CONTRIBUTORS

McMillan Binch Mendelsohn

Founded in 1903, McMillan Binch Mendelsohn provides a full range of business legal services and advice to corporate and financial services clients in Canada, the US, and abroad. Core practice areas, including mergers and acquisitions, financial services, corporate restructuring and insolvency, and competition/antitrust, are fully supported by the firm's experts in tax, litigation, real estate, labour and employment, public policy, and other specialized practice areas.

McMillan Binch Mendelsohn lawyers are recognized as leaders in Canadian and international professional directories, including Lexpert, Martindale-Hubbell, *Chambers Global Guide to the World's Leading Lawyers, Global Counsel 3000, International Financial Law Review 1000, Euromoney's Guide to the World's Leading Lawyers, Who's Who Legal, Global Competition Review* and *Lexpert/American Lawyer Media Top 500 Lawyers in Canada.*

The firm has teams concentrating on the energy, mining, media and entertainment, automotive, health care, and transportation sectors. Services are greatly enhanced by an extensive network of national and international relationships that include law firms in all provinces of Canada and major commercial and government centres outside Canada. To facilitate knowledge sharing, McMillan Binch Mendelsohn recently became the first Canadian firm to introduce wireless technology in their Toronto offices.

For more information, please visit www.mcmillanbinch.com.

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Markus Koehnen is a litigation partner with McMillan Binch Mendelsohn. Markus is listed in *Chambers Global: The World's Leading Lawyers* for Business under Dispute Resolution. He has appeared before all levels of courts in Canada, including the Supreme Court of Canada.

Markus is the author of *Oppression and Related Remedies*, a leading text on shareholder rights and directors liabilities published by Thomson/Carswell. He has also prepared the "Oppression Manual" for the Corporations Directorate of Industry Canada to assist that Ministry in deciding to investigate or intervene in shareholder disputes. He speaks and publishes widely in the area, and teaches at the Institute of Corporate Directors.

Markus has acted for shareholders, fund managers, directors, and corporate officers as cousel for both plaintiffs and defendants. In recent cases, he acted for a controlling shareholder of a publicly traded company facing allegations of appropriation of corporate opportunities, and has obtained an order replacing the board of directors of a publicly traded company. In addition, Markus has represented shareholders in a wide variety of disputes that have led to the buyout of one or more shareholder groups.

Mr. Koehnen has contributed to the "Corporate Roles", "Regulatory Compliance", and "Personal Liability of Directors" topics of the Ultimate Corporate Counsel Guide.

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Stephen Rigby is a partner at McMillan Binch Mendelsohn, practicing business law with an emphasis on mergers and acquisitions, other strategic re-organizations, and corporate finance transactions, both public and private. Stephen also provides ongoing advice on matters of corporate governance to boards of directors and shareholders.

Examples of representative transactions include: advising the independent committee of the board of directors of Dundee Realty Corporation, a Canadian public company, with respect to a related party transaction including the creation of Dundee REIT, a publicly traded real estate investment trust (2003); Canadian counsel to the independent committee of the board of Mayor's Jewellers with respect to a going private transaction with Birks and the formation of Birks & Mayors Inc. (2005); and many others.

Stephen leads the firm's air finance group, which provides advice on all aspects of commercial and private air-

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Stephen has contributed to a number of publications, including "Getting the Deal Through", *Corporate Governance 2006*; "Liability for Air Navigation and Airport Service Charges", *Aviation & Restructuring Bulletin, 2006*; and others.

Mr. Rigby has contributed to the "Corporate Roles", "Regulatory Compliance", and "Personal Liability of Directors" topics of the Ultimate Corporate Counsel Guide.

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CORPORATE GOVERNANCE

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¶31-100 CORPORATE ROLES

Prepared by Markus Koehnen, Partner (DEA, LL.B., B.A.) and
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¶31-101 OVERVIEW

This chapter provides a summary of the overall requirements that apply to Canadian boards of directors in terms of corporate governance practices and guidelines and a brief overview of the distinction between the board of directors and management. While legal requirements are referred to on occasion, the focus is intended to be practical, and concentrate on what boards should deal with as opposed to analyzing the legal liability of the directors, which will be discussed in subsequent sections.

¶31-102 PRACTICAL APPLICATION

¶31-104 The Board of Directors

Role of the Board

Boards of directors of Canadian companies are responsible for supervising the management of the business of the company and its relationship with shareholders. Except as may be set out in the corporate statutes and the constating documents, boards have unlimited powers with respect to the exercise of this supervisory role, and are free to establish their own operating procedures. The Board's primary role is to set and monitor the overall direction of the corporation. Key components to this overall task include the appointment of key management positions, approving annual budgets, objectives and strategies for the corporation, setting long-term strategic goals for the corporation, monitoring management's implementation of budgets and strategic direction, and ensuring that the corporation has adequate internal controls appropriate for the nature and size of its business. The most obvious of these controls involves financial controls, but they may also extend to environmental or other regulatory controls unique to the business.

Legal Requirements

Directors must be at least 18 years of age, of sound mind, and not bankrupt. Some Canadian corporate statutes prescribe a minimum number of resident Canadian directors (i.e., Canadian citizens or permanent residents) ranging from 25% to a majority. There is no requirement that directors own shares, although this may be required by a corporation's own policies as a matter of good corporate governance practice.

Canadian public companies listed on the Toronto Stock Exchange (TSX) are required to have a board of directors composed of at least three independent directors in order to satisfy corporate and securities law requirements. The audit committee must be composed of at least three directors, all of whom are independent (discussed below). The Rules of the Canadian Securities Administrators (CSA Rules), applicable to Canadian public companies, recommend that a majority of the directors and the chair of the board of directors be independent, but this is not required. Except as may be set out in the company's constating documents, there is no prescribed upper limit on the number of directors. Generally, Canadian public companies have between 5 and 15 directors. Typically, the chief executive officer (CEO) is a director, though not necessarily the chair of the board of directors.

Directors may be removed from office by majority vote of the shareholders.

Boards typically meet at least five times every year. The agenda for a board meeting is usually established by the chair of the board (or the lead independent director, as applicable) and the CEO, with input from the other directors and senior management, and is

sent to the directors in advance of the meeting, together with supporting materials. The chair of the board usually presides at board meetings. Typically, at each board meeting, the independent directors meet separately from management. Minutes of directors' meetings are not normally provided to shareholders.

Corporate Governance Best Practices

The Canadian Securities Administrators (CSA) Rules include a code of non-prescriptive corporate governance best practices that apply to Canadian public companies (see "National Policy 58-201" at ¶31-174) that include:

- having a majority of independent directors;
- appointing a chair who is an independent director or, where this is not possible, a "lead" director who is an independent director;
- holding regularly scheduled meetings of independent directors at which non-independent directors and management are not in attendance;
- adopting a charter setting out the responsibilities and operating procedures of the board of directors;
- developing clear position descriptions for the chair of the board, each committee of the board, and the CEO;
- ensuring that each new director receives a comprehensive orientation in order to understand his or her role and the role of the board and each committee;
- adopting a written code of business conduct and ethics;
- establishing a nominating committee and a compensation committee composed entirely of independent directors; and
- regular assessments of the board, the committees, and each individual director.

A director is considered independent if he or she is independent of management and has no other direct or indirect material business or other relationship with the company and its subsidiaries that could reasonably interfere with the exercise of his or her independent judgment.

Each Canadian public company is required to disclose whether (and if not, why not) it has adopted these corporate governance best practices in its management information circular or annual information form (AIF).

Public companies listed on the TSX Venture Exchange are exempt from some of these requirements.

While these guidelines are applicable only to Canadian public companies, many private companies use the guidelines as a touchstone to evaluate their respective corporate governance practices.

Board Mandates

In order to discharge its responsibility to supervise the management of the business and affairs of the corporation, the mandate of the board of directors of a Canadian company should include:

- satisfying itself as to the integrity of the CEO and other executive officers, and that the CEO and other executive officers create a culture of integrity throughout the organization;
- adopting a strategic planning process and approving, on at least an annual basis, a strategic plan which takes into account, among other things, the opportunities and risks of the business;
- identifying the principal competitive, financial, regulatory, and other risks of the company's business, and ensuring that appropriate systems to manage these risks are implemented;
- succession planning (including appointing, training, and monitoring senior management);
- adopting a communication policy for the issuer;
- ensuring that the company's internal control and management information systems are appropriate;
- developing the company's approach to corporate governance, including developing a set of corporate governance principles and guidelines that are specifically applicable to the company;
- establishing a process for receiving feedback from stakeholders (e.g., the board may wish to establish a process to permit stakeholders to directly contract the independent directors); and

- establishing expectations and responsibilities of directors, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials.

See "Sample Board Mandate" at ¶31-142.

The board of directors should also review and approve interim and annual financing statements of the company. As well, the board or the audit committee of a public company should also review and approve all earnings guidance and news releases containing financial information prior to the release of such information.

Committees of the Board

Boards of public companies are required to have an audit committee. Many boards of both public and private companies also establish other committees as the needs of the company may dictate. Many corporate statutes impose the same Canadian residency requirements on board committees as are imposed on boards as a whole.

Audit Committees

The audit committee of a Canadian public company must meet the requirements of "Multilateral Instrument 52-110" (see ¶31-174). The audit committee must be composed of at least three directors, all of whom are independent and financially literate. The audit committee must have a written charter giving the committee responsibility for, among other things,

- appointing the external auditors and setting their compensation (subject to shareholder approval);
- overseeing the work of the external auditors, including the resolution of disagreements between management and the external auditors;
- pre-approving audit and non-audit services;
- reviewing all public disclosure of financial information; and
- establishing procedures for dealing with complaints with respect to accounting or auditing matters and for whistleblowing.

See "Sample Audit Committee Mandate" at ¶31-144.

A director is considered financially literate if he or she has the ability to read and understand a set of financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of the accounting issues that can reasonably be expected to be raised by the financial statements of the company. For the purposes of determining whether a member of the audit committee is independent, MI 52-110 deems certain relationships with the issuer to constitute a "material relationship" with the company. It is possible that not all directors considered independent for the purposes of NP 58-201 will be independent for the purposes of MI 52-110.

Other Board Committees

The corporate governance "best practices" recommended under the CSA Rules include the establishment of a nominating committee and a compensation committee of the board. Each of the nominating committee and the compensation committee should be composed entirely of independent directors. Each committee should have a written charter establishing the committee's purpose, responsibilities, member qualifications, member appointment and removal, structure and operations (including permitted delegation), and the manner of reporting to the board.

The nominating committee's mandate should include:

- identifying individuals qualified to become new board members; and
- recommending nominees to the board.

See "Sample Nominating and Corporate Governance Committee Mandate" at ¶31-148.

In making its recommendations, the nominating committee should consider the competencies and skills required by the board, the competencies and skills of the current board members, and the competencies and skills of the each nominee.

The nomination of directors and the consideration of the appropriate size of the board remain with the board itself, with due consideration of the advice and input of the nominating committee.

The compensation committee's mandate should include:

- reviewing and approving corporate goals and objectives relevant to CEO compensation, evaluating the CEO's performance, and determining or recommending to the board the CEO's compensation based on such evaluation;
- determining or recommending to the board non-CEO officer and director compensation, incentive compensation plans and equity-based compensation plans; and
- reviewing all public disclosure of executive compensation.

See "Sample Compensation Committee Mandate" at ¶31-146.

A board may establish any number of other committees as may be appropriate in the particular circumstances. Common board committees include corporate governance committees, risk management committees, and environmental compliance committees.

¶31-106 Corporate Officers

The corporate officers (i.e., management) are appointed by the company's board of directors and are responsible for day-to-day management of the company. Except as may be set out in the company's constating documents, there are no prescribed officer positions. Typically, Canadian companies have a CEO (usually the President), a Chief Financial Officer (CFO), one or more Vice-Presidents in charge of various company businesses or functions and a secretary (often combined with the office of general counsel). A director may be an officer. An officer may hold more than one position. Generally, there are no residency requirements for officers.

The principal role of management is to run the day-to-day operations of the business in accordance with the strategic and budgetary direction established by the board. In larger corporations and in almost all public corporations, there will be a clearer division between the board and management than there may be in smaller corporations. In smaller corporations, the board may be expected to become involved in more of the detailed operations of running the business than one would expect in a larger corporation. This is not a function of any legal requirement but of efficiency.

¶31-140 PRECEDENTS/PRACTICAL TOOLS

¶31-142 Board of Directors Mandate

Board of Directors Mandate

1. General

The board of directors (Board) of [*name of corporation*] (Corporation) is responsible for supervising the management of the business and affairs of the Corporation.

The composition, responsibilities, and authority of the Board are set out in this Mandate.

This Mandate and the bylaws of the Corporation and such other procedures, not inconsistent therewith, as the Board may adopt from time to time, shall govern the meetings and procedures of the Board.

2. Composition

The directors of the Corporation (Directors) should have a mix of competencies and skills necessary to enable the Board and Board committees to properly discharge their responsibilities.

The Nominating Committee annually (and more frequently, if appropriate) recommends candidates to the Board for election or appointment as Directors, taking into account the Board's conclusions with respect to the appropriate size and composition of the Board and Board committees, the competencies and skills required to enable the Board and Board committees to properly discharge their responsibilities, and the competencies and skills of the current Board.

The Board approves the final choice of candidates.

The shareholders of the Corporation elect the Directors annually.

The Board has resolved that a majority of the Directors will be independent.

The Board will appoint a Chair and, if deemed appropriate, a Vice-Chair from among its members. If the Chair is not independent, the Board will designate one of the independent directors as the Lead Director. The Corporation has adopted position descriptions for the Chair, ViceChair, and Lead Director.

The Secretary of the Corporation shall be secretary of the Board (Secretary).

3. Responsibilities

The Board is responsible for supervising the management of the business and affairs of the Corporation and its subsidiary entities (Group).

In discharging their responsibilities, the Directors owe the following fiduciary duties to the Corporation:

- *a duty of loyalty*: they must act honestly and in good faith with a view to the best interests of the Corporation; and
- *a duty of care*: they must exercise the care, diligence, and skill that a reasonably prudent person would exercise in comparable circumstances.

In discharging their responsibilities, the Directors are entitled to rely on the honesty and integrity of the senior officers of the Corporation and the auditors and other professional advisers of the Corporation.

In discharging their responsibilities, the Directors are also entitled to directors and officers liability insurance purchased by the Corporation and indemnification from the Corporation to the fullest extent permitted by law and the constating documents of the Corporation.

The Board has specifically recognized its responsibilities for:

- to the extent feasible, satisfying itself as to the integrity of the Chief Executive Officer and other senior officers of the Corporation and that the Chief Executive Officer and other senior officers of the Corporation create a culture of integrity throughout the Group;
- adopting a strategic planning process and approving annually (or more frequently if appropriate) a strategic plan which takes into account, among other things, the opportunities and risks of the business of the Corporation;
- overseeing the identification of the principal risks of the business of the Corporation and overseeing the implementation of appropriate systems to manage these risks;
- overseeing the integrity of the internal control and management information systems of the Corporation;
- succession planning (including appointing, training, and monitoring the senior officers of the Corporation);
- adopting a disclosure policy for the Corporation; and
- developing the approach of the Corporation to corporate governance.

In addition to those matters which must by law be approved by the Board, the Board oversees the development of, and reviews and approves, significant corporate plans and initiatives, including the annual business plan and budget, major acquisitions and dispositions, and other significant matters of corporate strategy or policy.

To assist the Directors in discharging their responsibilities, the Board expects management of the Corporation to:

- review and update annually (or more frequently if appropriate) the strategic plan,10/3/2006 12:51PM and report regularly to the Board on the implementation of the strategic plan in light of evolving conditions;
- prepare and present to the Board annually (or more frequently if appropriate) a business plan and budget, and report regularly to the Board on the Corporation's performance against the business plan and budget; and
- report regularly to the Board on the Corporation's business and affairs and on any matters of material consequence for the Corporation and its shareholders.

Additional expectations are developed and communicated during the annual strategic planning and budgeting process and during regular Board and Board committee meetings.

The Board considers that generally management should speak for the Corporation in its communications with shareholders and the public. The Corporation's investor relations personnel are required to respond to inquiries from shareholders and the public after review and discussion, as appropriate, by senior management and the Board or Board committees. The Corporation's investor relations per-

sonnel are available to shareholders by telephone, fax and e-mail. The Corporation maintains an investor relations section on its Web site. Presentations at investor conferences are posted promptly on the Corporation's Web site. They are also available on request. The Board reviews the Corporation's major communications with shareholders and the public.

Directors are expected to attend Board meetings, meetings of Board committees of which they are members and the annual meeting of the shareholders of the Corporation. Directors are also expected to spend the time needed, and to meet as frequently as necessary, to discharge their responsibilities.

Directors are expected to comply with the Code of Business Conduct and Ethics of the Corporation.

4. Authority

The Board is authorized to carry out its responsibilities as set out in this Mandate.

The Board is authorized to retain, and to set and pay the compensation of, independent legal counsel and other advisers if it considers this appropriate.

The Board is authorized to invite officers and employees of the Corporation and outsiders with relevant experience and expertise to attend or participate in its meetings and proceedings, if it considers this appropriate.

The Directors have unrestricted access to the officers and employees of the Corporation. The Directors will use their judgment to ensure that any such contact is not disruptive to the operations of the Corporation and will, to the extent appropriate, advise the Chair and the Chief Executive Officer of the Corporation of any direct communications between them and the officers and employees of the Corporation.

The Board and the Directors have unrestricted access to the advice and services of the Secretary.

The Board may delegate certain of its functions to Board committees, each of which will have its own Mandate.

5. Meetings and Proceedings

The Board shall meet as frequently as is determined to be necessary, but not less than five times each year.

Any Director or the Secretary may call a meeting of the Board.

The Chair is responsible for the agenda of each meeting of the Board, including input from other Directors and the officers and employees of the Corporation as appropriate. Meetings will include presentations by management, or professional advisers and consultants when appropriate, and allow sufficient time to permit a full and open discussion of agenda items.

Unless waived by all Directors, a notice of each meeting of the Board confirming the date, time, place, and agenda of the meeting, together with any supporting materials, shall be forwarded to each Director at least three days before the date of the meeting.

The quorum for each meeting of the Board is a majority of the Directors. In the absence of the Chair, the other Directors may appoint one of their number as chair of a meeting. The chair of a meeting shall not have a second or casting vote.

The Secretary or his delegate shall keep minutes of all meetings of the Board, including all resolutions passed by the Board. Minutes of meetings shall be distributed to the Directors after preliminary approval thereof by the Chair.

An individual who is not a Director may be invited to attend a meeting of the Board for all or part of the meeting.

The independent Directors and the non-management Directors shall meet regularly alone to facilitate full communication.

