52-110CP (collectively, the "Audit Committee Instrument"); and

2. 52-109 *Certification of Disclosure in Companies Annual and Interim Filings* and the accompanying Companion Policy (collectively, the "Certification Instrument").

This response letter is being submitted by the Securities Law Group of Ogilvy Renault. It reflects internal comments of the Securities Law Group and also comments communicated to us by clients operating in the Canadian capital markets. Schedule "A" contains the names of those capital market participants who participated in the review and who do not object to being identified.

On behalf of these capital market participants and on our own behalf, we wish to confirm that we support the public policy objectives underlying the proposed Audit Committee and Certification Instruments. The comments below, in our judgment, do not significantly detract from the substantive provisions of the proposed instruments, and are aimed at ensuring a smoother transition for issuers into the new regulatory regime and clarifying certain points that may be open to diverging interpretations.

Audit Committee Instrument

1. ***Transition Period.*** The CSA has stated that it is their intention that the Audit Committee Instrument come into effect January 1, 2004. The Instrument currently provides for an exemption from the audit committee composition requirements for "Venture Issuers". Other issuers will be required to comply with these requirements immediately when the rules take effect. Many issuers are already in compliance with the proposals and others are actively assessing their committees, members and procedures with a view to both complying with the rules and, equally importantly, ensuring their audit committees are effective and operating independently of management.

   In order to ensure the appropriate replacement of audit committee members, we are of the view that the introduction of the independence and literacy requirements should be subject to a transition period. This will allow issuers to properly review their committees and consider, if necessary, appropriate and available members for the committee. Insisting on immediate independence of members for the sake of complying with rules being introduced on a tight timetable will not necessarily serve the goals of good corporate governance: namely providing protection against corporate wrong-doing and maintaining shareholder confidence and value. Well thought-out analysis of the composition of an audit committee may well do so.

   The Instrument recognizes the need for transitional arrangements in certain circumstances. In particular, where a member of the committee ceases to be independent, section 3.4 of the Instrument contemplates an exemption from the independence provision for a minimum six month period. This recognizes in our view the time necessary to make effective replacement decisions. We believe the same minimum transitional period should apply on the introduction of the Instrument.

2. ***Financial Literacy***. The definition of financial literacy requires industry specific financial literacy. Candidates for audit committees may indeed be financially literate and may in fact have audit committee experience that is transferable to the issuer's business. They may not however possess industry specific financial literacy unless already exposed to financial statements of issuers in the same industry. Certain industries have highly complex financial practices and statements. This is particularly true in the case of the financial services industry (where financial statements are subject to specific rules of the Office of the Superintendent of Financial Institutions) and in other industries such as the resource industry. To allow new audit committee members to attain industry specific knowledge, a two-year transition period for newly appointed audit committee members from the industry specific component of financial literacy would be appropriate.

3. ***Audit Committee Financial Expert***. Item 3 of Form 52-110F1 requires an issuer to disclose in its annual information form the identity of the audit committee "financial expert" or to disclose the absence of such a financial expert and the reasons why. The

definition of financial expert supposes the individual will have greater expertise than an audit committee member who is "financially literate". The Companion Policy states the view of the CSA that the mere designation or identification of the person as an audit committee financial expert does not impose on such person "any duties, obligations or liability that are greater than the duties, obligations and liability imposed on such person as a member of the audit committee and board of directors in the absence of such designation or identification".

Section 122 (1) of the *Canada Business Corporations Act* is an example of the customary standard of care applicable to directors. That section adopts the common law by recognizing that there are both objective and subjective elements of directors' liability (see *City Equitable Fire Insurance Co., in Re* [1925] Ch 407 (C.A.)). Under section 122 (1), a director is required to exercise the care, diligence and skill "that a reasonably prudent person would exercise in comparable circumstances". The Canadian courts have stated that a director does not need to exhibit a greater degree of standard and care than may reasonably be expected from a person of his or her knowledge or experience (see *Soper* v. *Canada* (C.A.) [1998] 1 F.C. 124). A "financial expert" within the meaning of the Instrument will likely, based upon the current law in Canada, be required to exercise the skill and care that would be expected both as a reasonable person but also as a person who qualifies as a financial expert. In addition, regulatory decisions have clearly established that experience of an individual and/or access to information will be considered when assessing director performance (see, for example, YBM Magnex 2003 OSC).

