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BORDEN LADNER GERVAIS

December 14, 2004

BY ELECTRONIC MAIL

Mr. John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
19th Floor, Box 55
Toronto, Ontario
M5H 3S8

- and -

Anne-Marie Beaudoin
Directrice du secretariat
Autorité des marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246, 22nd etage
Montreal, Quebec
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Dear Sirs/Mesdames:

Re: ***Proposed National Instrument 58-101 Disclosure of Corporate Governance Practices and proposed National Policy 58-201 Corporate Governance Guidelines and proposed Amendments to Multilateral Instrument 52-110 Audit Committees—Comments of Borden Ladner Gervais LLP***

We are pleased to provide our comments to the members of the Canadian securities administrators (CSA) on proposed National Instrument 58-101 *Disclosure of Corporate Governance Practices* (the Rule), proposed National Policy 58-201 *Corporate Governance Guidelines* (the Policy) and the proposed amendments to Multilateral Instrument 52-110 *Audit Committees* (the Amendment). We refer to the Rule, Policy and Amendment collectively as the Instruments.

Overall we commend the CSA for publishing the Instruments as nationally uniform instruments (with the exception of the Amendment, which will not apply in British Columbia, since MI 52-110 has not been adopted in that province). We strongly support national initiatives that will be adopted by each member of the CSA without variation or opt-outs. We believe that the Instruments will serve to advance corporate governance practices in Canada by reporting issuers that are subject to the Instruments.

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We have three overall comments on the Instruments, as well as several comments of a more technical nature.

Our overall comments are:

1. We urge the CSA to give reporting issuers sufficient time to become familiar with the Instruments and ensure that their corporate governance practices are in line with the CSA's expectations. We note from your first Communique published in late November that you are working towards having the Instruments apply to the 2005 annual report/proxy season. This timing is difficult from a purely administrative planning perspective taking into account the CSA's various rule-making procedures. Even if the Rule and Policy came into force by March 31, 2005 (which would be close to the earliest the Instruments could come into force under applicable rule-making procedures), many reporting issuers will be well underway with their preparations for their annual meetings and may have already mailed out proxy materials.

   More importantly, we do not understand why this timing is necessary from a policy perspective. In our view, it would be better to have the Policy come into effect in due course (keeping mind its non-prescriptive nature), but provide for an orderly transition to the new disclosure requirements contained in the Rule. A transition period should allow reporting issuers sufficient time to work with their Boards of Directors to ensure that the appropriate policies, including any codes of ethics, are prepared and adopted in a way that complies with the expectations of the CSA outlined in the Policy. Otherwise, we anticipate that reporting issuers will be concerned about the ramifications of providing prescribed disclosure about their policies and practices that do not necessarily comply with the practices described in the Policy.

2. We believe that the CSA should either provide more guidance about your expectations for reporting issuers that are not corporations, in a manner similar to what is already provided for in the Policy for limited partnerships, or clearly state that a non-corporate reporting issuer has full discretion to develop structures that are "equivalent" to the boards of corporations and adopt governance practices that are applicable to the particular entity. The sentence used both in Form 58-101F1 and in the Policy—"reference to a particular corporate characteristic, such as a board of directors, includes any equivalent characteristic of a non-corporate entity"—is not completely helpful, since more than one "equivalent characteristic" could apply. For example, could a trust establish an independent governance agency, separate from the trustee or management company, to act as the equivalent to the board of directors? As a further example, could an income trust rely on the board of directors of an underlying company to provide the corporate governance expected for the entire entity, including the income trust? Unless the CSA has specific and concrete structures and practices that you wish all non-corporate issuers to adopt, we recommend that the Form and the Policy recognize that non-corporate issuers may establish structures and practices that may be different from each other. We believe the Instruments should explicitly give a non-corporate issuer the flexibility to develop corporate governance structures and practices in ways that fit with its specific relationships with its

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trustee or trustees, management company and, as applicable, underlying entities. The Instruments should acknowledge that not all of the enumerated governance policies will have application to a non-corporate entity. Some examples of permissible governance structures and practices relating to non-corporate entities might be of assistance.