6. Self-Assessment

The Board shall regularly assess its effectiveness with a view to ensuring that the performance of the Board accords with best practices.

The Board shall annually review and update this Mandate as required.

¶31-144 Audit Committee Mandate

Audit Committee Mandate

1. General

The board of directors (Board) of [*name of corporation*] (Corporation) has established the Audit Committee (Committee) to assist the Board in fulfilling its corporate governance and oversight responsibilities with respect to accounting and financial reporting processes, internal financial control structure, financial risk management systems, and external audit function.

The composition, responsibilities, and authority of the Committee are set out in this Mandate.

This Mandate and the bylaws of the Corporation and such other procedures, not inconsistent therewith, as the Committee may adopt from time to time shall govern the meetings and procedures of the Committee.

2. Composition

The Committee shall be composed of at least three directors of the Corporation (Members):

(a) all of whom are *independent* (as determined by the Board in accordance with the Policy on Independence of Directors of the Corporation);

(b) all of whom are *financially literate* (i.e., have the ability to read and understand a set of financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of the accounting issues that can reasonably be expected to be raised by the financial statements of the Corporation); and

(c) at least one of whom is *financially sophisticated* (i.e., has past employment experience in finance or accounting, requisite professional certification in accounting, or other comparable experience or background that results in his or her financial sophistication).

Members shall be appointed by the Board and shall serve until they resign, cease to be a Director, or are removed or replaced by the Board.

The Board shall designate one of the Members as chair of the Committee (Chair).

The Secretary of the Corporation shall be secretary of the Committee (Secretary).

3. Responsibilities

The Committee shall assist the Board in fulfilling its corporate governance and oversight responsibilities with respect to accounting and financial reporting processes, internal financial control structure, financial risk management systems, and external audit function.

The Committee shall have the responsibilities set out below.

3.1 Managing, on behalf of the Shareholders of the Corporation, the Relationship between the Corporation and its External Auditors

The Committee shall be responsible for managing, on behalf of the shareholders of the Corporation, the relationship between the Corporation and its external auditors, including:

(a) appointing the external auditors, subject to shareholder approval;

(b) setting the compensation of the external auditors;

(c) overseeing the work of the external auditors, including the resolution of disagreements between management and the external auditors with respect to financial reporting;

(d) pre-approving all audit services and permitted non-audit services to be provided to the Corporation and its subsidiary entities by the external auditors;

(e) having the external auditors report to the Committee in a timely manner with respect to all required matters, including those set out in paragraph 3.2;

(f) reviewing and approving the hiring policies of the Corporation with respect to present and former partners and employees of the current and former external auditors;

(g) overseeing the rotation of the audit partner having primary responsibility for the external audit of the Corporation, the audit partner responsible for reviewing the external audit, and the external auditors at such intervals as may be required;

(h) overseeing any change in the external auditors, including the notice of change of auditors required under applicable laws; and

(i) reviewing and assessing the performance, independence, and objectivity of the external auditors.

3.2 Overseeing the External Audit

The Committee shall be responsible for overseeing the external audit of the Corporation, including:

(a) reviewing and approving the engagement letter and the audit plan, including financial risk areas identified by the external auditors and management, and facilitating coordination where more than one audit firm is involved;

(b) reviewing and assessing the accounting and reporting practices and principles used by the Corporation in preparing its financial statements, including:

- all significant accounting policies and practices used, including any changes from preceding years and any proposed changes for future years;
- all significant financial reporting issues, estimates, and judgments made;
- all alternative treatments of financial information discussed by the external auditors and management, the results of such discussions, and the treatments preferred by the external auditors;
- any material issues identified by the external auditors with respect to the adequacy of the internal financial control structure, and any special audit steps adopted in light of material deficiencies or weaknesses;
- the effect of regulatory and accounting initiatives and off-balance sheet transactions, or structures on the financial statements;
- any errors or omissions in, and any required restatement of, the financial statements for preceding years;
- all significant tax issues;
- the reporting of all material contingent liabilities and related party transactions; and
- any material written communications between the external auditors and management;

(c) reviewing and assessing the results of the external audit and the external auditors' opinion on the financial statements, including:

- the scope and quality of the external and internal audit work performed;
- the resources required to carry out the audit work performed;
- the cooperation and any lack of cooperation received by the external auditors from employees of the Corporation; and
- the contents of the audit report;

(d) reviewing and discussing with the external auditors and management any management or internal control letters issued or proposed to be issued by the external auditors;

(e) reviewing and discussing with the external auditors any problems or difficulties encountered by them in the course of their audit work and management's response (including any restrictions on the scope of activities or access to requested information and any significant disagreements with management); and

(f) reviewing and discussing with legal counsel and other advisers matters that may have a material impact on the financial statements, operations, assets or compliance policies of the Corporation and any material reports or enquiries received by the Corporation and its subsidiary entities from regulators or government agencies.

3.3 Reviewing and Approving and Recommending to the Board for Approval the Financial Statements, MD&A and Interim Reports of the Corporation

The Committee shall review, approve and, where required, recommend to the Board for approval, the financial statements, management's discussion and analysis of financial condition and results of operations (MD&A), and interim financial reports of the Corporation and other public disclosure of financial information extracted from the financial statements of the Corporation with particular focus on:

(a) the quality and appropriateness of accounting and reporting practices and principles, and any changes thereto;

(b) major estimates or judgments, including alternative treatments of financial information discussed by management and the external auditors, the results of such discussions, and the treatments preferred by the external auditors;

(c) material financial risks;

(d) material transactions;

(e) material adjustments;

(f) compliance with loan agreements;

(g) material off-balance sheet transactions and structures;

(h) related party transactions;

(i) compliance with accounting standards;

(j) compliance with legal and regulatory requirements; and

(k) disagreements with management.

3.4 Overseeing Internal Financial Control Structure and Financial Risk Management Systems

The Committee shall be responsible for overseeing the internal financial control structure and financial risk management systems of the Corporation, including:

(a) reviewing and discussing with management and the external auditors the quality and adequacy of the internal control over financial reporting structure of the Corporation, including any material deficiencies or weakness and the steps taken by management to rectify these deficiencies or weaknesses;

(b) reviewing and discussing with management and the external auditors the quality and adequacy of the financial risk management systems of the Corporation including the major financial risk exposures of the Corporation and the steps taken by management to monitor and control these exposures;

(c) reviewing and discussing with management and the external auditors the establishment of and compliance with the Code of Business Conduct and Ethics of the Corporation; and

(d) reviewing and discussing with the Chief Executive Officer and the Chief Financial Officer of the Corporation the procedures undertaken by them in connection with the certifications required to be given by them in connection with annual and other filings required to be made by the Corporation under applicable securities laws.

3.5 Establish and Review Certain Procedures

The Committee shall establish adequate procedures, or require that adequate procedures are established, with respect to the following, and shall annually assess the adequacy of these procedures:

(a) the review of the public disclosure of financial information extracted from the financial statements of the Corporation;

(b) the receipt, retention, and treatment of complaints received by the Corporation with respect to accounting, internal accounting controls, or auditing matters; and

(c) the confidential, anonymous submission by employees of the Corporation of concerns regarding questionable accounting or auditing matters.

3.6 Other

The Committee shall:

(a) in cooperation with the Board and management, develop a calendar of activities and a meeting schedule for each year;

(b) review the operating and capital budgets of the Corporation;

(c) annually, and more frequently if appropriate, review the funding and administration of the employee benefit plans of the Corporation; and

(d) review and discuss with management and the external auditors any material difficulties or problems with regulatory or government agencies with respect to financial matters and management's response thereto.

3.7 Matters for which the Audit Committee is not Responsible

The Committee is not responsible for those matters which are the responsibility of management or the external auditors including:

(a) planning and conducting the external audit;

(b) ensuring that the financial statements of the Corporation have been prepared in accordance with generally accepted accounting principles;

(c) ensuring that the financial statements of the Corporation and the other financial information of the Corporation contained in regulatory filings and other public disclosure of the Corporation fairly present in all material respects the financial condition, results of operations, and cash flows of the Corporation;

(d) ensuring the adequacy of the internal control over financial reporting structure and the financial risk management systems of the Corporation; and

(e) ensuring compliance with applicable laws and regulations or the Code of Business Conduct and Ethics of the Corporation.

4. Authority

The Committee is authorized to carry out its responsibilities as set out in this Mandate and to make recommendations to the Board arising therefrom.

The Committee may delegate to the Chair and to the Chief Financial Officer (CFO) of the Corporation the authority, within specified limits, to authorize in advance all engagements of the external auditors to provide pre-approved services to the Corporation and its subsidiary entities. The Chair and the CFO shall report all engagements authorized by them to the Committee at its next meeting.

The Committee shall have direct and unrestricted access to the external auditors, officers and employees, and information and records of the Corporation.

The Committee is authorized to retain, and to set and pay the compensation of, independent legal counsel and other advisers, if it considers this appropriate.

The Committee is authorized to invite officers and employees of the Corporation, and outsiders with relevant experience and expertise, to attend or participate in its meetings and proceedings, if it considers this appropriate.

The external auditors shall have direct and unrestricted access to the Committee and shall report directly to the Committee.

The Corporation shall pay directly or reimburse the Committee for the expenses incurred by the Committee in carrying out its responsibilities.

5. Meetings and Proceedings

The Committee shall meet at least five times each year, and not less frequently than once each calendar quarter.

Any Member or the Secretary may call a meeting of the Committee. The external auditors or the CFO may ask a Member to call a meeting of the Committee.

The Chair is responsible for the agenda of each meeting of the Committee, including input from the officers and employees of the Corporation, the external auditors, other Members, and other directors of the Corporation as appropriate. Meetings will include presentations by management or professional advisers and consultants when appropriate, and will allow sufficient time to permit a full and open discussion of agenda items.

Unless waived by all Members, a notice of each meeting of the Committee confirming the date, time, place, and agenda of the meeting, together with any supporting materials, shall be forwarded to each Member at least three days before the date of the meeting.

The quorum for each meeting of the Committee is two Members. In the absence of the Chair, the other Members may appoint one of their number as chair of a meeting. The chair of a meeting shall not have a second or casting vote.

The Chair or his delegate shall report to the Board following each meeting of the Committee.

The Secretary or his delegate shall keep minutes of all meetings of the Committee, including all resolutions passed by the Committee. Minutes of all meetings shall be distributed to the Members and the other directors of the Corporation after preliminary approval thereof by the Chair.

An individual who is not a Member may be invited to attend a meeting of the Committee for all or part of the meeting. The Chair of the Board, the President and CEO of the Corporation, the CFO, and the engagement partners at the external auditors have a standing invitation to attend all meetings of the Committee, except those meetings or parts of meetings where the Committee meets alone or in private session with management, the external auditors, or professional advisers and consultants.

The Committee shall meet regularly alone and in private sessions with management and the external auditors to facilitate full communication.

6. Self-Assessment

The Committee and the Board shall annually assess the effectiveness of the Committee with a view to ensuring that the performance of the Committee accords with best practices.

The Committee and the Board shall annually review and update this Mandate as required.

¶31-146 Compensation Committee Mandate

Compensation Committee Mandate

1. General

The board of directors (Board) of [*name of corporation*] (Corporation) has established the Compensation Committee (Committee) to assist the Board in fulfilling its responsibilities with respect to the recruitment and assessment of the performance of the Chief Executive Officer (CEO) of the Corporation; the compensation of the CEO, the other officers of the Corporation, and the directors of the Corporation; executive compensation disclosure; and oversight of the compensation structure and benefit plans and programs of the Corporation.

The composition, responsibilities, and authority of the Committee are set out in this Mandate.

This Mandate and the bylaws of the Corporation and such other procedures, not inconsistent therewith, as the Committee may adopt from time to time shall govern the meetings and procedures of the Committee.

2. Composition

The Committee shall be composed of at least two directors of the Corporation (Members) all of whom are *independent* (within the meaning of the Policy on Independence of Directors of the Corporation).

Members shall be appointed by the Board and shall serve until they resign, cease to be a Director, or are removed or replaced by the Board.

The Board shall designate one of the Members as chair of the Committee (Chair).

The Secretary of the Corporation shall be secretary of the Committee (Secretary).

3. Responsibilities

The Committee shall assist the Board in fulfilling its responsibilities with respect to the recruitment and assessment of the performance of the CEO; the compensation of the CEO, the other officers of the Corporation, and the directors of the Corporation; executive compensation disclosure; and oversight of the compensation structure and benefit plans and programs of the Corporation.

The Committee shall have the responsibilities set out below.

3.1 Responsibilities with respect to the Composition of the Board

The Committee shall:

(a) together with the Nominating and Corporate Governance Committee, annually and more frequently if appropriate, assess the size and composition of the Board and Board committees, assess the competencies and skills required to enable the Board and Board committees to properly discharge their responsibilities, and report the results of that assessment to the Board; and

(b) together with the Nominating and Corporate Governance Committee, annually and more frequently if appropriate, assess the effectiveness of the Board and Board committees, assess the competencies and skills of the directors of the Corporation, and report the results of that assessment to the Board.

3.2 Responsibilities with respect to the Recruitment and Assessment of the Performance of the CEO

The Committee shall:

(a) when required, oversee the process of identifying and recruiting new candidates for appointment as CEO, including assessing the competencies and skills of identified individuals and reporting the results of that assessment to the Board; and

(b) annually and more frequently if appropriate, reviewing and approving corporate goals and objectives relative to the compensation of the CEO and assessing the performance of the CEO in light of those goals and objectives.

3.3 Responsibilities with respect to the Compensation of the CEO and Other Officers

The Committee shall:

(a) make recommendations to the Board with respect to the compensation and benefits of the CEO;

(b) make recommendations to the Board with respect to the compensation and benefits of the other officers of the Corporation;

(c) review and approve the terms of the employment agreements and severance arrangements of the CEO and other officers of the Corporation;

(d) review and approve the statement of executive compensation required to be included in the management proxy circular of the Corporation; and

(e) review and approve any other executive compensation disclosure before it is publicly disclosed by the Corporation.

3.4 Responsibilities with respect to the Compensation of the Directors

The Committee shall review periodically the compensation of the directors of the Corporation for service on the Board and Board committees and make recommendations to the Board with respect thereto.

3.5 Responsibilities with respect to Compensation Structure and Benefit Plans and Programs

The Committee shall review and assess periodically the compensation structure and benefit plans and programs of the Corporation and make recommendations to the Board with respect thereto.

4. Authority

The Committee is authorized to carry out its responsibilities as set out in this Mandate, and to make recommendations to the Board arising therefrom.

The Committee is authorized to retain, and to set and pay the compensation of, independent legal counsel and other advisers, if it considers this appropriate.

The Committee is authorized to invite officers and employees of the Corporation, and outsiders with relevant experience and expertise, to attend or participate in its meetings and proceedings, if it considers this appropriate.

The Corporation shall pay directly or reimburse the Committee for the expenses incurred by the Committee in carrying out its responsibilities.

5. Meetings and Proceedings

The Committee shall meet as frequently as required but not less frequently than twice each year.

Any Member or the Secretary may call a meeting of the Committee.

The Chair is responsible for the agenda of each meeting of the Committee, including input from the officers and employees of the Corporation, other Members, and other directors of the Corporation as appropriate. Meetings will include presentations by management, or professional advisers and consultants when appropriate, and will allow sufficient time to permit a full and open discussion of agenda items.

Unless waived by all Members, a notice of each meeting of the Committee confirming the date, time, place, and agenda of the meeting, together with any supporting materials, shall be forwarded to each Member at least three days before the date of the meeting.

The quorum for each meeting of the Committee is two Members. In the absence of the Chair, the other Members may appoint one of their number as chair of a meeting. The chair of a meeting shall not have a second or casting vote.

The Chair or his delegate shall report to the Board following each meeting of the Committee.

The Secretary or his delegate shall keep minutes of all meetings of the Committee, including all resolutions passed by the Committee. Minutes of meetings shall be distributed to the Members and the other directors of the Corporation after preliminary approval thereof by the Chair.

An individual who is not a Member may be invited to attend a meeting of the Committee for all or part of the meeting. The Chair of the Board has a standing invitation to attend all meetings of the Committee except for those meetings or parts of meetings where the Committee meets alone.

The Committee shall meet regularly alone to facilitate full communication.

6. Self-Assessment

The Committee and the Board shall annually assess the effectiveness of the Committee with a view to ensuring that the performance of the Committee accords with best practices.

The Committee and the Board shall annually review and update this Mandate as required.

¶31-148 Nominating and Corporate Governance Committee Mandate

Nominating and Corporate Governance Committee Mandate

1. General

The board of directors (Board) of [*name of corporation*] (Corporation) has established the Corporate Governance Committee (Committee) to assist the Board in fulfilling its responsibilities with respect to the composition and operation of the Board, and Board committees, and corporate governance standards and practices.

The composition, responsibilities and authority of the Committee are set out in this Mandate.

This Mandate and the bylaws of the Corporation and such other procedures, not inconsistent therewith, as the Committee may adopt from time to time shall govern the meetings and procedures of the Committee.

2. Composition

The Committee shall be composed of at least two directors of the Corporation (Members).

Members shall be appointed by the Board and shall serve until they resign, cease to be a Director, or are removed or replaced by the Board.

The Board shall designate one of the Members as chair of the Committee (Chair).

The Secretary of the Corporation shall be secretary of the Committee (Secretary).

3. Responsibilities

The Committee shall assist the Board in fulfilling its responsibilities with respect to the composition and operation of the Board and Board committees and corporate governance standards and practices.

The Committee shall have the responsibilities set out below.

3.1 Responsibilities with respect to the Composition of the Board and Board Committees

The Committee shall:

(a) together with the Compensation Committee, annually and more frequently if appropriate, assess the size and composition of the Board and Board committees, the competencies and skills required to enable the Board and Board committees to properly discharge their responsibilities, and report the results of that assessment to the Board;

(b) together with the Compensation Committee, annually and more frequently if appropriate, assess the effectiveness of the Board and Board committees, assess the competencies and skills of the directors of the Corporation, and report the results of that assessment to the Board;

(c) oversee the process of identifying and recruiting new candidates for election or appointment as directors of the Corporation, including assessing the competencies and skills of identified individuals and reporting the results of that assessment to the Board;

(d) annually or more frequently if appropriate, recommend to the Board candidates for election or appointment as directors of the Corporation, taking into account the Board's conclusions with respect to the appropriate size and composition of the Board and Board committees, the

competencies and skills required to enable the Board and Board committees to properly discharge their responsibilities, and the competencies and skills of the current Board; and

(e) annually and more frequently if appropriate, assess the *independence*, *financial literacy*, and *financial sophistication* of the directors of the Corporation and report the results of that assessment to the Board.