While the mere "designation" of a financial expert in and of itself may not increase a director's liability, the actual expertise and experience necessary to establish an individual as a financial expert may well increase that director's liability. The designation may be seen by the courts as establishing the "subjective" element of a director's duty, namely his expertise. It is difficult to see how the greater financial expertise of one member of a committee can be held to attract less liability than the other members of the committee.

In light of the foregoing, the statement of the CSA that a director who is designated as a financial expert acquires no greater liability is potentially misleading. The Companion Policy does not operate to change the law; in fact, the wording recognizes the standard of care of directors. In order to avoid burdening with additional liability individuals who possess the qualities to be designated as financial experts and who are designated as such, we urge the CSA to foster the adoption of appropriately worded legislative exemptions in the relevant jurisdictions.

The Companion Policy statement is ineffective in regulating how courts will view the designation. While the purpose of the instrument is to encourage issuers to appoint

experts to their committee, the effects of acquiring the designation of a financial expert and how a court interprets it (possibly as a gold seal), may in fact discourage individuals from serving in such capacity. The financial expert may be considered differently from the other members of the committee. The operation of the committee as a committee of financial literate members should, in our view, be sufficient to meet the goals of good governance.

4. ***Meaning of Independence.***

(a) *Non-Executive Chairman.* Subsection 1.4(3)(a) provides that an officer of an issuer will be deemed to have a material relationship with the issuer and therefore may not be considered independent. The definition of "officer" in most securities legislation covers the chairman of the board and any deputy chairman or vice chairman. Many issuers have by-laws or administrative resolutions which provide that the chairman of the board and any deputy chairman or vice chairman are corporate officers. Based on this, most non-executive chairmen or vice chairmen of boards would not qualify as independent for the purpose of audit committee membership based on the current proposed language. Alternatively, if not considered an officer, a non-executive chairman or vice chairman may be considered to receive additional remuneration to other directors and as a result may fall within the wording in sub-section 1.4(3) (e) of the Instrument.

We do not believe that this result was intended. The effect can be remedied through the addition of a proviso to Subsection 1.4(3) to the effect that a non-executive chairman of the board, vice chairman or deputy chairman will not be considered to have a material relationship with an issuer for the purpose of the independence qualification only by reason of his or her holding the position of non-executive chairman of a board, vice chairman or deputy chairman (i.e. other than on full-time basis as specified in the definition of "executive officer" in Multilateral Instrument 52-110).

(b) *Family Members.* We are of the view that the immediate family members (subsection 1.4(3)(a)) should be subject to a *de minimus* exemption of $75,000.

(c) *Applicability of "cooling-off" period to certain advisors.* Subsection 1.4(3)(e) precludes persons who have accepted at any time during the "prescribed period" (three years or less) directly or indirectly consulting, advisory or other compensatory fees, from serving on an issuer's audit committee. Subsection 1.4(7)(b) provides that indirect acceptance includes acceptance of a fee by a partner of an entity that provides accounting, consulting, legal, investment banking or financial advisory services to the issuer or any subsidiary entity of the issuer.

We are in full support of the concept of an independent audit committee, however we are concerned that the prescribed three year cooling off period for former partners, members or executive officers of entities that provide consulting, legal, investment banking or financial advisory services to the issuer may be unduly restrictive and may well result in qualified individuals being summarily prohibited from serving on an audit committee. Whether or not a former member, partner or executive officer will be able to exercise independent judgment in respect of the audit committee function will depend on a variety of circumstances, including the nature of the services provided i.e.. did they involve matters that concern the fair presentation of the issuer's financial results, the extent of the services provided, whether the individual in question was involved in the provision of the services and whether the individual's compensation from his or her former partnership or company is in any way tied to the affairs of the issuer.

Therefore we are of the view that the Audit Committee Instrument should be amended to provide that during the prescribed three year period former partners, members or executive officers of service providers will be presumed not to be independent. That presumption would however be rebuttable by an issuer following an assessment of the particular circumstances. This will require the board to carefully assess the appointment of such individuals while at the same time ensuring that the audit committee consists of qualified and independent members.