We have reviewed the corporate governance guidance for income trusts provided in National Policy 41-201 *Income Trusts and other Indirect Offerings* and do not believe it provides the guidance we are suggesting be included in the Instruments.

3. We wish to emphasize a comment we made in our comments on proposed National Instrument 81-107 (see the comments of our Investment Management group). A regulatory gap will remain if the Instruments and NI 81-107 are adopted by the CSA in the form currently published. No regulatory guidance will exist for the governance of investment funds that are not considered mutual funds, but that are reporting issuers and exempt from the application of the Instruments. Although we fully support the decision to exempt these issuers from the Instruments, we do not view this regulatory gap as desirable, particularly since members of the CSA have expressed concern from time to time about governance issues for investment funds during the prospectus review process. In our view, governance for these funds would be better addressed by regulatory instrument rather than ad hoc staff processes. For example, NI 81-107 could be adapted to fit the structures inherent for public investment funds that are not mutual funds.

Our technical comments are as follows:

1. We understand that section 1.4 (which is incorporated by reference into the Rule through section 1.2 of the Rule) and section 1.5 of the Amendment are derived from different sources. In our view, it is somewhat artificial to apply section 1.4 to all directors and then add the requirements of section 1.5 on those directors who sit on an audit committee. The NYSE definition of independence, which is the derivation of section 1.4 of the Amendment, is used both to define the independence of directors generally and also the independence of audit committee members. Although we understand that it may be appropriate to have a higher degree of independence for the purposes of being an audit committee member, we believe that certain provisions of section 1.4 are more appropriate to determine the independence of an audit committee member. In particular, proposed paragraphs 1.4(3)(c) and (d) deal with the relationship of the director to the issuer's internal or external auditor, which is particularly relevant for audit committee members but less relevant for other directors. Accordingly, we recommend that these paragraphs be moved into proposed section 1.5.

2. As a drafting point, we suggest it would be more logical to have the independence test for directors generally to be included in the Rule and have MI 52-110 cross-reference that definition, as opposed to the other way around. We recommend that what is currently section 1.4 of the Amendment be moved to become section 1.2 of the Rule (in this way, the British Columbia-only definition of independence could be deleted). Section 1.4 of the Amendments would provide that an audit committee member must be an independent director within the meaning of section

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1.2 of NI 58-101 and not have a material relationship under what is now proposed section 1.5. Making this change would have the added benefit of allowing the CSA to impose its final decision on the definition of independence for directors generally upon making NI 58-101 a final rule, rather than waiting for the Amendments to become effective.

3. As a practical matter, when an issuer or its counsel is preparing an information circular it will be checking the disclosure against Form 51-102F6. Similarly, if an issuer that does not solicit proxies is preparing its AIF (or MD&A in the case of a venture issuer), it will be looking to Form 51-102F2 (or Form 51-102F1). Accordingly, we suggest that in order for the information contained in Forms 58-101F1 and 58-101F2 not to be overlooked, a cross-reference to these Forms be included in the appropriate Forms under NI 51-102. Similarly, we would suggest that section 2.3 of the Rule be included in Part 12 of NI 51-102, in order that all of the filing requirements be included in one place. Alternatively, as a practical matter, it might be preferable when NI 51-102 is next proposed to be amended that the Rule be incorporated into NI 51-102. Keeping continuous reporting requirements together in one place will make it easier for issuers to determine their continuous disclosure obligations and, therefore, to comply with all of their obligations.

4. We note that the Policy does not contain the same list of entities to which it does not apply as is contained in the Rule. We recommend that the Policy be conformed to the Rule to minimize confusion. As noted above, we fully support the list of exempt entities provided for in the Rule.

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We hope that our comments will be considered as constructive by the CSA. Please contact either of the undersigned if you wish to discuss our comments with us. Our contact details are set out below.

Yours truly,

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