3.2 Responsibilities with respect to the Operation of the Board and Board Committees

The Committee shall:

(a) periodically review the operation of the Board and Board committees, including the frequency and location of meetings, the agenda for and reports and other information provided at meetings, and the conduct of meetings, and make recommendations to the Board;

(b) annually and more frequently if appropriate, assess the effectiveness of the relationship between the Board and the Chief Executive Officer and other senior officers of the Corporation, and report the results of that assessment to the Board;

(c) annually and more frequently if appropriate, review with the Chair and the Chief Executive Officer of the Corporation succession planning for the senior officers of the Corporation, and report the results of that review to the Board;

(d) periodically review the position descriptions of the Chair, Vice-Chair, Lead Director, and Chief Executive Officer of the Corporation, and make recommendations to the Board; and

(e) monitor the orientation and advancement of the directors of the Corporation.

3.3 Responsibilities with respect to Corporate Governance

The Committee shall:

(a) identify corporate governance standards and practices applicable to the Corporation, and make recommendations to the Board;

(b) periodically, review the articles and bylaws of the Corporation; the Statement of Corporate Governance; the Code Of Business Conduct and Ethics; the Statement of Policies and Procedures with respect to Confidentiality, Disclosure, Insider Trading and Tipping, and Insider Reporting; the Policy on Independence of Directors of the Corporation; and the Mandates of the Board and Board committees, and make recommendations to the Board;

(c) review corporate governance-related shareholder proposals and make recommendations to the Board;

(d) review and approve the disclosure with respect to corporate governance practices required to be included in the regulatory filings and the annual management information circular of the Corporation; and

(e) review and approve any other corporate governance practices disclosure before it is publicly disclosed by the Corporation.

4. Authority

The Committee is authorized to carry out its responsibilities as set out in this Mandate, and to make recommendations to the Board arising therefrom.

The Committee is authorized to retain, and to set and pay the compensation of, independent legal counsel and other advisers if it considers this appropriate.

The Committee is authorized to invite officers and employees of the Corporation, and outsiders with relevant experience and expertise, to attend or participate in its meetings and proceedings, if it considers this appropriate.

The Corporation shall pay directly or reimburse the Committee for the expenses incurred by the Committee in carrying out its responsibilities.

5. Meetings and Proceedings

The Committee shall meet as frequently as required, but not less frequently than twice each year.

Any Member or the Secretary may call a meeting of the Committee.

The Chair is responsible for the agenda of each meeting of the Committee, including input from the officers and employees of the Corporation, other Members, and other directors of the Corporation as appropriate. Meetings will include presentations by management, or professional advisers and consultants when appropriate, and will allow sufficient time to permit a full and open discussion of agenda items.

Unless waived by all Members, a notice of each meeting of the Committee confirming the date, time, place, and agenda of the meeting, together with any supporting materials, shall be forwarded to each Member at least three days before the date of the meeting.

The quorum for each meeting of the Committee is two Members. In the absence of the Chair, the other Members may appoint one of their number as chair of a meeting. The chair of a meeting shall not have a second or casting vote.

The Chair or his delegate shall report to the Board following each meeting of the Committee.

The Secretary or his delegate shall keep minutes of all meetings of the Committee, including all resolutions passed by the Committee. Minutes of meetings shall be distributed to the Members and the other directors of the Corporation after preliminary approval thereof by the Chair.

An individual who is not a Member may be invited to attend a meeting of the Committee for all or part of the meeting. The Chair of the Board has a standing invitation to attend all meetings of the Committee except those meetings or parts of meetings where the Committee meets alone.

The Committee shall meet regularly alone to facilitate full communication.

6. Self Assessment

The Committee and the Board shall annually assess the effectiveness of the Committee with a view to ensuring that the performance of the Committee accords with best practices.

The Committee and the Board shall annually review and update this Mandate as required.

¶31-150 Form 52-110F1 — Audit Committee Information Required in an AIF[1]

1. The Audit Committee's Charter

Disclose the text of the audit committee's charter.

2. Composition of the Audit Committee

Disclose the name of each audit committee member and state whether or not the member is (i) independent and (ii) financially literate.

3. Relevant Education and Experience

Describe the education and experience of each audit committee member that is relevant to the performance of his or her responsibilities as an audit committee member and, in particular, disclose any education or experience that would provide the member with:

(a) an understanding of the accounting principles used by the issuer to prepare its financial statements;

(b) the ability to assess the general application of such accounting principles in connection with the accounting for estimates, accruals and reserves;

(c) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the issuer's financial statements, or experience actively supervising one or more individuals engaged in such activities; and

(d) an understanding of internal controls and procedures for financial reporting.

4. Reliance on Certain Exemptions

If, at any time since the commencement of the issuer's most recently completed financial year, the issuer has relied on

(a) the exemption in section 2.4 (*De Minimis* Non-audit Services),

(b) the exemption in section 3.2 (Initial Public Offerings),

(c) the exemption in section 3.4 (Events Outside Control of Member),

(d) the exemption in section 3.5 (Death, Disability or Resignation of Audit Committee Member) or

(e) an exemption from this Instrument, in whole or in part, granted under Part 8 (Exemptions),

state that fact.

5. Reliance on the Exemption in Subsection 3.3(2) or Section 3.6

If, at any time since the commencement of the issuer's most recently completed financial year, the issuer has relied upon the exemption in subsection 3.3(2) (Controlled Companies) or section 3.6 (Temporary Exemption for Limited and Exceptional Circumstances), state that fact and disclose

(a) the name of the member, and

(b) the rationale for appointing the member to the audit committee.

6. Reliance on Section 3.8

If, at any time since the commencement of the issuer's most recently completed financial year, the issuer has relied upon section 3.8 (Acquisition of Financial Literacy), state that fact and disclose

(a) the name of the member,

(b) that the member is not financially literate, and

(c) the date by which the member expects to become financially literate.

[1] Form 52-110F1 accompanies Multilateral Instrument 52-110 — Audit Committees. This instrument came into force in all jurisdictions except British Columbia on March 30, 2004. British Columbia issuers should refer to B.C. Instrument 52-509 — Audit Committees, which came into force in British Columbia on July 1, 2005.

7. Audit Committee Oversight

If, at any time since the commencement of the issuer's most recently completed financial year, a recommendation of the audit committee to nominate or compensate an external auditor was not adopted by the board of directors, state that fact and explain why.

8. Pre-Approval Policies and Procedures

If the audit committee has adopted specific policies and procedures for the engagement of non-audit services, describe those policies and procedures.

9. External Auditor Service Fees (By Category)

(a) Disclose, under the caption "Audit Fees", the aggregate fees billed by the issuer's external auditor in each of the last two fiscal years for audit services.

(b) Disclose, under the caption "Audit-Related Fees", the aggregate fees billed in each of the last two fiscal years for assurance and related services by the issuer's external auditor that are reasonably related to the performance of the audit or review of the issuer's financial statements and are not reported under clause (a) above. Include a description of the nature of the services comprising the fees disclosed under this category.

(c) Disclose, under the caption "Tax Fees", the aggregate fees billed in each of the last two fiscal years for professional services rendered by the issuer's external auditor for tax compliance, tax advice, and tax planning. Include a description of the nature of the services comprising the fees disclosed under this category.

(d) Disclose, under the caption "All Other Fees", the aggregate fees billed in each of the last two fiscal years for products and services provided by the issuer's external auditor, other than the services reported under clauses (a), (b) and (c), above. Include a description of the nature of the services comprising the fees disclosed under this category.

¶31-152 Form 52-110F2 — Disclosure by Venture Issuers[2]

1. The Audit Committee's Charter

Disclose the text of the audit committee's charter.

2. Composition of the Audit Committee

Disclose the name of each audit committee member and state whether or not the member is (i) independent and (ii) financially literate.

3.Relevant Education and Experience

Describe the education and experience of each audit committee member that is relevant to the performance of his or her responsibilities as an audit committee member and, in particular, disclose any education or experience that would provide the member with:

(a) an understanding of the accounting principles used by the issuer to prepare its financial statements;

(b) the ability to assess the general application of such accounting principles in connection with the accounting for estimates, accruals and reserves;

(c) experience preparing, auditing, analyzing or evaluating financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of issues that can reasonably be expected to be raised by the issuer's financial statements, or experience actively supervising one or more individuals engaged in such activities; and

(d) an understanding of internal controls and procedures for financial reporting.

4. Audit Committee Oversight

If, at any time since the commencement of the issuer's most recently completed financial year, a recommendation of the audit committee to nominate or compensate an external auditor was not adopted by the board of directors, state that fact and explain why.

5. Reliance on Certain Exemptions

If, at any time since the commencement of the issuer's most recently completed financial year, the issuer has relied on

(a) the exemption in section 2.4 (*De Minimis* Non-audit Services), or

(b) an exemption from this Instrument, in whole or in part, granted under Part 8 (Exemptions),

state that fact.

6. Pre-Approval Policies and Procedures

If the audit committee has adopted specific policies and procedures for the engagement of non-audit services, describe those policies and procedures.

7. External Auditor Service Fees (By Category)

(a) Disclose, under the caption "Audit Fees", the aggregate fees billed by the issuer's external auditor in each of the last two fiscal years for audit fees.

(b) Disclose, under the caption "Audit-Related Fees", the aggregate fees billed in each of the last two fiscal years for assurance and related services by the issuer's external auditor that are reasonably related to the performance of the audit or review of the issuer's financial statements and are not reported under clause (a) above. Include a description of the nature of the services comprising the fees disclosed under this category.

(c) Disclose, under the caption "Tax Fees", the aggregate fees billed in each of the last two fiscal years for professional services rendered by the issuer's external auditor for tax compliance, tax advice, and tax planning. Include a description of the nature of the services comprising the fees disclosed under this category.

[2] Form 52-110F2 accompanies Multilateral Instrument 52-110 — Audit Committees. This instrument came into force in all jurisdictions except British Columbia on March 30, 2004. British Columbia issuers should refer to B.C. Instrument 52-509 — Audit Committees, which came into force in British Columbia on July 1, 2005.

(d) Disclose, under the caption "All Other Fees", the aggregate fees billed in each of the last two fiscal years for products and services provided by the issuer's external auditor, other than the services reported under clauses (a), (b) and (c), above. Include a description of the nature of the services comprising the fees disclosed under this category.

8. Exemption

Disclose that the issuer is relying upon the exemption in section 6.1 of the Instrument.

[The next page is 9833.]

¶31-170 CASE LAW/LEGISLATION

¶31-172 Case Law

People's Department Stores v. Wise, [2004] 3 S.C.R. 461

In this case the Supreme Court of Canada affirmed that the primary role of the board of directors is to manage or supervise the management of the business and affairs of a corporation. The Court also had the following to say about the existence of good corporate governance rules:

> The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care. However, even with good corporate governance rules, director's decisions can still be open to criticism from outsiders.

Whether director's decisions are open to criticism depends upon the application of the business judgment rule, which is discussed in later sections of this chapter. The significance of the Supreme Court of Canada's comment lies in the fact that the establishment of good corporate governance practices will provide evidence to support a director's defence that he or she did comply with the requisite duty of care and met with the requisite standard of care.

¶31-174 Legislation

National Policy 58-201 — Corporate Governance Guidelines

Part 1 — Purpose and Application

1.1 Purpose of this Policy This Policy provides guidance on corporate governance practices which have been formulated to:

- achieve a balance between providing protection to investors and fostering fair and efficient capital markets and confidence in capital markets;
- be sensitive to the realities of the greater numbers of small companies and controlled companies in the Canadian corporate landscape;
- take into account the impact of corporate governance developments in the U.S. and around the world; and
- recognize that corporate governance is evolving.

The guidelines in this Policy are not intended to be prescriptive. We encourage issuers to consider the guidelines in developing their own corporate governance practices.

We do, however, understand that some parties have concerns about how this Policy and National Instrument 58-101 Disclosure of Corporate Governance Practices affect controlled companies. Accordingly, we intend, over the next year, to carefully consider these concerns in the context of a study to examine the governance of controlled companies. We will consult market participants in conducting the study. After completing the study, we will consider whether to change how this Policy and National Instrument 58-101 treat controlled companies.

1.2 Application This Policy applies to all reporting issuers, other than investment funds. Consequently, it applies to both corporate and non-corporate entities. Reference to a particular corporate characteristic, such as a board of directors (the board), includes any equivalent characteristic of a non-corporate entity. For example, in the case of a limited partnership, we recommend that a majority of the directors of the general partner should be independent of the limited partnership (including the general partner).

Income trust issuers should, in applying these guidelines, recognize that certain functions of a corporate issuer, its board and its management may be performed by any or all of the trustees, the board or management of a subsidiary of the trust, or the board, management or employees of a management company. For this purpose, references to "the issuer" refer to both the trust and any underlying entities, including the operating entity.

Part 2 — Meaning of Independence

2.1 Meaning of Independence For the purposes of this Policy, a director is independent if he or she would be independent for the purposes of National Instrument 58-101 Disclosure of Corporate Governance Practices.

Part 3 — Corporate Governance Guidelines

Composition of the Board

3.1 The board should have a majority of independent directors.

3.2 The chair of the board should be an independent director. Where this is not appropriate, an independent director should be appointed to act as "lead director". However, either an independent chair or an independent lead director should act as the effec-

tive leader of the board and ensure that the board's agenda will enable it to successfully carry out its duties.

Meetings of Independent Directors

3.3 The independent directors should hold regularly scheduled meetings at which non-independent directors and members of management are not in attendance.

Board Mandate

3.4 The board should adopt a written mandate in which it explicitly acknowledges responsibility for the stewardship of the issuer, including responsibility for:

(a) to the extent feasible, satisfying itself as to the integrity of the chief executive officer (the CEO) and other executive officers and that the CEO and other executive officers create a culture of integrity throughout the organization;

(b) adopting a strategic planning process and approving, on at least an annual basis, a strategic plan which takes into account, among other things, the opportunities and risks of the business;

(c) the identification of the principal risks of the issuer's business, and ensuring the implementation of appropriate systems to manage these risks;

(d) succession planning (including appointing, training and monitoring senior management);

(e) adopting a communication policy for the issuer;

(f) the issuer's internal control and management information systems; and

(g) developing the issuer's approach to corporate governance, including developing a set of corporate governance principles and guidelines that are specifically applicable to the issuer.

The written mandate of the board should also set out:

(i) measures for receiving feedback from stakeholders (e.g., the board may wish to establish a process to permit stakeholders to directly contact the independent directors), and

(ii) expectations and responsibilities of directors, including basic duties and responsibilities with respect to attendance at board meetings and advance review of meeting materials.

In developing an effective communication policy for the issuer, issuers should refer to the guidance set out in National Policy 51-201 Disclosure Standards.

For purposes of this Policy, "executive officer" has the same meaning as in National Instrument 51-102 Continuous Disclosure Obligations.

Position Descriptions

3.5 The board should develop clear position descriptions for the chair of the board and the chair of each board committee. In addition, the board, together with the CEO, should develop a clear position description for the CEO, which includes delineating management's responsibilities. The board should also develop or approve the corporate goals and objectives that the CEO is responsible for meeting.

Orientation and Continuing Education

3.6 The board should ensure that all new directors receive a comprehensive orientation. All new directors should fully understand the role of the board and its committees, as well as the contribution individual directors are expected to make (including, in particular, the commitment of time and resources that the issuer expects from its directors). All new directors should also understand the nature and operation of the issuer's business.

3.7 The board should provide continuing education opportunities for all directors, so that individuals may maintain or enhance their skills and abilities as directors, as well as to ensure their knowledge and understanding of the issuer's business remains current.

Code of Business Conduct and Ethics

3.8 The board should adopt a written code of business conduct and ethics (a code). The code should be applicable to directors, officers and employees of the issuer. The code should constitute written standards that are reasonably designed to promote integrity and to deter wrongdoing. In particular, it should address the following issues:

(a) conflicts of interest, including transactions and agreements in respect of which a director or executive officer has a material interest;

(b) protection and proper use of corporate assets and opportunities;

(c) confidentiality of corporate information;

(d) fair dealing with the issuer's security holders, customers, suppliers, competitors and employees;

(e) compliance with laws, rules and regulations; and

(f) reporting of any illegal or unethical behaviour.

3.9 The board should be responsible for monitoring compliance with the code. Any waivers from the code that are granted for the benefit of the issuer's directors or executive officers should be granted by the board (or a board committee) only.

Although issuers must exercise their own judgement in making materiality determinations, the Canadian securities regulatory authorities consider that conduct by a director or executive officer which constitutes a material departure from the code will likely constitute a "material change" within the meaning of National Instrument 51-102 Continuous Disclosure Obligations. National Instrument 51-102 requires every material change report to include a full description of the material change. Where a material departure from the code constitutes a material change to the issuer, we expect that the material change report will disclose, among other things:

- the date of the departure(s),
- the party(ies) involved in the departure(s),
- the reason why the board has or has not sanctioned the departure(s), and
- any measures the board has taken to address or remedy the departure(s).

Nomination of Directors

3.10 The board should appoint a nominating committee composed entirely of independent directors.

3.11 The nominating committee should have a written charter that clearly establishes the committee's purpose, responsibilities, member qualifications, member appointment and removal, structure and operations (including any authority to delegate to individual members and subcommittees), and manner of reporting to the board. In addition, the nominating committee should be given authority to engage and compensate any outside advisor that it determines to be necessary to permit it to carry out its duties. If an issuer is legally required by contract or otherwise to provide third parties with the right to nominate directors, the selection and nomination of those directors need not involve the approval of an independent nominating committee.

3.12 Prior to nominating or appointing individuals as directors, the board should adopt a process involving the following steps:

(A) Consider what competencies and skills the board, as a whole, should possess. In doing so, the board should recognize that the particular competencies and skills required for one issuer may not be the same as those required for another.

(B) Assess what competencies and skills each existing director possesses. It is unlikely that any one director will have all the competencies and skills required by the board. Instead, the board should be considered as a group, with each individual making his or her own contribution. Attention should also be paid to the personality and other qualities of each director, as these may ultimately determine the boardroom dynamic.

The board should also consider the appropriate size of the board, with a view to facilitating effective decision-making.

In carrying out each of these functions, the board should consider the advice and input of the nominating committee.

3.13 The nominating committee should be responsible for identifying individuals qualified to become new board members and recommending to the board the new director nominees for the next annual meeting of shareholders.

3.14 In making its recommendations, the nominating committee should consider:

(a) the competencies and skills that the board considers to be necessary for the board, as a whole, to possess;

(b) the competencies and skills that the board considers each existing director to possess; and

(c) the competencies and skills each new nominee will bring to the boardroom.

The nominating committee should also consider whether or not each new nominee can devote sufficient time and resources to his or her duties as a board member.