(d) *Exceptions to Subsection 1.4(7)(b).* Subsection 1.4(7)(b) specifies that the indirect acceptance of consulting advisory or other fees includes acceptance of a fee by a partner, member or executive officer of an entity that provides services to an issuer and or subsidiary with an exception to the effect that limited partners, non-managing members and those occupying similar positions and who have no active role in providing services to the entity are not to be considered to have a disqualifying material relationship. This wording should be amended to clarify that the exception extends to associates (ie. non-partner employees of professional firms) whose compensation does not depend directly on fees received from the issuer.

We are also of the view that there should be a *de minimus* amount of fees that should be allowed before the entity is considered to have a disqualifying material relationship.

5. ***Approval of Non-Audit Services.*** Section 2.3(4) provides that an audit committee must pre-approve all non-audit services to be provided to the issuer or its subsidiary entities by its external auditors or the external auditors of the issuer's subsidiary entities.

Corresponding rules adopted by the SEC pursuant to the Sarbanes Oxley Act of 2002 provide that audit committees may establish policies and procedures for pre-approval of allowable non-audit services provided they are consistent with the prohibition as to non-allowable non-audit services, detailed as to the particular service, and designed to safeguard the continued independence of the external auditors. The rules also reflect a de minimis exception which waives the pre-approval requirements for non-audit services provided that all such services (i) do not aggregate to more than 5% of total revenues paid by the issuer to its external auditors in the year; (ii) were not recognized as non-audit services at the time of the engagement; and (iii) are promptly brought to the attention of the audit committee and approved prior to the completion of the audit. We are of the view that the Audit Committee Instrument should similarly allow for a pre-approval policy and for a de minimis exception.

We believe also that there should be a carve-out for non-audit services provided to an issuer's subsidiary entities which are themselves issuers covered by the Audit Committee Instrument. In this case, the subsidiary entity would, as an issuer subject to the Audit Committee Instrument, have its own audit committee with responsibility for approving non-audit services provided to the subsidiary entity. A further pre-approval and oversight mechanism at the level of the parent company audit committee would be cumbersome in terms of double levels of pre-approval and constitute interference by the audit committee of the parent company with the exercise by the subsidiary's audit committee and board of their obligations to all shareholders in making determinations as to the delivery of non-audit services.

6. ***Complaints by Employees***. Subsection 2.3 provides that the audit committee must establish procedures for the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters. The Audit Committee Instrument should provide that anonymity is not required to be maintained if, in the reasonable opinion of the audit committee, the maintenance of anonymity would significantly impair the audit committee's ability to investigate and deal with concerns initially submitted by an employee. The current provisions of the Audit Committee Instrument do not provide an audit committee with latitude to establish procedures which provide for circumstances where anonymity may reasonably be lifted with appropriate safeguards for the employee.

Further to our discussion in item 1 above, we are of the view that there should be a transition period of six months to allow meaningful procedures to be established. The establishment of workable procedures, including dissemination of information with respect to such procedures within an issuer's multifaceted and multi-jurisdictional organization is a significant undertaking. Full implementation of procedures as required by Section 2.3(7) cannot be accomplished within a matter of weeks.

7. ***Issuers of Exchangeable Preferred Shares***. Subsection 4.3 of the Certification Instrument exempts issuers of exchangeable securities which qualify for the relief contemplated by Section 13.3 of proposed National Instrument 51-102 – Continuous Disclosure Obligations. Issuers of "designated exchangeable securities" subject to the other conditions contained in Subsection 13.3 would be exempted from the certification requirements of the Certification Instrument on the basis that the economic interests of holders of designated exchangeable securities is equivalent to the economic interests of holders of equity securities of the parent company underlying the designated exchangeable securities.

   The same rationale should extend to requirements relating to audit committees contained in the Audit Committee Instrument. Also, issuers of designated exchangeable securities are not required to prepare, file and send to security holders in Canada financial statements. The review of same by an audit committee of the subsidiary issuer of designated exchangeable debentures would therefore be moot. With this in mind, the language at Section 1.2(d)(ii) of the Audit Committee Instrument 52-110 should be amended as follows: (underlined to show proposed addition):

   "(ii) the parent of the subsidiary entity is subject to the requirements of this Instrument, <u>or eligible for the exemption at part 7 of this Instrument</u>."