Compensation

3.15 The board should appoint a compensation committee composed entirely of independent directors.

3.16 The compensation committee should have a written charter that establishes the committee's purpose, responsibilities, member qualifications, member appointment and removal, structure and operations (including any authority to delegate to individual members or subcommittees), and the manner of reporting to the board. In addition, the compensation committee should be given authority to engage and compensate any outside advisor that it determines to be necessary to permit it to carry out its duties.

3.17 The compensation committee should be responsible for:

(a) reviewing and approving corporate goals and objectives relevant to CEO compensation, evaluating the CEO's performance in light of those corporate goals and objectives, and determining (or making recommendations to the board with respect to) the CEO's compensation level based on this evaluation;

(b) making recommendations to the board with respect to non-CEO officer and director compensation, incentive-compensation plans and equity-based plans; and

(c) reviewing executive compensation disclosure before the issuer publicly discloses this information.

Regular Board Assessments

3.18 The board, its committees and each individual director should be regularly assessed regarding his, her or its effectiveness and contribution. An assessment should consider

(a) in the case of the board or a board committee, its mandate or charter, and

(b) in the case of an individual director, the applicable position description(s), as well as the competencies and skills each individual director is expected to bring to the board.

Multilateral Instrument 52-110 — Audit Committees

Part 1 — Definitions and Application

1.1 Definitions In this Instrument,

"accounting principles" has the meaning ascribed to it in National Instrument 52-107, Acceptable Accounting Principles, Auditing Standards and Reporting Currency;

"AIF" has the meaning ascribed to it in National Instrument 51-102;

"asset-backed security" has the meaning ascribed to it in National Instrument 51-102;

"audit committee" means a committee (or an equivalent body) established by and among the board of directors of an issuer for the purpose of overseeing the accounting and financial reporting processes of the issuer and audits of the financial statements of the issuer, and, if no such committee exists, the entire board of directors of the issuer;

"audit services" means the professional services rendered by the issuer's external auditor for the audit and review of the issuer's financial statements or services that are normally provided by the external auditor in connection with statutory and regulatory filings or engagements;

"credit support issuer" has the meaning ascribed to it in section 13.4 of National Instrument 51-102;

"designated foreign issuer" has the meaning ascribed to it in National Instrument 71-102, Continuous Disclosure and Other Exemptions Relating to Foreign Issuers;

"exchangeable security issuer" has the meaning ascribed to it in section 13.3 of National Instrument 51-102;

"executive officer" of an entity means an individual who is:

(a) a chair of the entity;

(b) a vice-chair of the entity;

(c) the president of the entity;

(d) a vice-president of the entity in charge of a principal business unit, division or function including sales, finance or production;

(e) an officer of the entity or any of its subsidiary entities who performs a policy-making function in respect of the entity; or

(f) any other individual who performs a policy-making function in respect of the entity;

"foreign private issuer" means an issuer that is a foreign private issuer within the meaning of Rule 405 under the 1934 Act;

"immediate family member" means an individual's spouse, parent, child, sibling, mother or father-in-law, son or daughter-in-law, brother or sister-in-law, and anyone (other than an employee of either the individual or the individual's immediate family member) who shares the individual's home;

"investment fund" has the meaning ascribed to it in National Instrument 51-102;

"marketplace" has the meaning ascribed to it in National Instrument 21-101, Marketplace Operation;

"MD&A" has the meaning ascribed to it in National Instrument 51-102;

"National Instrument 51-102" means National Instrument 51-102, Continuous Disclosure Obligations;

"non-audit services" means services other than audit services;

"SEC foreign issuer" has the meaning ascribed to it in National Instrument 71-102, Continuous Disclosure and Other Exemptions Relating to Foreign Issuers;

"U.S. marketplace" means an exchange registered as a "national securities exchange" under section 6 of the 1934 Act, or the Nasdaq Stock Market;

"venture issuer" means an issuer that, at the end of its most recently completed financial year, does not have any of its securities listed or quoted on the Toronto Stock Exchange, a U.S. marketplace or a marketplace outside of Canada and the United States of America.

1.2 Application This Instrument applies to all reporting issuers other than:

(a) investment funds;

(b) issuers of asset-backed securities;

(c) designated foreign issuers;

(d) SEC foreign issuers;

(e) issuers that are subsidiary entities, if

(i) the subsidiary entity does not have equity securities (other than non-convertible, non-participating preferred securities) trading on a marketplace, and

(ii) the parent of the subsidiary entity is

(A) subject to the requirements of this Instrument, or

(B) an issuer that (1) has securities listed or quoted on a U.S. marketplace, and (2) is in compliance with the requirements of that U.S. marketplace applicable to issuers, other than foreign private issuers, regarding the role and composition of audit committees;

(f) exchangeable security issuers, if the exchangeable security issuer qualifies for the relief contemplated by, and is in compliance with the requirements and conditions set out in, section 13.3 of National Instrument 51-102; and

(g) credit support issuers, if the credit support issuer qualifies for the relief contemplated by, and is in compliance with the requirements and conditions set out in, section 13.4 of National Instrument 51-102.

1.3 Meaning of Affiliated Entity, Subsidiary Entity and Control

(1) For the purposes of this Instrument, a person or company is considered to be an affiliated entity of another person or company if

(a) one of them controls or is controlled by the other or if both persons or companies are controlled by the same person or company, or

(b) the person is an individual who is

(i) both a director and an employee of an affiliated entity, or

(ii) an executive officer, general partner or managing member of an affiliated entity.

(2) For the purposes of this Instrument, a person or company is considered to be a subsidiary entity of another person or company if

(a) it is controlled by,

(i) that other, or

(ii) that other and one or more persons or companies each of which is controlled by that other, or

(iii) two or more persons or companies, each of which is controlled by that other; or

(b) it is a subsidiary entity of a person or company that is the other's subsidiary entity.

(3) For the purpose of this Instrument, "control" means the direct or indirect power to direct or cause the direction of the management and policies of a person or company, whether through ownership of voting securities or otherwise.

(4) Despite subsection (1), an individual will not be considered to control an issuer for the purposes of this Instrument if the individual:

(a) owns, directly or indirectly, ten per cent or less of any class of voting securities of the issuer; and

(b) is not an executive officer of the issuer.

1.4 Meaning of Independence

(1) An audit committee member is independent if he or she has no direct or indirect material relationship with the issuer.

(2) For the purposes of subsection (1), a "material relationship" is a relationship which could, in the view of the issuer's board of directors, be reasonably expected to interfere with the exercise of a member's independent judgement.

(3) Despite subsection (2), the following individuals are considered to have a material relationship with an issuer:

(a) an individual who is, or has been within the last three years, an employee or executive officer of the issuer;

(b) an individual whose immediate family member is, or has been within the last three years, an executive officer of the issuer;

(c) an individual who:

(i) is a partner of a firm that is the issuer's internal or external auditor,

(ii) is an employee of that firm, or

(iii) was within the last three years a partner or employee of that firm and personally worked on the issuer's audit within that time;

(d) an individual whose spouse, minor child or stepchild, or child or stepchild who shares a home with the individual:

(i) is a partner of a firm that is the issuer's internal or external auditor,

(ii) is an employee of that firm and participates in its audit, assurance or tax compliance (but not tax planning) practice, or

(iii) was within the last three years a partner or employee of that firm and personally worked on the issuer's audit within that time;

(e) an individual who, or whose immediate family member, is or has been within the last three years, an executive officer of an entity if any of the issuer's current executive officers serves or served at that same time on the entity's compensation committee; and

(f) an individual who received, or whose immediate family member who is employed as an executive officer of the issuer received, more than $75,000 in direct compensation from the issuer during any 12 month period within the last three years.

(4) Despite subsection (3), an individual will not be considered to have a material relationship with the issuer solely because

(a) he or she had a relationship identified in subsection (3) if that relationship ended before March 30, 2004; or

(b) he or she had a relationship identified in subsection (3) by virtue of subsection (8) if that relationship ended before June 30, 2005.

(5) For the purposes of clauses (3)(c) and (3)(d), a partner does not include a fixed income partner whose interest in the firm that is the internal or external auditor is limited to the receipt of fixed amounts of compensation (including deferred compensation) for prior service with that firm if the compensation is not contingent in any way on continued service.

(6) For the purposes of clause (3)(f), direct compensation does not include:

(a) remuneration for acting as a member of the board of directors or of any board committee of the issuer, and

(b) the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the issuer if the compensation is not contingent in any way on continued service.

(7) Despite subsection (3), an individual will not be considered to have a material relationship with the issuer solely because the individual or his or her immediate family member

(a) has previously acted as an interim chief executive officer of the issuer, or

(b) acts, or has previously acted, as a chair or vice-chair of the board of directors or of any board committee of the issuer on a part-time basis.

(8) For the purpose of section 1.4, an issuer includes a subsidiary entity of the issuer and a parent of the issuer.

1.5 Additional Independence Requirements

(1) Despite any determination made under section 1.4, an individual who

(a) accepts, directly or indirectly, any consulting, advisory or other compensatory fee from the issuer or any subsidiary entity of the issuer, other than as remuneration for acting in his or her capacity as a member of the board of directors or any board committee, or as a part-time chair or vice-chair of the board or any board committee; or

(b) is an affiliated entity of the issuer or any of its subsidiary entities, is considered to have a material relationship with the issuer.

(2) For the purposes of subsection (1), the indirect acceptance by an individual of any consulting, advisory or other compensatory fee includes acceptance of a fee by

(a) an individual's spouse, minor child or stepchild, or a child or stepchild who shares the individual's home; or

(b) an entity in which such individual is a partner, member, an officer such as a managing director occupying a comparable position or executive officer, or occupies a similar position (except limited partners, non-managing members and those occupying similar positions who, in each case, have no active role in providing services to the entity) and which pro-

vides accounting, consulting, legal, investment banking or financial advisory services to the issuer or any subsidiary entity of the issuer.

(3) For the purposes of subsection (1), compensatory fees do not include the receipt of fixed amounts of compensation under a retirement plan (including deferred compensation) for prior service with the issuer if the compensation is not contingent in any way on continued service.

1.6 Meaning of Financial Literacy For the purposes of this Instrument, an individual is financially literate if he or she has the ability to read and understand a set of financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of the issues that can reasonably be expected to be raised by the issuer's financial statements.

Part 2 — Audit Committee Responsibilities

2.1 Audit Committee Every issuer must have an audit committee that complies with the requirements of the Instrument.

2.2 Relationship with External Auditors Every issuer must require its external auditor to report directly to the audit committee.

2.3 Audit Committee Responsibilities

(1) An audit committee must have a written charter that sets out its mandate and responsibilities.

(2) An audit committee must recommend to the board of directors:

(a) the external auditor to be nominated for the purpose of preparing or issuing an auditor's report or performing other audit, review or attest services for the issuer; and

(b) the compensation of the external auditor.

(3) An audit committee must be directly responsible for overseeing the work of the external auditor engaged for the purpose of preparing or issuing an auditor's report or performing other audit, review or attest services for the issuer, including the resolution of disagreements between management and the external auditor regarding financial reporting.

(4) An audit committee must pre-approve all non-audit services to be provided to the issuer or its subsidiary entities by the issuer's external auditor.

(5) An audit committee must review the issuer's financial statements, MD&A and annual and interim earnings press releases before the issuer publicly discloses this information.

(6) An audit committee must be satisfied that adequate procedures are in place for the review of the issuer's public disclosure of financial information extracted or derived from the issuer's financial statements, other than the public disclosure referred to in subsection (5), and must periodically assess the adequacy of those procedures.

(7) An audit committee must establish procedures for:

(a) the receipt, retention and treatment of complaints received by the issuer regarding accounting, internal accounting controls, or auditing matters; and

(b) the confidential, anonymous submission by employees of the issuer of concerns regarding questionable accounting or auditing matters.

(8) An audit committee must review and approve the issuer's hiring policies regarding partners, employees and former partners and employees of the present and former external auditor of the issuer.

2.4 *De Minimis* Non-Audit Services An audit committee satisfies the pre-approval requirement in subsection 2.3(4) if:

(a) the aggregate amount of all the non-audit services that were not pre-approved is reasonably expected to constitute no more than five per cent of the total amount of fees paid by the issuer and its subsidiary entities to the issuer's external auditor during the fiscal year in which the services are provided;

(b) the issuer or the subsidiary entity of the issuer, as the case may be, did not recognize the services as non-audit services at the time of the engagement; and

(c) the services are promptly brought to the attention of the audit committee of the issuer and approved, prior to the completion of the audit, by the audit committee or by one or more of its members to whom authority to grant such approvals has been delegated by the audit committee.

2.5 Delegation of Pre-Approval Function

(1) An audit committee may delegate to one or more independent members the authority to pre-approve non-audit services in satisfaction of the requirement in subsection 2.3(4).

(2) The pre-approval of non-audit services by any member to whom authority has been delegated pursuant to subsection (1) must be presented to the audit committee at its first scheduled meeting following such pre-approval.

2.6 Pre-Approval Policies and Procedures An audit committee satisfies the pre-approval requirement in subsection 2.3(4) if it adopts specific policies and procedures for the engagement of the non-audit services, if:

(a) the pre-approval policies and procedures are detailed as to the particular service;

(b) the audit committee is informed of each non-audit service; and

(c) the procedures do not include delegation of the audit committee's responsibilities to management.

Part 3 — Composition of the Audit Committee

3.1 Composition

(1) An audit committee must be composed of a minimum of three members.

(2) Every audit committee member must be a director of the issuer.

(3) Subject to sections 3.2, 3.3, 3.4, 3.5 and 3.6, every audit committee member must be independent.

(4) Subject to sections 3.5 and 3.8, every audit committee member must be financially literate.

3.2 Initial Public Offerings

(1) Subject to section 3.9, if an issuer has filed a prospectus to qualify the distribution of securities that constitutes its initial public offering, subsection 3.1(3) does not apply for a period of up to 90 days commencing on the date of the receipt for the prospectus, provided that one member of the audit committee is independent.

(2) Subject to section 3.9, if an issuer has filed a prospectus to qualify the distribution of securities that constitutes its initial public offering, subsection 3.1(3) does not apply for a period of up to one year commencing on the date of the receipt for the prospectus, provided that a majority of the audit committee members are independent.

3.3 Controlled Companies

(1) An audit committee member that sits on the board of directors of an affiliated entity is exempt from the requirement in subsection 3.1(3) if the member, except for being a director (or member of a board committee) of the issuer and the affiliated entity, is otherwise independent of the issuer and the affiliated entity.

(2) Subject to section 3.7, an audit committee member is exempt from the requirement in subsection 3.1(3) if:

(a) the member would be independent of the issuer but for the relationship described in paragraph 1.5(1)(b) or as a result of subsection 1.4(8);

(b) the member is not an executive officer, general partner or managing member of a person or company that

(i) is an affiliated entity of the issuer, and

(ii) has its securities trading on a marketplace;

(c) the member is not an immediate family member of an executive officer, general partner or managing member referred to in paragraph (b), above;

(d) the member does not act as the chair of the audit committee; and

(e) the board determines in its reasonable judgement that

(i) the member is able to exercise the impartial judgement necessary for the member to fulfill his or her responsibilities as an audit committee member, and

(ii) the appointment of the member is required by the best interests of the issuer and its shareholders.

3.4 Events Outside Control of Member Subject to section 3.9, if an audit committee member ceases to be independent for reasons outside the member's reasonable control, the member is exempt from the requirement in subsection 3.1(3) for a period ending on the later of:

(a) the next annual meeting of the issuer, and

(b) the date that is six months from the occurrence of the event which caused the member to not be independent.

3.5 Death, Disability or Resignation of Member Subject to section 3.9, if the death, disability or resignation of an audit committee member has resulted in a vacancy on the audit committee that the board of directors is required to fill, an audit committee member appointed to fill such vacancy is exempt from the requirements in subsections 3.1(3) and (4) for a period ending on the later of:

(a) the next annual meeting of the issuer, and

(b) the date that is six months from the day the vacancy was created.

3.6 Temporary Exemption for Limited and Exceptional Circumstances Subject to section 3.7, an audit committee member is exempt from the requirement in subsection 3.1(3) if:

(a) the member is not an individual described in subsection 1.5(1);

(b) the member is not an employee or officer of the issuer, or an immediate family member of an employee or officer of the issuer;

(c) the board, under exceptional and limited circumstances, determines in its reasonable judgement that

(i) the member is able to exercise the impartial judgement necessary for the member to fulfill his or her responsibilities as an audit committee member, and

(ii) the appointment of the member is required by the best interests of the issuer and its shareholders;

(d) the member does not act as chair of the audit committee; and

(e) the member does not rely upon this exemption for a period of more than two years.

3.7 Majority Independent The exemptions in subsection 3.3(2) and section 3.6 are not available to a member unless a majority of the audit committee members would be independent.

3.8 Acquisition of Financial Literacy Subject to section 3.9, an audit committee member who is not financially literate may be appointed to the audit committee provided that the member becomes financially literate within a reasonable period of time following his or her appointment.

3.9 Restriction on Use of Certain Exemptions The exemptions in sections 3.2, 3.4, 3.5 and 3.8 are not available to a member unless the issuer's board of directors has determined that the reliance on the exemption will not materially adversely affect the ability of the audit committee to act independently and to satisfy the other requirements of this Instrument.

Part 4 — Authority of the Audit Committee

4.1 Authority An audit committee must have the authority

(a) to engage independent counsel and other advisers as it determines necessary to carry out its duties,

(b) to set and pay the compensation for any advisers employed by the audit committee, and

(c) to communicate directly with the internal and external auditors.

Part 5 — Reporting Obligations

5.1 Required Disclosure Every issuer must include in its AIF the disclosure required by Form 52-110F1.

5.2 Management Information Circular If management of an issuer solicits proxies from the security holders of the issuer for the purpose of electing directors to the issuer's board of directors, the issuer must include in its management information circular a cross-reference to the sections in the issuer's AIF that contain the information required by section 5.1.

Part 6 — Venture Issuers

6.1 Venture Issuers Venture issuers are exempt from the requirements of Parts 3 (Composition of the Audit Committee) and 5 (Reporting Obligations).

6.2 Required Disclosure

(1) Subject to subsection (2), if management of a venture issuer solicits proxies from the security holders of the venture issuer for the purpose of electing directors to its board of directors, the venture issuer must include in its management information circular the disclosure required by Form 52-110F2.

(2) A venture issuer that is not required to send a management information circular to its security holders must provide the disclosure required by Form 52-110F2 in its AIF or annual MD&A.

Part 7 — U.S. Listed Issuers

7.1 U.S. Listed Issuers An issuer that has securities listed or quoted on a U.S. marketplace is exempt from the requirements of Parts 2 (Audit Committee Responsibilities), 3 (Composition of the Audit Committee), 4 (Authority of the Audit Committee), and 5 (Reporting Obligations), if:

(a) the issuer is in compliance with the requirements of that U.S. marketplace applicable to issuers, other than foreign private issuers, regarding the role and composition of audit committees; and

(b) if the issuer is incorporated, continued or otherwise organized in a jurisdiction in Canada, the issuer includes in its AIF the disclosure (if any) required by paragraph 7 of Form 52-110F1.

Part 8 — Exemptions

8.1 Exemptions

(1) The securities regulatory authority or regulator may grant an exemption from this rule, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario, only the regulator may grant such an exemption.

Part 9 — Effective Date

9.1 Effective Date

(1) This Instrument comes into force on March 30, 2004.

(2) Despite subsection (1), this Instrument applies to an issuer commencing on the earlier of:

(a) the first annual meeting of the issuer after July 1, 2004, and

(b) July 1, 2005.

Companion Policy 52-110CP — to Multilateral Instrument 52-110

Part 1 — General

1.1 Purpose Multilateral Instrument 52-110, Audit Committees (the Instrument) is a rule in each of Québec, Alberta, Manitoba, Ontario, Nova Scotia and Newfoundland and Labrador, a Commission regulation in Saskatchewan and Nunavut, a policy in New Brunswick, Prince Edward Island and the Yukon Territory, and a code in the Northwest Territories. We, the securities regulatory authorities in each of the foregoing jurisdictions (the Jurisdictions), have implemented the Instrument to encourage reporting issuers to establish and maintain strong, effective and independent audit committees. We believe that such audit committees enhance the quality of financial disclosure made by reporting issuers, and ultimately foster increased investor confidence in Canada's capital markets.

This companion policy (the Policy) provides information regarding the interpretation and application of the Instrument.

1.2 Application to Non-Corporate Entities The Instrument applies to both corporate and non-corporate entities. Where the Instrument or this Policy refers to a particular corporate characteristic, such as a board of directors, the reference should be read to also include any equivalent characteristic of a non-corporate entity. For example, in the case of a limited partnership, the directors of the general partner who are independent of the limited partnership (including the general partner) should form an audit committee which fulfils these responsibilities.

Income trust issuers should apply the Instrument in a manner which recognizes that certain functions of a corporate issuer, its board and its management may be performed by any or all of the trustees, the board or management of a subsidiary of the trust, or the board, management or employees of a management company. For this purpose, references to "the issuer" refer to both the trust and any underlying entities, including the operating entity.

If the structure of an issuer will not permit it to comply with the Instrument, the issuer should seek exemptive relief.

1.3 Management Companies The definition of "executive officer" includes any individual who performs a policy-making function in respect of the entity in question. We consider this aspect of the definition to include an individual who, although not employed by the entity in question, nevertheless performs a policy-making function in respect of that entity, whether through another person or company or otherwise.

1.4 Audit Committee Procedures The Instrument establishes requirements for the responsibilities, composition and authority of audit committees. Nothing in the Instrument is intended to restrict the ability of the board of directors or the audit committee to establish the committee's quorum or procedures, or to restrict the committee's ability to invite additional parties to attend audit committee meetings.

Part 2 — The Role of the Audit Committee

2.1 The Role of the Audit Committee An audit committee is a committee of a board of directors to which the board delegates its responsibility for oversight of the financial reporting process. Traditionally, the audit committee has performed a number of roles, including

- helping directors meet their responsibilities,
- providing better communication between directors and the external auditors,
- enhancing the independence of the external auditor,
- increasing the credibility and objectivity of financial reports, and
- strengthening the role of the directors by facilitating in-depth discussions among directors, management and the external auditor.

The Instrument requires that the audit committee also be responsible for managing, on behalf of the shareholders, the relationship between the issuer and the external auditors. In particular, it provides that an audit committee must have responsibility for:

(a) overseeing the work of the external auditors engaged for the purpose of preparing or issuing an auditor's report or related work; and

(b) recommending to the board of directors the nomination and compensation of the external auditors.

Although under corporate law an issuer's external auditors are responsible to the shareholders, in practice, shareholders have often been too dispersed to effectively exercise meaningful oversight of the external auditors. As a result, management has typically assumed this oversight role. However, the auditing process may be compromised if the external auditors view their main responsibility as serving management rather than the shareholders. By assigning these responsibilities to an independent audit committee, the Instrument ensures that the external audit will be conducted independently of the issuer's management.

2.2 Relationship between External Auditors and Shareholders Subsection 2.3(3) of the Instrument provides that an audit committee must be directly responsible for overseeing the work of the external auditors engaged for the purpose of preparing or issuing an auditor's report or performing other audit, review or attest services for the issuer, including the resolution of disagreements between management and the external auditors regarding financial reporting. Notwithstanding this responsibility, the external auditors are retained by, and are ultimately accountable to, the shareholders. As a result, subsection 2.3(3) does not detract from the external auditors' right and responsibility to also provide their views directly to the shareholders if they disagree with an approach being taken by the audit committee.

2.3 Public Disclosure of Financial Information Issuers are reminded that, in our view, the extraction of information from financial statements that have not previously been reviewed by the audit committee and the release of that information into the marketplace is inconsistent with the issuer's obligation to have its audit committee review the financial statements. See also National Policy 51-201, Disclosure Standards.

Part 3 — Independence

3.1 Meaning of Independence The Instrument generally requires every member of an audit committee to be independent. Subsection 1.4(1) of the Instrument defines independence to mean the absence of any direct or indirect material relationship between the director and the issuer. In our view, this may include a commercial, charitable, industrial, banking, consulting, legal, accounting or familial relationship, or any other relationship that the board considers to be material. Although shareholding alone may not interfere with the exercise of a director's independent judgement, we believe that other relationships between an issuer and a shareholder may constitute material relationships with the issuer, and should be considered by the board when determining a director's independence. However, only those relationships which could, in the view of the issuer's board of directors, be reasonably expected to interfere with the exercise of a member's independent judgement should be considered material relationships within the meaning of section 1.4.

Subsection 1.4(3) and section 1.5 of the Instrument describe those individuals that we believe have a relationship with an issuer that would reasonably be expected to interfere with the exercise of the individual's independent judgement. Consequently, these individuals are not considered independent for the purposes of the Instrument and are therefore precluded from serving on the issuer's audit committee. Directors and their counsel should therefore consider the nature of the relationships outlined in subsection 1.4(3) and section 1.5 as guidance in applying the general independence requirement set out in subsection 1.4(1).

3.2 Derivation of Definition In the United States, listed issuers must comply with the audit committee requirements contained in SEC rules as well as the director independence and audit committee requirements of the applicable securities exchange or market. The definition of independence included in the Instrument has therefore been derived from both the applicable SEC rules and the corporate governance rules issued by the New York Stock Exchange. The portion of the definition of independence that parallels the NYSE rules is found in section 1.4 of the Instrument. Section 1.5 of the Instrument contains additional rules regarding audit committee member independence that were derived from the applicable SEC rules. To be independent for the purposes of the Instrument, a director must satisfy the requirements in both sections 1.4 and 1.5.

3.3 Safe Harbour Subsection 1.3(1) of the Instrument provides, in part, that a person or company is an affiliated entity of another entity if the person or company controls the other entity. Subsection 1.3(4), however, provides that an individual will not be considered to control an issuer if the individual:

(a) owns, directly or indirectly, ten per cent or less of any class of voting equity securities of the issuer; and

(b) is not an executive officer of the issuer.

Subsection 1.3(4) is intended only to identify those individuals who are not considered to control an issuer. The provision is not intended to suggest that

an individual who owns more than ten percent of an issuer's voting equity securities automatically controls an issuer. Instead, an individual who owns more than ten percent of an issuer's voting equity securities should examine all relevant facts and circumstances to determine if he or she controls the issuer and is therefore an affiliated entity within the meaning of subsection 1.3(1).

3.4 Remuneration of Chair of Board, Etc. Subsection 1.4(6) of the Instrument provides that, for the purpose of the prescribed relationship described in clause 1.4(3)(f), direct compensation does not include remuneration for acting as a member of the board of directors or of any board committee of the issuer. In our view, remuneration for acting as a member of the board also includes remuneration for acting as the chair of the board or of any committee of the board.

Part 4 — Financial Literacy, Financial Education and Experience

4.1 Financial Literacy For the purposes of the Instrument, an individual is financially literate if he or she has the ability to read and understand a set of financial statements that present a breadth and level of complexity of accounting issues that are generally comparable to the breadth and complexity of the issues that can reasonably be expected to be raised by the issuer's financial statements. In our view, it is not necessary for a member to have a comprehensive knowledge of GAAP and GAAS to be considered financially literate.

4.2 Disclosure of Relevant Education and Experience

(1) Item 3 of Forms 52-110F1 and 52-110F2 require an issuer to disclose any education or experience of an audit committee member that would provide the member with, among other things, an understanding of the accounting principles used by the issuer to prepare its financial statements. The level of understanding that is requisite is influenced by the complexity of the business being carried on. For example, if the issuer is a complex financial institution, a greater degree of education and experience is necessary than would be the case for an audit committee member of an issuer with a more simple business.

(2) Item 3 of Forms 52-110F1 and 52-110F2 also require an issuer to disclose any experience that the member has, among other things, actively supervising persons engaged in preparing, auditing, analyzing or evaluating certain types of financial statements. The phrase active supervision means more than the mere existence of a traditional hierarchical reporting relationship between supervisor and those being supervised. An individual engaged in active supervision participates in, and contributes to, the process of addressing (albeit at a supervisory level) the same general types of issues regarding preparation, auditing, analysis or evaluation of financial statements as those addressed by the individual or individuals being supervised. The supervisor should also have experience that has contributed to the general expertise necessary to prepare, audit, analyze or evaluate financial statements that is at least comparable to the general expertise of those being supervised. An executive officer should not be presumed to qualify. An executive officer with considerable operations involvement, but little financial or accounting involvement, likely would not be exercising the necessary active supervision. Active participation in, and contribution to, the process, albeit at a supervisory level, of addressing financial and accounting issues that demonstrate a general expertise in the area would be necessary.

Part 5 — Non-Audit Services

5.1 Pre-Approval of Non-Audit Services Section 2.6 of the Instrument allows an audit committee to satisfy, in certain circumstances, the pre-approval requirements in subsection 2.3(4) by adopting specific policies and procedures for the engagement of non-audit services. The following guidance should be noted in the development and application of such policies and procedures:

- Monetary limits should not be the only basis for the pre-approval policies and procedures. The establishment of monetary limits will not, alone, constitute policies that are detailed as to the particular services to be provided and will not, alone, ensure that the audit committee will be informed about each service.

- The use of broad, categorical approvals (e.g., tax compliance services) will not meet the requirement that the policies must be detailed as to the particular services to be provided.

- The appropriate level of detail for the pre-approval policies will differ depending upon the facts and circumstances of the issuer. The pre-approval policies must be designed to ensure that the audit committee knows precisely what services it is being asked to pre-approve so that it can make a well-reasoned assessment of the impact of the service on the auditor's independence. Furthermore, because the Instrument requires that the policies cannot result in a delegation of the audit committee's responsibility to management, the pre-approval policies must be sufficiently detailed as to particular services so that a member of man-

agement will not be called upon to determine whether a proposed service fits within the policy.

Part 6 — Disclosure Obligations

6.1 Incorporation by Reference National Instrument 51-102 permits disclosure required to be included in an issuer's AIF or information circular to be incorporated by reference, provided that the referenced document has already been filed with the applicable securities regulatory authorities.

Any disclosure required by the Instrument to be included in an issuer's AIF or management information circular may also incorporated by reference, provided that the procedures set out in National Instrument 51-102 are followed.

Form 52-110F1 — Audit Committee Information Required in an AIF

See ¶31-150.

Form 52-110F2 — Disclosure by Venture Issuers

See ¶31-152.

¶31-190 FURTHER INFORMATION

¶31-196 Publications

The Canadian Coalition for Good Governance, *Corporate Governance Guidelines for Building High Performance Boards*, ver.1, 2005, online: http://www.ccgg.ca/guidelines/corporate-governance-guidelines/

The Canadian Coalition for Good Governance, *Best Practices in Shareholder Communications: Director Disclosure*, 2005, online: http://www.ccgg.ca/best-practices/

Canadian Institute of Chartered Accountants, *Risk Management and Governance Collection*, online: http://www.rmgb.ca/index.cfm/ci_id/3083/la_id/1.htm

Dimma, A. William. *Tougher Boards for Tougher Times: Corporate Governance in the Post-Enron Era*, (Mississauga, Ont.: J. Wiley & Sons Canada, 2006).

Dimma, A. William. *Excellence in the Boardroom: Best Practices in Corporate Directorship*, (Etobicoke, Ont.: Wiley, 2002).

Dorval, Thierry. *Governance of Publicly Listed Corporations*, (Markham, Ont.: LexisNexis Butterworths, 2005).

Hansell, Carol. *What Directors Need to Know* (Toronto: Carswell, 2003).

Smithson, John. *The Role of the Non-Executive Director in the Small to Medium-size Business*, (New York: Palgrave Macmillan, 2004).

[The next page is 9901.]

¶31-200 REGULATORY COMPLIANCE

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¶31-201 OVERVIEW

This unit focuses on certain aspects of regulatory compliance in relation to the corporate governance: certification of financial information, controls over financial reporting, disclosure controls, and corporate codes of ethics. Much of this section deals with the statutory and regulatory requirements applicable to public corporations, which derive from provincial Securities Acts and their associated multilateral instruments and policies. Stipulations contained in Securities Acts and multilateral instruments are mandatory. Those contained in national policies are not.

¶31-202 PRACTICAL APPLICATION

¶31-204 CEO/CFO Certification

Multilateral Instrument 52-109 (MI 52-109) requires that each Canadian public company file a prescribed certificate with the Canadian securities regulatory authorities. The certificate must be signed by the company's chief executive officer (CEO) and chief financial officer (CFO) each time the company makes its annual and interim filings. Each officer must certify that:

- he or she has reviewed the annual or interim filing;
- to his or her knowledge, the filing does not contain any untrue statement of a material fact, or omit to state a material fact that is required to be stated or necessary to make a statement that is not misleading in light of the circumstances under which it was made;
- the financial statements, together with the other financial information included in the filing, fairly present in all material respects the financial condition, results of operations, and cash flows of the company;
- the certifying officers are responsible for establishing and maintaining disclosure controls and procedures and internal control over financial reporting for the company;
- the certifying officers have designed or caused to be designed under their supervision such disclosure controls and procedures to provide reasonable assurance that material information relating to the company and its subsidiaries are made known to the certifying officers;
- the certifying officers have designed or caused to be designed under their supervision such internal control over financial reporting to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements in accordance with generally accepted accounting principles (GAAP);
- the certifying officers have evaluated the effectiveness of the company's disclosure controls and procedures, and have caused the company to disclose the conclusions of the evaluation; and
- the certifying officers have caused the company to disclose any change in the company's internal control over financial reporting.

If a company does not have a CEO or CFO, the certificate is required from each person who performs similar functions to a CEO or CFO, as the case may be.

Public companies that comply with the certification requirements of the U.S. Sarbanes-Oxley Act and cer-

tain foreign issuers are exempt from the requirements of MI 52-109.

An officer providing a false certification under MI 52-109 is subject to a quasi-criminal, administrative, or civil proceeding under Canadian securities laws. In addition, under the amendments to the Ontario *Securities Act* that came into force on December 31, 2005, an officer providing a false certification could be subject to civil liability for misrepresentation (see "Personal Liability for Directors and Officers" at ¶31-300). Under these amendments, a person who acquires or disposes of a security of the company during the period of misrepresentation has a right of action for damages without regard for that person's reliance on the misrepresentation.

¶31-206 Internal Control Over Financial Reporting

Canadian public companies are required to have in place certain internal controls over financial reporting. These controls must be designed to ensure that the company is able to provide reasonable assurance about:

- the reliability of a company's financial reporting; and
- the preparation of financial statements in accordance with GAAP.

Internal controls over financial reporting include:

- maintaining records that, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the company;
- recording transactions as necessary to permit the preparation of financial statements in accordance with GAAP;
- ensuring that receipts and expenditures of the company are made only in accordance with authorizations of the management and directors of the company; and
- preventing or detecting in a timely manner any unauthorized acquisitions, use, or disposition of the company's assets that could have a material effect on the company's annual financial statements or interim financial statements.

The design of these controls, policies, and procedures is typically the responsibility of a company's senior management, to be implemented by the company's directors, officers, and other personnel. Neither MI 52-109 nor the accompanying companion policy prescribes any specific policies or procedures that must form part of the internal control process. In practice, many public companies engage accounting or other advisery firms to assist with the design, review, and audit of internal controls.

As noted above, MI 52-109 requires that the CEO and the CFO of a public company each certify certain matters relating to the design and effectiveness of the company's internal control over financial reporting.

¶31-208 Disclosure Controls

Canadian public companies are required to prepare, publicly disclose, and file their interim quarterly unaudited and annual audited financial statements and related management discussion and analysis (MD&A) with the securities regulatory authorities. They are also required to prepare and file an annual continuous disclosure document (the AIF) with the securities regulatory authorities. The AIF sets out all material information with respect to the company. Material information is information with respect to the business, operations, or capital of the company that would reasonably be expected to have a significant effect on the market price or value of the securities of the company.

Canadian public companies are also required to prepare a management proxy circular in connection with the annual meetings of shareholders. In addition to information with respect to the business to be transacted at the meeting, the proxy circular must include prescribed information with respect to:

- compliance with corporate governance best practices;
- shareholdings of significant shareholders; and
- director and senior officer compensation and indebtedness, including a report of the board or the compensation committee on executive compensation.

Other information may also be provided, such as a summary of the board and committee meetings held and a record of attendance by directors.

Canadian public companies are required to make immediate public disclosure, followed by a filing with the securities regulatory authorities, of any change in the business, operations, or capital of the company that would reasonably be expected to have a significant effect on the market price or value of the securities of the company.

Finally, insiders (i.e., directors, senior officers, and shareholders owning 10% or more of the voting securities) of a company are required to disclose changes in their share ownership.

As noted above, MI 52-109 requires that the CEO and the CFO of a public company each certify certain matters relating to the design and effectiveness of the company's disclosure controls and procedures.

For the purposes of MI 52-109, disclosure controls and procedures refers to the controls and other procedures of a company that are designed to provide reasonable assurance that information required to be disclosed by the company in its annual filings, interim filings, or other reports filed under securities laws is recorded, processed, summarized, and reported within the time periods specified in those laws. Adequate disclosure, controls, and procedures must also be designed to ensure that information is accumulated and communicated to the company's CEO and CFO or other appropriate management personnel, to allow timely disclosure decisions to be made.