   The parent entity of the subsidiary entity issuer of designated exchangeable securities is most customarily a US listed issuer eligible for the exemption provided in Part 7 of the Audit Committee Instrument. Without the addition proposed above, a question would subsist as to whether the exemption covered at Section 1.2(d) would extend to issuers of designated exchangeable securities.

8. ***Venture Issuer Exemption***. Venture Issuers are exempt from the provisions of Parts 3 and 5 of the Audit Committee Instrument. The definition of Venture Issuer is based upon the exchange or quotation service an issuer's securities are listed or quoted on. We are of the view that the more appropriate exemption might be based upon the size or market capitalization of the issuer. In particular, excluding from the exemption issuers who have their securities listed on any marketplace outside the US may result in smaller issuers being subject to the requirements.

<u>The Certification Instrument</u>

1. ***Effective Date***. The Instrument proposes CEO and CFO certification in respect of annual and interim filings made after January 1, 2004. Section 1.3 provides for a one year transition period in respect of certification of internal and disclosure controls of an issuer but a "bare" certificate is required in respect of the financial statements referenced in certificates filed on or after January 1, 2004. While we are in full support of the principle that executive officers stand behind the financial statements of the issuer, it is not clear

that it is appropriate to require an executive officer to certify financial matters that relate to a period during which the proposed instrument was not yet in effect. In all likelihood, the certification instrument will not be finalized and finally communicated to issuers and their advisors until late 2003.

As the certifications are personal certifications, CEO's and CFO's will want to review the certification requirements and devise issuer appropriate systems to provide them with the necessary comfort to sign the certificates. Therefore, we would propose that there be a transition period with respect to all certification to allow development of the necessary structures.

2. ***Form of Certification.*** Subparagraph 5 of each of Form 52-109F1 and Form 52-109F2 provides for certification by the signing officer that he or she has disclosed to the issuer's auditors and audit committee significant deficiencies or weaknesses of internal controls and any fraud involving management, the whole "based on my most recent evaluation". With the form relating to certification of interim filings using the same language, i.e. "based on my most recent evaluation" a question arises as to whether the CSAs are thereby indirectly suggesting that evaluations of internal controls should be carried on an interim basis. As pointed out in the Request for Comments, the CSAs have concluded that a formal interim evaluation is unnecessary. Clarification language to this effect should be added to the Companion Policy as practitioners called upon to advise in the future on the Certification Instrument will not always turn to the Request for Comments for interpretation purposes, but will more likely turn to the Companion Policy.

3. ***Certification and Exemption for Issuers that Comply with US Laws.*** Subsections 4.1(1)(b) and 4.1(2)(b) provides that in order to be eligible for the exemption, an issuer which complies with US laws must have its most recent annual report (or quarterly report) and signed certificates filed on SEDAR. The term most recent is vague and may refer to the preceding annual report or quarterly report as opposed to the annual report or quarterly report in respect of which the signed certificates are being filed. This can be clarified by replacing this subsection with the following (underlined to show additions):

   "(b) the issuer's signed certificates and annual report with respect to which such certificates relate are filed on SEDAR as soon as reasonably practicable after they are filed with the SEC."

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This letter has been prepared by the Securities Law Group of Ogilvy Renault and incorporates views expressed by one or more of the capital market participants who participated in this review and whose names are set out in Schedule "A". Each of the views expressed herein are not necessarily shared by all of these capital market participants nor do they reflect the individual views of all Ogilvy Renault partners. If you have any questions concerning these comments,

please contact Tracey Kernahan (direct line (416) 216-2045 or by e-mail at tkernahan@ogilvyrenault.com or by fax at (416) 216-3930) or Francis R. Legault (direct line (514) 847-4495 or by fax at (514) 845-7126 or by e-mail at flegault@ogilvyrenault.com).

Yours very truly,

Ogilvy Renault

SCHEDULE "A"

Bombardier Inc.

Lafarge Canada Inc.

Laurentian Bank of Canada

Quebecor World Inc.

SNC-Lavalin Group Inc.