The audit committee of a Canadian public company must review the company's financial statements, MD&A, and annual and interim earnings press releases before the company publicly discloses the information. The audit committee must also be satisfied that adequate procedures are in place to review the company's public disclosure of financial information and must periodically assess the adequacy of those procedures.

¶31-210 Corporate Code of Ethics

National Policy 58-201 includes a non-binding "best practices" recommendation that the board of directors adopt a written code of business conduct and ethics (Code) applicable to directors, officers and employees. The board of directors is typically also responsible for monitoring compliance with the Code and granting any waivers from its application.

The Canadian Securities Administration (CSA) Rules recommend that the Code should address the following issues:

- conflicts of interest, including transactions and agreements in respect of which a director or executive officer has a material interest;
- protection and proper use of corporate assets and opportunities;
- confidentiality of corporate information;
- fair dealing with the company's security holders, customers, suppliers, competitors, and employees;
- compliance with laws, rules, and regulations; and
- reporting of any illegal or unethical behaviour.

A material departure from the Code would typically constitute a "material change" for the purposes of Canadian securities laws, necessitating the preparation and filing of a material change report.

While the CSA Rules are only applicable to Canadian public companies, a growing number of private companies have adopted a formal code of ethics as a means to promote integrity and prevent wrongdoing. A well-crafted Code can serve as a useful touchstone when assessing a company's response to opportunities and challenges.

A sample code of ethics is attached in the "Precedents/ Practical Tools" section of this unit (see ¶31-240).

¶31-240 PRECEDENTS/PRACTICAL TOOLS

¶31-242 Code of Business Conduct and Ethics

1. Introduction

The board of directors (Board) of *[name of corporation]* (Corporation) has developed this Code for the purposes set out below. The Code applies to all directors, officers and employees (Employees) of the Corporation and its subsidiary entities (Group) and members of their immediate families and, where applicable, third parties engaged to represent the Group.

The Code is not a prescriptive set of rules. Rather, it is a practical set of policies and standards intended to guide and influence behaviour. As a result, the exercise of common sense and good judgment is required with respect to matters not specifically covered by the Code.

The Board will review and, if appropriate, make changes to the Code annually. All changes to the Code will be promptly disclosed to the shareholders of the Corporation.

2. Purposes

The purposes of the Code are to deter wrongdoing and to promote:

- honest and ethical conduct, including ethical handling of actual or apparent conflicts of interest between personal and business relationships;
- full, fair, accurate, timely, and understandable disclosure in all reports and documents filed, and other public communications made, by the Group;
- compliance with all applicable laws, regulations, and rules;
- protection and proper use of corporate assets and opportunities;
- confidentiality with respect to corporate and personal information;
- fair dealing with security holders, customers, suppliers, and competitors;
- accountability for adherence to the Code; and
- prompt internal reporting of violations of the Code.

3. Compliance

3.1 Violations

All Employees must comply with the Code. Employees who violate the Code may be subject to disciplinary action, including dismissal.

Any waiver of the Code with respect to officers and directors of the Corporation may only be made by the Board and must promptly be disclosed to the shareholders of the Corporation.

No punishment or disciplinary or retaliatory action may be taken against an Employee for complying with the Code.

3.2 Accountability

All Employees must be familiar with the Code and seek assistance from their manager or the Corporate Counsel of the Corporation (Corporate Counsel) or his or her designate if they do not understand any part of the Code or what to do in any particular situation.

The officers of the Group are responsible to the Board for ensuring that Employees comply with the Code and must take reasonable steps to ensure that all Employees and, where applicable, third parties engaged to represent the Group are familiar and comply with the Code.

3.3 Reporting

Employees must report any case of suspected fraud, theft, bribery, or other illegal activity involving the Group to one or more of the following individuals: their manager, the Corporate Counsel or his or her designate, the Chief Executive Officer of the Corporation, the Chair of the Audit Committee, or the Chair of the Board.

Employees must also report any suspected serious breach of the Code to one or more of the following individuals: their manager, the Corporate Counsel or his or her designate, the Chief Executive Officer of the Corporation, the Chair of the Audit Committee, or the Chair of the Board.

Unless otherwise determined, the Corporate Counsel is responsible for investigating all reports and taking appropriate action, including advising the Chief Executive Officer of the Corporation, the Chair of the Audit Committee, and the Chair of the Board.

3.4 Assistance

Employees who do not understand any part of the Code or what to do in any particular situation should seek assistance from their manager or from the Corporate Counsel or his or her designate.

The Corporate Counsel can be contacted as follows:

[name and address]

Telephone:
Fax:
E-mail:

4. Policies and Standards

4.1 Compliance with Laws

Employees must understand and comply with the letter and, where clear, the spirit of all laws, regulations and rules applicable to the Group and their own work. Ignorance does not excuse the obligation to comply.

4.2 Relationships with Governmental Authorities

The Group seeks to have open, honest, and constructive relationships with all governments and governmental, regulatory, and other similar bodies having jurisdiction or authority over the Group and its business and operations (Governmental Authorities).

All information provided by Employees to Governmental Authorities must be full, fair, accurate, timely, and understandable.

4.3 Political Activities

The Group is impartial with respect to party politics.

Employees may participate in political activities as long as they do not do so on company time and do not use the financial or other resources of the Group.

4.4 Financial Inducements

Employees must not make payments or give gifts or other favours to third parties to induce or influence them to give business opportunities to, or make business decisions in favour of, the Group. Bribes, "kick-backs", secret commissions, and similar irregular payments are prohibited.

4.5 Gifts and Benefits

Employees must exercise care and good judgment in accepting or offering business-related gifts.

Accepting or offering business-related gifts of moderate value is acceptable in situations where business-related gift giving is legal and in accordance with local business practice, and the gifts involved are appropriate for the occasion. Employees must not, however, accept or offer business-related gifts of any kind in circumstances that could be perceived as inducing or influencing the recipient to give business opportunities to, or make business decisions in favour of, the Group. If there is any doubt with respect to a particular situation, Employees should seek assistance from their manager or from the Corporate Counsel or his or her designate.

Employees who accept gifts must report the gift to their manager or the Corporate Counsel or his or her designate. The monetary value of the gift, local customs, and legal requirements will be considered when determining whether the gift should be retained by the Employee, given to the Group or returned. A gift that is given to the Group will normally be donated to a charity or made available to all Employees in the applicable work unit.

The following items must not be accepted or offered as gifts under any circumstances, regardless of value:

- cash or personal cheques;
- drugs or other controlled substances;
- product or service discounts that are not available to all Employees;
- personal use of accommodation or transportation; and
- payments or loans to be used toward the purchase of personal property (other than borrowing on commercial terms from entities who are in the business of lending).

Employees may not request a gift of any kind from a supplier, customer, or other person with whom the Group conducts business, or from a competitor of the Group.

4.6 Conflicts of Interest

Employees must avoid all situations where their personal interests may conflict, or may be perceived to conflict, with their duties to the Group.

The following factors should be considered in evaluating any particular situation:

- any potential positive or negative impact on the Employee's job performance or responsibilities;
- whether the Employee has access to confidential information;
- any potential positive or negative impact on the business or operations of the Group;
- any potential positive or negative impact on the relationships between the Group and its customers, suppliers, or service providers;
- any potential positive impact on a competitor's position;

- any potential financial or other benefit (direct or indirect) to the Employee or customer, supplier, or other person with whom the Group conducts business; and
- whether the matter would appear improper to an outside observer.

The following are examples of situations in which a possible conflict of interest may arise:

- employment by or service to (e.g., as a consultant or director) a competitor, customer, supplier, or person with whom the Group conducts business;
- having, directly or indirectly, a significant financial interest in any entity that does business, seeks to do business, or competes with the Group;
- accepting gifts, favours, loans (other than borrowing on commercial terms from entities that are in the business of lending), or preferential treatment from any person that does business, seeks to do business, or competes with the Group unless consistent with the policy described under "Gifts and Benefits" above;
- conducting business on behalf of the Group with immediate family members or an entity in which an Employee or his or her immediate family members or friends have a significant financial interest; and
- taking personal advantage of opportunities that are presented to or discovered by an Employee as a result of his or her position with the Group or through the use of the property or information of the Group.

If there is any doubt with respect to a particular situation, Employees should seek assistance from their manager or from the Corporate Counsel or his or her designate.

4.7 Personal Information

Employees who collect personal information from other Employees or third parties on behalf of the Group must do so in a lawful, ethical, and non-intrusive manner and must inform the individual involved in advance of the purpose for which information is being collected. Employees must take appropriate steps to ensure that all personal information collected is accurate and is retained for no longer than necessary.

Employees must maintain the confidentiality of all personal information held by the Group. Employees must not disclose such personal information to other Employees unless it is reasonably required by them to perform their jobs. Employees must not disclose such personal information to third parties unless required by applicable law or regulation (and then only to the extent required) or unless the informed consent of the relevant individual has been obtained.

4.8 Confidential Information

All information that has been developed or acquired by the Group, including technical, financial, and business information, and not generally disclosed (confidential information) is the property of and confidential to the Group, and must be protected against theft, loss, or misuse.

Employees must not disclose confidential information to other Employees without authorization from their manager, unless it is reasonably required by them to perform their jobs. Employees must not reveal confidential information to third parties (other than approved auditors, lawyers and other professional advisers, financial advisers, and banks or other financial institutions) without authorization by the Corporate Counsel or his or her designate. Such disclosure should be limited only to those

who "need-to-know" and be made pursuant to a confidentiality agreement restricting the recipient from disclosing or using the information in an unauthorized manner.

See also the Statement of Policies and Procedures with respect to Confidentiality, Disclosure, Insider Trading and Tipping, and Insider Reporting of the Corporation.

Employees must only use confidential information for authorized purposes on behalf of the Group, and not for their own personal gain or benefit.

4.9 Public Disclosure

The Corporation is required to make public disclosure of all information with respect to the business, operations, or capital of the Group that would reasonably be expected to have a significant effect on the market price or value of the securities of the Corporation (material information). Employees must advise the Corporate Counsel or his or her designate of any developments that may constitute material information.

The Disclosure Committee is responsible for coordinating disclosure of all material information, and must approve all internally produced materials containing confidential information (e.g., press releases, reports for Governmental Authorities) before they are released or distributed outside the Group.

Employees must not make public statements or speeches on topics related to the business and operations of the Group without first obtaining the authorization of the Corporate Counsel or his or her designate.

See also the "Statement of Policies and Procedures" with respect to Confidentiality, Disclosure, Insider Trading and Tipping, and Insider Reporting of the Corporation.

4.10 Insider Trading

Employees are prohibited from buying or selling securities of the Corporation, or securities of a company in a "special relationship" with the Corporation, while in possession of material information concerning the Corporation or the special relationship company that has not been generally disclosed. Employees are also prohibited from disclosing such material information to third parties except in the necessary course of business. These prohibitions also apply to persons to whom Employees may disclose such material information (e.g., immediate family members or friends).

A company is in a "special relationship" with the Corporation if the Corporation owns, directly or indirectly, 10% or more of the shares of the company or the Corporation is proposing to make a take-over bid for the company, effect a merger or business combination with the company, acquire a substantial interest in the company or its property, or enter into any other transaction with the company that is material to the company.

See also the "Statement of Policies and Procedures" with respect to Confidentiality, Disclosure, Insider Trading and Tipping, and Insider Reporting of the Corporation.

4.11 Information Systems

The computers and other information systems (e.g., voice mail, electronic mail, the Internet, facsimile) of the Group (information systems) are valuable assets of the Group.

Employees must comply with the following policies when conducting business on the information systems:

- Employees must protect and maintain the confidentiality of all information communicated or stored using the information systems, including using passwords and properly secured communication methods.
- Employees may use the information systems for modest personal use, if such use is unrelated to outside business activities, does not interfere with the business or operations of the Group, and is not performed during working hours.
- Employees must not illegally copy information system software in the course of their employment.
- All electronic or automated messages created, distributed, or stored on the information systems are the property of the Group. The Group may access these messages from time to time for any reason, including to investigate breaches of security or company procedures, or to respond to external requests for information that the Group is required to provide legally.
- Offensive material (e.g., pornography, hate literature) is prohibited.
- Sensitive transactions (e.g., take-over bids, acquisitions) must not be conducted electronically, unless an appropriate level of security is implemented to protect confidential information.

4.12 Financial Books and Records

All financial and other transactions involving or affecting the Group must be properly authorized and approved and fully and accurately recorded in the financial books and records of the Group in accordance with applicable laws and regulations, the controls and procedures of the Group, generally accepted accounting principles, and the highest standards of integrity.

Employees responsible for establishing and managing the financial reporting systems of the Group (Finance Employees) must ensure that:

- all business transactions are properly authorized;
- all records fairly and accurately reflect the transactions or occurrences to which they relate;
- all records fairly and accurately reflect in reasonable detail the assets, liabilities, revenues, and expenditures of the Group;
- the accounting records do not contain any false or intentionally misleading entries;
- no transactions are intentionally misclassified as to accounts, departments, or accounting periods; and
- all transactions are supported by accurate documentation in reasonable detail and recorded in the proper account and in the proper accounting period.

Officers responsible for establishing and managing the financial reporting systems of the Group must establish and maintain procedures to:

- educate Finance Employees about, and monitor their compliance with, applicable laws and regulations;
- identify any possible violations of applicable laws and regulations and report them to the Corporate Counsel or his or her designate and the Audit Committee;
- encourage and reward professional integrity;

- eliminate any pressure to achieve specific financial results by altering records and other entries, misapplying accounting principles, or entering into transactions that are designed to circumvent accounting controls or otherwise disguise the true nature of the transaction; and
- encourage Finance Employees to report deviations from accounting practices and procedures.

Employees must not conceal information relating to the Group from management, the auditors, or the legal advisers of the Group.

Employees must protect the financial books and records of the Group from destruction or tampering.

Questions relating to the financial books and records of the Group should be referred to the Chief Financial Officer of the Corporation.

4.13 Corporate Social Responsibility

The Group is committed to sustainable development. Health, safety, environment, and community responsibilities are integral to the way in which the Group conducts its business.

4.14 Health and Safety

The most valuable assets of the Group are its people. The Group is committed to providing a safe, healthy, and productive work environment, and to promoting safe and productive work practices throughout its operations.

Employees must comply with all occupational health and safety laws, regulations, and rules applicable to the business and operations of the Group and their own work. Employees have a responsibility to promote health and safety in the workplace, and must report or correct dangerous conditions immediately so that workplace accidents are minimized.

The misuse of drugs and other controlled substances, both legal and illegal, interferes with a safe, healthy, and productive work environment and is prohibited. Employees must not use, possess, distribute, or sell illegal drugs or other controlled substances on premises; in vehicles owned, leased, or occupied by the Group; or while conducting business for or on behalf of the Group.

Employees must not work while under the influence of drugs or alcohol. Employees who are taking a drug or other medication, whether or not prescribed by a physician, that could impair judgment, coordination, or other senses important to the safe and productive performance of work, must notify their manager before starting work. The manager will determine whether the Employee can work, and will impose any necessary work restrictions.

4.15 Environment

Employees must comply with all environmental laws, regulations, and rules applicable to the business and operations of the Group and their own work.

4.16 Equality in Employment

The Group does not permit discrimination, intimidation, or harassment of, or by, Employees on the basis of race, gender, marital status, national origin, or religious beliefs, or on the basis of any other personal characteristics protected by law. Employees are entitled to freedom from sexual and all other forms of personal harassment. They are also entitled to have their dignity honoured and their rights protected.

Discrimination is not permitted anywhere in the Group or in any part of the employment relationship, including recruitment, promotion, training, opportunities, salary, benefits, and terminations.

Employees must promote and maintain an environment that encourages personal respect and mutual trust. Differences between individuals, such as race, gender, religion, and physical limitations, must be respected.

¶31-244 Form 52-109F1 — Certification of Annual Filings[1]

I, [*identify the certifying officer, the issuer, and his or her position at the issuer*], certify that:

1. I have reviewed the annual filings (as this term is defined in Multilateral Instrument 52-109, Certification of Disclosure in Issuers' Annual and Interim Filings) of [*identify issuer*] (the issuer) for the period ending [*state the relevant date*];

2. Based on my knowledge, the annual filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the annual filings;

3. Based on my knowledge, the annual financial statements together with the other financial information included in the annual filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date and for the periods presented in the annual filings;

4. The issuer's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures and internal control over financial reporting for the issuer, and we have:

   (a) designed such disclosure controls and procedures, or caused them to be designed under our supervision, to provide reasonable assurance that material information relating to the issuer, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which the annual filings are being prepared;

   (b) designed such internal control over financial reporting, or caused it to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP; and

   (c) evaluated the effectiveness of the issuer's disclosure controls and procedures as of the end of the period covered by the annual filings and have caused the issuer to disclose in the annual MD&A our conclusions about the effectiveness of the disclosure controls and procedures as of the end of the period covered by the annual filings based on such evaluation; and

   (d) I have caused the issuer to disclose in the annual MD&A any change in the issuer's internal control over financial reporting that occurred during the issuer's most recent interim period that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.

Date: [*insert date*]

[*Signature*] [*Title*]

[1] Form 52-109F1 accompanies Multilateral Instrument 52-109 — Certification of Disclosure in Issuer's Annual and Interim Filings. This instrument came into force in all jurisdictions except British Columbia on March 30, 2004. This instrument came into force in British Columbia on September 19, 2005.

¶31-246 Form 52-109FT1 — Certification of Annual Filings during Transition Period[2]

I, [*identify the certifying officer, the issuer, and his or her position at the issuer*], certify that:

1. I have reviewed the annual filings (as this term is defined in Multilateral Instrument 52-109, Certification of Disclosure in Issuers' Annual and Interim Filings) of [*identify issuer*] (the issuer) for the period ending [*state the relevant date*];
2. Based on my knowledge, the annual filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the annual filings; and
3. Based on my knowledge, the annual financial statements together with the other financial information included in the annual filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date and for the periods presented in the annual filings.

Date: [*insert date*]

[*Signature*] [*Title*]

[2] Form 52-109FT1 accompanies Multilateral Instrument 52-109 — Certification of Disclosure in Issuer's Annual and Interim Filings. This instrument came into force in all jurisdictions except British Columbia on March 30, 2004. This instrument came into force in British Columbia on September 19, 2005.

¶31-248 Form 52-109F2 — Certification of Interim Filings[3]

I [*identify the certifying officer, the issuer, and his or her position at the issuer*], certify that:

1. I have reviewed the interim filings (as this term is defined in Multilateral Instrument 52-109, Certification of Disclosure in Issuers' Annual and Interim Filings) of [*identify the issuer*], (the issuer) for the interim period ending [*state the relevant date*];

2. Based on my knowledge, the interim filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the interim filings;

3. Based on my knowledge, the interim financial statements together with the other financial information included in the interim filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date and for the periods presented in the interim filings;

4. The issuer's other certifying officers and I are responsible for establishing and maintaining disclosure controls and procedures and internal control over financial reporting for the issuer, and we have:

   (a) designed such disclosure controls and procedures, or caused them to be designed under our supervision, to provide reasonable assurance that material information relating to the issuer, including its consolidated subsidiaries, is made known to us by others within those entities, particularly during the period in which the interim filings are being prepared; and

   (b) designed such internal control over financial reporting, or caused it to be designed under our supervision, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP; and

   (c) I have caused the issuer to disclose in the interim MD&A any change in the issuer's internal control over financial reporting that occurred during the issuer's most recent interim period that has materially affected, or is reasonably likely to materially affect, the issuer's internal control over financial reporting.

Date: [*insert date*]

[*Signature*] [*Title*]

[3] Form 52-109F2 accompanies Multilateral Instrument 52-109 — Certification of Disclosure in Issuer's Annual and Interim Filings. This instrument came into force in all jurisdictions except British Columbia on March 30, 2004. This instrument came into force in British Columbia on September 19, 2005.

¶31-250 Form 52-109FT2 — Certification of Interim Filings during Transition Period[4]

I [*identify the certifying officer, the issuer, and his or her position at the issuer*], certify that:

1. I have reviewed the interim filings (as this term is defined in Multilateral Instrument 52-109, Certification of Disclosure in Issuers' Annual and Interim Filings) of [*identify the issuer*], (the issuer) for the interim period ending [*state the relevant date*];

2. Based on my knowledge, the interim filings do not contain any untrue statement of a material fact or omit to state a material fact required to be stated or that is necessary to make a statement not misleading in light of the circumstances under which it was made, with respect to the period covered by the interim filings; and

3. Based on my knowledge, the interim financial statements together with the other financial information included in the interim filings fairly present in all material respects the financial condition, results of operations and cash flows of the issuer, as of the date and for the periods presented in the interim filings.

Date: [*insert date*]

[*Signature*] [*Title*]

[4] Form 52-109FT2 accompanies Multilateral Instrument 52-109 — Certification of Disclosure in Issuer's Annual and Interim Filings. This instrument came into force in all jurisdictions except British Columbia on March 30, 2004. This instrument came into force in British Columbia on September 19, 2005.

¶31-270 CASE LAW/LEGISLATION

¶31-274 Legislation
Multilateral Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings

Part 1 — Definitions and Application

1.1 Definitions In this Instrument,

"AIF" has the meaning ascribed to it in NI 51-102;

"annual certificate" means the certificate required to be filed pursuant to Part 2;

"annual filings" means the issuer's AIF, if any, and annual financial statements and annual MD&A filed under provincial and territorial securities legislation for the most recently completed financial year, including for greater certainty all documents and information that are incorporated by reference in the AIF;

"annual financial statements" means the annual financial statements required to be filed under NI 51-102;

"Canadian GAAP" has the meaning ascribed to it in NI 52-107;

"disclosure controls and procedures" means controls and other procedures of an issuer that are designed to provide reasonable assurance that information required to be disclosed by the issuer in its annual filings, interim filings or other reports filed or submitted by it under provincial and territorial securities legislation is recorded, processed, summarized and reported within the time periods specified in the provincial and territorial securities legislation and include, without limitation, controls and procedures designed to ensure that information required to be disclosed by an issuer in its annual filings, interim filings or other reports filed or submitted under provincial and territorial securities legislation is accumulated and communicated to the issuer's management, including its chief executive officers and chief financial officers (or persons who perform similar functions to a chief executive officer or a chief financial officer), as appropriate to allow timely decisions regarding required disclosure;

"interim certificate" means the certificate required to be filed pursuant to Part 3;

"interim filings" means the issuer's interim financial statements and interim MD&A filed under provincial and territorial securities legislation for the most recently completed interim period;

"interim financial statements" means the interim financial statements required to be filed under NI 51-102;

"interim period" has the meaning ascribed to it in NI 51-102;

"internal control over financial reporting" means a process designed by, or under the supervision of, the issuer's chief executive officers and chief financial officers, or persons performing similar functions, and effected by the issuer's board of directors, management and other personnel, to provide reasonable assurance regarding the reliability of financial reporting and the preparation of financial statements for external purposes in accordance with the issuer's GAAP and includes those policies and procedures that:

(a) pertain to the maintenance of records that in reasonable detail accurately and fairly reflect the transactions and dispositions of the assets of the issuer,

(b) provide reasonable assurance that transactions are recorded as necessary to permit preparation of financial statements in accordance with the issuer's GAAP, and that receipts and expenditures of the issuer are being made only in accordance with authorizations of management and directors of the issuer, and

(c) provide reasonable assurance regarding prevention or timely detection of unauthorized acquisition, use or disposition of the issuer's assets that could have a material effect on the annual financial statements or interim financial statements;

"investment fund" has the meaning ascribed to it in NI 51-102;

"issuer's GAAP" has the meaning ascribed to it in NI 52-107;

"MD&A" has the meaning ascribed to it in NI 51-102;

"NI 51-102" means National Instrument 51-102, Continuous Disclosure Obligations;

"NI 52-107" means National Instrument 52-107, Acceptable Accounting Principles, Auditing Standards and Reporting Currency;

"Sarbanes-Oxley Act" means the *Sarbanes-Oxley Act of 2002*, Pub.L. 107-204, 116 Stat. 745 (2002);

"SEDAR" means the computer system for the transmission, receipt, acceptance, review and dissemina-

tion of documents filed in electronic format known as the System for Electronic Document Analysis and Retrieval;

"subsidiary" has the meaning ascribed to it in Section 1590 of the CICA Handbook; and

"US GAAP" has the meaning ascribed to it in NI 52-107.

1.2 Application This Instrument applies to all reporting issuers other than investment funds.

Part 2 — Certification of Annual Filings

2.1 Every issuer must file a separate annual certificate, in Form 52-109F1, in respect of and personally signed by each person who, at the time of filing the annual certificate:

1. is a chief executive officer;
2. is a chief financial officer; and
3. in the case of an issuer that does not have a chief executive officer or chief financial officer, performs similar functions to a chief executive officer or a chief financial officer, as the case may be.

2.2 The annual certificates must be filed by the issuer separately but concurrently with the latest of the following:

1. if it files an AIF, the filing of its AIF; and
2. the filing of its annual financial statements and annual MD&A.

Part 3 — Certification of Interim Filings

3.1 Every issuer must file for each interim period a separate interim certificate, in Form 52-109F2, in respect of and personally signed by each person who, at the time of the filing of the interim certificate:

1. is a chief executive officer;
2. is a chief financial officer; and
3. in the case of an issuer that does not have a chief executive officer or chief financial officer, performs similar functions to a chief executive officer or a chief financial officer, as the case may be.

3.2 The interim certificates must be filed by the issuer separately but concurrently with the filing of its interim filings.

Part 4 — Exemptions

4.1 Exemption for Issuers that Comply with U.S. Laws

(1) Subject to subsection (4), an issuer is exempt from Part 2 with respect to the most recently completed financial year if:

(a) the issuer is in compliance with U.S. federal securities laws implementing the annual report certification requirements in section 302(*a*) of the Sarbanes-Oxley Act; and

(b) the issuer's signed certificates relating to its annual report for its most recently completed financial year are filed through SEDAR as soon as reasonably practicable after they are filed with the SEC.

(2) Subject to subsection (5), an issuer is exempt from Part 3 with respect to the most recently completed interim period if:

(a) the issuer is in compliance with U.S. federal securities laws implementing the quarterly report certification requirements in section 302(*a*) of the Sarbanes-Oxley Act; and

(b) the issuer's signed certificates relating to its quarterly report for its most recently completed quarter are filed through SEDAR as soon as reasonably practicable after they are filed with the SEC.

(3) An issuer is exempt from Part 3 with respect to the most recently completed interim period if:

(a) the issuer furnishes to the SEC a current report on Form 6-K containing the issuer's quarterly financial statements and MD&A;

(b) the Form 6-K is accompanied by signed certificates that are furnished to the SEC in the same form required by U.S. federal securities laws implementing the quarterly report certification requirements in section 302(*a*) of the Sarbanes-Oxley Act; and

(c) the signed certificates relating to the quarterly report filed under cover of the Form 6-K are filed through SEDAR as soon as reasonably practicable after they are furnished to the SEC.

(4) Notwithstanding subsection 4.1(1), Part 2 of this Instrument applies to an issuer with respect to the most recently completed financial year if the issuer files annual financial statements prepared in accordance with Canadian GAAP, unless the issuer files those statements with the SEC in compliance with U.S. federal securities laws implementing the annual report certification requirements in section 302(*a*) of the Sarbanes-Oxley Act.

(5) Notwithstanding subsection 4.1(2), Part 3 of this Instrument applies to an issuer with respect to the most recently completed interim period if the issuer files interim financial statements prepared in accordance with Canadian GAAP, unless the issuer files those statements with the SEC in compliance with

U.S. federal securities laws implementing the quarterly report certification requirements in section 302(a) of the Sarbanes-Oxley Act.

4.2 Exemption for Foreign Issuers An issuer is exempt from the requirements in this Instrument so long as it qualifies for the relief contemplated by, and is in compliance with the requirements and conditions set out in, sections 5.4 and 5.5 of National Instrument 71-102 Continuous Disclosure and Other Exemptions Relating to Foreign Issuers.

4.3 Exemption for Certain Exchangeable Security Issuers An issuer is exempt from the requirements in this Instrument so long as it qualifies for the relief contemplated by, and is in compliance with the requirements and conditions set out in, section 13.3 of NI 51-102.

4.4 Exemption for Certain Credit Support Issuers An issuer is exempt from the requirements in this Instrument so long as it qualifies for the relief contemplated by, and is in compliance with the requirements and conditions set out in, section 13.4 of NI 51-102.

4.5 General Exemption

(1) The regulator or securities regulatory authority may grant an exemption from this Instrument, in whole or in part, subject to such conditions or restrictions as may be imposed in the exemption.

(2) Despite subsection (1), in Ontario only the regulator may grant such an exemption.

Part 5 — Effective Date and Transition

5.1 Effective Date This Instrument comes into force on March 30, 2004.

5.2 Transition (1) *Annual Certificates*

(a) Subject to paragraph (1)(b), the provisions of this Instrument concerning annual certificates apply for financial years beginning on or after January 1, 2004.

(b) Notwithstanding Part 2 or paragraph (1)(a), an issuer may file annual certificates in Form 52-109FT1 in respect of any financial year ending on or before March 30, 2005.

(c) Notwithstanding Part 2 or paragraph 5.2(1)(a), an issuer that files an annual certificate in Form 52-109F1 in respect of a financial year ending on or before June 29, 2006 may omit from the Form 52-109F1

(i) the words "and internal control over financial reporting" in the introductory language in paragraph 4;

(ii) paragraph 4(b); and

(iii) paragraph 5.

(2) *Interim Certificates*

(a) Subject to paragraph (2)(b), the provisions of this Instrument concerning interim certificates apply for interim periods beginning on or after January 1, 2004.

(b) Notwithstanding Part 3 or paragraph (2)(a), an issuer may file interim certificates in Form 52-109FT2 in respect of any interim period that occurs prior to the end of the first financial year in respect of which the issuer is required to file an annual certificate in Form 52-109F1.

(c) Notwithstanding Part 3 or paragraph 5.2(2)(a), an issuer that files an interim certificate in Form 52-109F2 for a permitted interim period may omit from the Form 52-109F2

(i) the words "and internal control over financial reporting" in the introductory language in paragraph 4;

(ii) paragraph 4(b); and

(iii) paragraph 5.

(d) For the purpose of paragraph 5.2(2)(c), a permitted interim period is an interim period that occurs prior to the end of the issuer's first financial year ending after June 29, 2006.

Companion Policy 52-109CP — To Multilateral Instrument 52-109

Part 1 — General

This Companion Policy provides information about how the provincial and territorial securities regulatory authorities interpret Multilateral Instrument 52-109, and should be read in conjunction with it.

Part 2 — Form and Filing of Certificates

The annual certificates and interim certificates must be filed in the exact language prescribed in Forms 52-109F1 and 52-109F2 (subject to Part 3 — Form of Certificates during Transition Period). Each certificate must be separately filed through SEDAR under the issuer's profile in the appropriate annual certificate or interim certificate filing type:

Category of Filing — Continuous Disclosure Folder for Filing Type — General

Filing Type — Annual Certificates Document Type: Form 52-109F1 — Certification of Annual Filings — CEO Form 52-109F1 — Certification of Annual Filings — CFO Form 52-109FT1 — Certification of Annual Filings — CEO Form 52-109FT1 — Certification of Annual Filings — CFO

or

Filing Type — Interim Certificates Document Type: Form 52-109F2 — Certification of Interim Filings — CEO Form 52-109F2 — Certification of Interim Filings — CFO Form 52-109FT2 — Certification of Interim Filings — CEO Form 52-109FT2 — Certification of Interim Filings — CFO

As indicated in Part 11, an issuer that is in compliance with U.S. federal securities laws implementing the certification requirements in section 302(a) of the Sarbanes-Oxley Act, may be able to rely upon the exemptions from the annual certificate and interim certificate requirements under section 4.1. To avail itself of these exemptions, an issuer must file through SEDAR the certificates of the chief executive officer and chief financial officer that the issuer filed with SEC as exhibits to the annual or quarterly reports with respect to the relevant reporting period. These certificates should be filed in the appropriate filing type described above.

An issuer relying on the exemptions in section 4.1 of the Instrument need not file the paper copies of the signed certificates that it filed with, or furnished to, the SEC.

Part 3 — Certificates during Transition Period

Section 5.2 provides for a transition period for the filing of both annual certificates and interim certificates.

Pursuant to section 2.1, an issuer is required to file its annual certificates in Form 52-109F1. Under subsection 5.2(1)(b), however, an issuer may file annual certificates in Form 52-109FT1 in respect of any financial year ending on or before March 30, 2005. Form 52-109FT1 does not require the certifying officers to make the representations set out in paragraphs 4 and 5 of Form 52-109F1 regarding the design of disclosure controls and procedures and internal control over financial reporting, the evaluation of the effectiveness of disclosure controls and procedures and any changes in the issuer's internal control over financial reporting.

Pursuant to section 3.1, an issuer is required to file its interim certificates in Form 52-109F2. Under subsection 5.2(2)(b), however, an issuer may file interim certificates in Form 52-109FT2 in respect of any interim period that occurs prior to the end of the first financial year in respect of which the issuer is required to file an annual certificate in Form 52-109F1. The representations set out in paragraphs 4 and 5 of Form 52-109F1 will serve as the basis for the corresponding representations set out in paragraphs 4 and 5 of Form 52-109F2.

Upon completion of the transition period, issuers must file annual certificates and interim certificates in Forms 52-109F1 and 52-109F2, respectively, which will include the representations in paragraph 4 of these forms. For further clarification, we do not expect the representations in paragraph 4 to extend to the prior period comparative information included in the annual filings or interim filings if:

(a) the prior period comparative information was previously the subject of certificates in Forms 52-109FT1 or 52-109FT2; or

(b) the Instrument did not require an annual certificate or interim certificate in respect of the prior period to be filed.

For illustration purposes only, the table in Appendix A sets out the filing requirements for annual certificates and interim certificates of issuers with financial years beginning on the first day of a month.

Part 4 — Persons Performing Functions Similar to a Chief Executive Officer and Chief Financial Officer

Where an issuer does not have a chief executive officer or chief financial officer, each person who performs similar functions to a chief executive officer or chief financial officer must certify the annual filings and interim filings. It is left to the issuer's discre-

tion to determine who those persons are. In the case of an income trust reporting issuer (as described in proposed National Policy 41-201, Income Trusts and Other Indirect Offerings) where executive management resides at the underlying business entity level or in an external management company, we would generally consider the chief executive officer or chief financial officer of the underlying business entity or the external management company to be persons performing functions in respect of the income trust similar to a chief executive officer or chief financial officer. In the case of a limited partnership reporting issuer with no chief executive officer or chief financial officer, we would generally consider the chief executive officer or chief financial officer of its general partner to be persons performing functions in respect of the limited partnership reporting issuer similar to a chief executive officer or chief financial officer.

Part 5 — "New" Chief Executive Officers and Chief Financial Officers

Chief executive officers and chief financial officers (or persons performing functions similar to a chief executive officer or chief financial officer) holding such offices at the time that annual certificates and interim certificates are required to be filed are the persons who must sign those certificates. Certifying officers are required to file annual certificates and interim certificates in the specified form (without any amendment) and failure to do so will be a breach of the Instrument.

Pursuant to paragraphs 4(a) and (b) of Forms 52-109F1 and 52-109F2, the certifying officers are required to represent that they have designed (or caused to be designed under their supervision) disclosure controls and procedures and internal control over financial reporting. There may be situations where an issuer's disclosure controls and procedures and internal control over financial reporting have been designed and implemented prior to the certifying officers assuming their respective offices. We recognize that in these situations the certifying officers may have difficulty in representing that they have designed or caused to be designed these controls and procedures. In our view, where:

(a) disclosure controls and procedures and internal control over financial reporting have been designed and implemented prior to the certifying officers assuming their respective offices;

(b) the certifying officers have reviewed the existing controls and procedures upon assuming their respective offices; and

(c) the certifying officers have designed (or caused to be designed under their supervision) any modifications or enhancements to the existing controls and procedures determined to be necessary following their review,

the certifying officers will have designed (or caused to be designed under their supervision) these controls and procedures for the purposes of paragraphs 4(a) and (b) of Forms 52-109F1 and 52-109F2.

Part 6 — Internal Control over Financial Reporting and Disclosure Controls and Procedures

We believe that chief executive officers and chief financial officers should be required to certify that their issuers have adequate internal control over financial reporting and disclosure controls and procedures. We believe that this is an important factor in maintaining integrity in our capital markets and thereby enhancing investor confidence in our capital markets. The Instrument defines "disclosure controls and procedures" and "internal control over financial reporting". The Instrument does not, however, prescribe the degree of complexity or any specific policies or procedures that must make up those controls and procedures. This is intentional. In our view, these considerations are best left to management's judgement based on various factors that may be particular to an issuer, including its size, the nature of its business and the complexity of its operations.

While there is a substantial overlap between the definition of disclosure controls and procedures and internal control over financial reporting, there are both some elements of disclosure controls and procedures that are not subsumed within the definition of internal control over financial reporting and some elements of internal control over financial reporting that are not subsumed within the definition of disclosure controls and procedures. For example, disclosure controls and procedures may include those components of internal control over financial reporting that provide reasonable assurances that transactions are recorded as necessary to permit the preparation of financial statements in accordance with the issuer's GAAP. However, some issuers may design their disclosure controls and procedures so that certain components of internal control over financial reporting pertaining to the accurate recording of transactions and disposition of assets or to the safeguarding of assets are not included.

Part 7 — Evaluation of Effectiveness of Disclosure Controls and Procedures

Paragraph 4(c) of Form 52-109F1 requires the certifying officers to represent that they have evaluated

the effectiveness of the issuer's disclosure controls and procedures and have caused the issuer to disclose in the annual MD&A their conclusions about the effectiveness of the disclosure controls and procedures based on such evaluation. The Instrument does not specify the contents of the certifying officers' report on its evaluation of disclosure controls and procedures; however, given that disclosure controls and procedures should be designed to provide, at a minimum, reasonable assurance of achieving their objectives, the report should set forth, at a minimum, the conclusions of the certifying officers as to whether the controls and procedures are, in fact, effective at the "reasonable assurance" level.

Part 8 — Fair Presentation

Pursuant to the third paragraph in each of the annual certificates and interim certificates, the chief executive officer and chief financial officer must each certify that their issuer's financial statements and other financial information "fairly present" the financial condition of the issuer for the relevant time period. Those representations are not qualified by the phrase "in accordance with generally accepted accounting principles" which Canadian auditors typically include in their financial statement audit reports. This qualification has been specifically excluded from the Instrument to prevent management from relying entirely upon compliance with the issuer's GAAP in this representation, particularly where the issuer's GAAP financial statements may not reflect the financial condition of an issuer (since the issuer's GAAP does not always define all the components of an overall fair presentation).

The Instrument requires the certifying officers to certify that the financial statements (including prior period comparative financial information) and the other financial information included in the annual filings and interim filings fairly present the issuer's financial condition, results of operation and cash flows. The certification statement regarding the fair presentation of financial statements and other information is not limited to a representation that the financial statements and other financial information have been presented in accordance with the issuer's GAAP. We believe that this is appropriate as the certification is intended to provide assurances that the financial information disclosed in the annual filings and interim filings, viewed in their entirety, meets a standard of overall material accuracy and completeness that is broader than financial reporting requirements under GAAP. As a result, issuers are not entitled to limit the representation to Canadian GAAP, US GAAP or any other source of generally accepted accounting principles.

We do not believe that a formal definition of fair presentation is appropriate as it encompasses a number of qualitative and quantitative factors that may not be applicable to all issuers. In our view, fair presentation includes but is not necessarily limited to:

- selection of appropriate accounting policies
- proper application of appropriate accounting policies
- disclosure of financial information that is informative and reasonably reflects the underlying transactions
- inclusion of additional disclosure necessary to provide investors with a materially accurate and complete picture of financial condition, results of operations and cash flows.

The concept of fair presentation as used in the annual certificates and interim certificates is not limited to compliance with the issuer's GAAP; however, it is not intended to permit an issuer to depart from the issuer's GAAP recognition and measurement principles in the preparation of its financial statements. In the event that an issuer is of the view that there are limitations to the issuer's GAAP based financial statements as an indicator of the issuer's financial condition, the issuer should provide additional disclosure in its MD&A necessary to provide a materially accurate and complete picture of the issuer's financial condition, results of operations and cash flows.

For additional commentary on what constitutes fair presentation, we refer you to case law in this area. The leading U.S. case in this area is *U.S. v. Simon* (425 F.2d 796); the leading Canadian case in this area is the B.C. Court of Appeal decision in *Kripps v. Touche Ross and Co*, [1997] B.C.J. No. 968.

Part 9 — Financial Condition

Pursuant to the third paragraph in each of the annual certificates and interim certificates, the chief executive officer and chief financial officer must each certify that their issuer's financial statements fairly present the financial condition of the issuer for the relevant time period. The Instrument does not formally define financial condition. The term "financial condition" in the annual certificates and interim certificates is intended to be used in the same manner as the term "financial condition" is used in The Canadian Institute of Chartered Accountants' MD&A Guidelines and NI 51-102. In our view, financial condition encompasses a number of qualitative and quantitative factors which would be difficult to enumerate in a comprehensive list applicable

to all issuers. Financial condition of an issuer includes, without limitation, considerations such as:

- liquidity
- solvency
- capital resources
- overall financial health of the issuer's business
- current and future considerations, events, risks or uncertainties that might impact the financial health of the issuer's business.

Part 10 — Consolidation

Issuers are required to prepare their financial statements on a consolidated basis under the issuer's GAAP. As a result the representations in paragraphs 2 and 3 of the certification will extend to consolidated financial statements. In addition, when the certifying officers provide these two representations, we expect that these representations will indicate that their issuers' disclosure controls and procedures provide reasonable assurance that material information relating to their issuers and their consolidated subsidiaries is made known to them.

We are of the view that regardless of the level of control that an issuer has over a consolidated subsidiary, management of the issuer has an obligation to present consolidated disclosure that includes a fair presentation of the financial condition of the subsidiary. An issuer needs to maintain adequate internal control over financial reporting and disclosure controls and procedures to accomplish this. In the event that a chief executive officer or chief financial officer is not satisfied with his or her issuer's controls and procedures insofar as they relate to consolidated subsidiaries, the chief executive officer or chief financial officer should cause the issuer to disclose in its MD&A his or her concerns regarding such controls and procedures.

An issuer's financial results and MD&A may consolidate those of a subsidiary which is also a reporting issuer. In those circumstances, it is left to the business judgment of the certifying officers of the issuer to determine the level of due diligence required in respect of the consolidated subsidiary in order to provide the issuer's certification.

Part 11 — Exemptions

The exemptions in section 4.1 of the Instrument are based on our view that the investor confidence aims of the Instrument do not justify requiring issuers to comply with the certification requirements in the Instrument if such issuers already comply with substantially similar requirements in the U.S.

As a condition to being exempt from the annual certificate and interim certificate requirements under subsections 4.1(1) and (2) respectively, issuers must file through SEDAR the certificates of the chief executive officer and chief financial officer that they filed with the SEC in compliance with its rules implementing the certification requirements prescribed in section 302(*a*) of the Sarbanes-Oxley Act.

Pursuant to NI 52-107 certain Canadian issuers are able to satisfy their requirements to file financial statements prepared in accordance with Canadian GAAP by filing statements prepared in accordance with US GAAP. However, it is possible that some Canadian issuers may still continue to prepare two sets of financial statements and continue to file their Canadian GAAP statements in the applicable jurisdictions. In order to ensure that the Canadian GAAP financial statements are certified (pursuant to either the Sarbanes-Oxley Act or the Instrument) those issuers will not have recourse to the exemptions in subsections 4.1(1) and (2).

Part 12 — Liability for False Certification

An officer providing a false certification potentially could be subject to quasi-criminal, administrative or civil proceedings under securities law.

Officers providing a false certification could also potentially be subject to private actions for damages either at common law or, in Québec, under civil law, or under the Securities Act (Ontario) when amendments which create statutory civil liability for misrepresentations in continuous disclosure are proclaimed in force. The liability standard applicable to a document required to be filed with the Ontario Securities Commission, including an annual certificate or interim certificate, will depend on whether the document is a "core" document as defined under Part XXIII.1 of the *Securities Act* (Ontario). Annual certificates and interim certificates are currently not included in the definition of "core document" but would be caught by the definition of "document".

In any action commenced under Part XXIII.1 of the *Securities Act* (Ontario) a court has the discretion to treat multiple misrepresentations having common subject matter or content as a single misrepresentation. This provision could permit a court in appropriate cases to treat a misrepresentation in an issuer's financial statements and a misrepresentation made by an officer in an annual certificate or interim certificate that relate to the underlying financial statements as a single misrepresentation.

Appendix A

[not reproduced]

National Policy 58-201 — Corporate Governance Guidelines

See ¶31-174.

Other Legislation

The following is a list of other applicable legislation:

- Companion Policy 52-109CP to Multilateral Instrument 52-109 — Certification of Disclosure in Issuers' Annual and Interim Filings.
- Alberta — *Securities Act*, R.S.A. 2000, c. S-4.
- British Columbia — *Securities Act*, R.S.B.C. 1996, c. 418.
- Manitoba — *The Securities Act*, R.S.M. 1988, c. S50.
- New Brunswick — *Securities Act*, S.N.B. 2004, c. S-5.5.
- Newfoundland and Labrador — *The Securities Act*, R.S.N.L. 1990, c. S-13.
- Northwest Territories — *Securities Act*, R.S.N.W.T. 1988, c. S-5.
- Nova Scotia — *Securities Act*, R.S.N.S. 1989, c. 418.
- Nunavut — *Securities Act*, R.S.N.W.T. 1988, c. S-5.
- Ontario — *Securities Act*, R.S.O. 1990, c. s.5.
- Prince Edward Island — *Securities Act*, R.S.P.E.I. 1988, c. S-3.
- Quebec — *Securities Act*, R.S.Q., c. V-1.1.
- Saskatchewan — *The Securities Act, 1988*, S.S. 1988, c. S-42.2.
- Yukon — *Securities Act*, R.S.Y. 2002, c. 201.

¶31-290 FURTHER INFORMATION

¶31-296 Publications

Baikie, Timothy S. *Getting and Staying Listed in Canada: A Primer for Public Company Executives and Their Professional Advisers* (Toronto: CCH Canadian, 2003).

Findlay, Paul G. *Securities Law and Practice (Borden Ladner Gervais LLP)*, 3rd ed. (Toronto: Carswell, 2003).

Johnston, David L. and Rockwell, Kathleen D. *Canadian Securities Regulation*, 3rd ed. (Markham, Ont.: Butterworths, 2003).

MacIntosh, G. Jeffrey and Nicholls, C. Christopher. *Securities Law*, (Toronto: Irwin Law, 2002).

Puri, Poonam and Larsen, Jeffrey. *Corporate Governance and Securities Regulation in the 21st Century* (Markham, Ont.: LexisNexis Butterworths, 2004).

[The next page is 10,001.]

¶31-300 PERSONAL LIABILITY FOR DIRECTORS AND OFFICERS

Prepared by Markus Koehnen, Partner (DEA, LL.B., B.A.) and
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¶31-301 OVERVIEW

This chapter will examine the various sources of personal liability for directors and officers, the nature of that liability, and the fundamental defences available to directors should they face personal attack.

Personal liability for directors and officers stems from a variety of sources. The principal among them are:

- the constating corporate statute;
- security statutes and corporate governance regulations;
- other statutes; and
- tort liability.

¶31-302 PRACTICAL APPLICATION

¶31-304 Liability under the Constating Corporate Statute

Corporations are creatures of statute. Each corporation is established pursuant to the provisions of a particular statute (the constating statute). The most common constating statute for purposes of most commercial businesses are the business corporations Acts of the individual provinces. Certain businesses, such as banks, insurance companies, and trust companies, have their own constating statutes, which deal with directors' and officers' liability, as well as matters regulating that particular industry. In most cases, the liability established under those statutes is substantially similar to the liability established under the business corporations Acts.

The most common forms of liability created by constating corporate statutes involve:

(1) the duty to act in good faith and in the best interest of the corporation;

(2) the duty to avoid conflict of interest;

(3) the corporate opportunity doctrine;

(4) the duty of care;

(5) oppression; and

(6) miscellaneous breaches of the constating statute.

The Duty To Act Honestly in Good Faith, and in the Best Interests of the Corporation

The duty to act honestly, in good faith and in the best interests of the corporation is also often referred to as the fiduciary duty. The duty requires directors to put the corporation's interests above their own. Although the duty is owed only to the corporation, the derivative action and oppression sections of most corporate statutes give a cause of action to complainants other than the corporation for the breach of this duty.

For purposes of defining this duty, the best interests of the corporation are the best interests of shareholders as a whole. The best interests of the corporation do not refer only to short-term increases in profitability. Directors are free to act in whatever they honestly believe are the best interests of the corporation. This includes long-term views of shareholder benefit, taking risks, and taking non-shareholder interests into account, if doing so is rationally related to corporate or shareholder interests.

The duty to act in the best interests of the corporation has particular implications for directors who are nominees of a particular shareholder, or who represent a particular stakeholder of interest. Such directors are subject to the same duties as any other director. In other words, their duty lies to the corporation, not to the person who appointed them. This can put nominee directors into a difficult position, especially if they acquire information that is of interest or importance to the corporation, but that their appointer would like to keep from the corporation. The nominee director, like any other director, has a duty to disclose to the corporation any information he or she acquires that materially affects the corporation, even if disclosure would damage the interests of the party that the nominee "represents". The word "represents" is in quotation marks because the director does not legally represent anyone. The nominee director's only course of action is to insulate his or her self from the acquisition of such information, or to assume the risk of potential liability to the corporation and its shareholders.

Conflict of Interest

Although related to the duty to act honestly, in good faith, and in the best interests of the corporation, Canadian corporate statutes contain separate conflict of interest provisions. These provisions contain a number of elements and require a director or officer to disclose to the corporation in writing the nature and extent of any interest he or she has in a material contract or material transaction whether made or proposed with the corporation in which the director or officer is interested.

Disclose: The duty to disclose is absolute. The director cannot claim that he or she was acting in the best interests of the corporation in the face of a failure to disclose. Disclosure must be made as soon as the director becomes aware of the conflict, or at the first meeting at which the contract is proposed, whichever is earlier.

To the Corporation: Disclosure must be made to the corporation. This means to the board as a whole or, in some cases, to a committee of the board, where the relevant corporate statute permits. Disclosure to one director with a request that he or she disclose it to the others is insufficient.

In Writing: Disclosure should be made in writing or by having notice of the conflict entered into the minutes of the corporation. The advantage of having the director put the notice in writing is that it avoids future debate about the adequacy of the nature and extent of the disclosure.

Nature and Extent of Interest: Directors must disclose not only the fact of conflict but all information that is material to the board's judgment. In many cases this will mean disclosing information that may be personally prejudicial to the director. The nature of the disclosure is measured against the director's duty to act in the best interests of the corporation, not in his or her own best interests. At a minimum, this includes disclosing enough detail to enable the board to appreciate the full extent of the conflicted director's financial or other interest in the transaction, including the nature and quantum of the profit he or she is likely to derive from the transaction.

Material Contract: Materiality for purposes of the conflict disclosure rules does not mean materiality for purposes of accounting rules. Courts are entirely unsympathetic to defences that parse the contract or its profitability in an effort to argue that the contract was not material. The governing rule should be: "if in doubt, disclose".

Made or Proposed: Disclosure obligations apply to existing or proposed contracts. Thus, if a director or officer becomes interested in a contract with the corporation after it has been entered into, that interest must be disclosed in the same way that any interest in a proposed contract must be disclosed. In the case of existing contracts, disclosure must be made as soon as the director becomes interested in the contract. In the case of proposed contracts, disclosure must be made as soon as the director becomes aware of the proposed contract.

Nature of Interest: Whether directors or officers are interested in a contract is broadly construed. They are certainly interested in the contract if they are a party to the transaction. They are also interested if they have a material interest in a party to the transaction. Interest, however, transcends personal financial interest and extends to any type of indirect personal interest. Thus, a contract from which a friend or relative would benefit is also one in which the director is

interested. Conflict exists when the director has some type of relationship to the contract that could, objectively, affect his or her duty of undivided loyalty to the corporation. Benefit to a friend or relative causes that *objective* concern, no matter how subjectively loyal the director might be. Again, when in doubt, disclose.

Disclosure is not Enough — Simple disclosure does not relieve the director of his or her fiduciary duties. The remaining directors must expressly approve the contract to permit the director to participate in it. Even that is not conclusive. Shareholders can even challenge a contract that has been approved by the board, if its terms are not fair to the corporation and do not simulate an arm's length contract.

A conflicted director cannot vote on the board resolution, although the director can participate in discussions concerning the contract and need not recuse his or her self from such discussions. However, it is good practice to allow unconflicted directors the opportunity to discuss the issue in the absence of the conflicted director.

Corporate Opportunities

The corporate opportunity doctrine is a common-law doctrine that flows from the director's statutory fiduciary duty to the corporation. It prohibits a director from pursuing business opportunities that belong to the corporation, and also imposes on the director a duty to advise the corporation of opportunities of which the director becomes aware that the corporation might be interested in pursuing.

The doctrine applies to business opportunities that the corporation is pursuing; that the corporation might be interested in pursuing; and, in certain circumstances, to opportunities that the corporation cannot pursue or has decided not to pursue.

The most complicated of these scenarios involves opportunities that the corporation cannot or has decided not to pursue. There are many cases holding that directors cannot pursue such opportunities, just as there are cases holding that directors can pursue them. The outcome of a particular case probably turns on the director's ability to persuade a court that the corporation genuinely could not pursue the opportunity or had genuinely decided not to pursue it.

The fact that a third party indicated that it would not, or did not want to, deal with the corporation is not sufficient to permit the director to pursue the opportunity. In such instances, the court's concern will be whether the third party refused to deal with the corporation, or whether the refusal was somehow engineered to permit the director to appropriate the opportunity for himself. At a minimum, there should be some tangible evidence of a *bona fide* effort to persuade the third party to deal with the corporation.

Similarly, a corporation's decision not to pursue an opportunity is not decisive. Some courts have held that, in such circumstances, a director continues to be precluded from pursuing the opportunity unless the opportunity comes back to the director independently of his or her involvement in the corporation. The concern of these courts is that the information the director received about the opportunity was received in his or her capacity as a director, and can therefore be used only in that capacity. The underlying concern in these cases may also be whether the corporation declined the opportunity for genuine business reasons, or whether the refusal to pursue was motivated by a preference of the directors to pursue the opportunity for themselves. The most persuasive evidence of the corporation not being able or wishing to pursue the opportunity is probably evidence of dire financial limits on the ability of the corporation to participate.

The easiest way of avoiding the uncertainty of the law is for a director who is interested in pursuing an opportunity to obtain the consent of those directors who have no interest in the opportunity. Even then, the director's ability to pursue the opportunity will probably depend on the nature of the disclosure that was made to unconflicted directors. If information was withheld or presented in a way that made the opportunity less attractive for the corporation, board approval will not permit a director to pursue the opportunity. Once again, a court's decision will be guided by the director's paramount duty to act in what are objectively the best interests of the corporation.

The most typical remedy for breach of the corporate opportunity doctrine is disgorgement of profit. Where a director or officer participates with others who are subject to the corporate opportunity doctrine, each

individual may be jointly and severely liable to the corporation for the entire loss.

The Duty of Care

The *Canada Business Corporations Act* and other Canadian corporate statutes require directors to "exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances". A number of issues will be considered here:

(i) To Whom is the Duty of Care Owed?

(ii) Are All Directors Equally Liable?

(iii) The Business Judgment Defence.

(iv) Care in Running the Business.

(v) Reliance on Others.

To Whom is the Duty of Care Owed?

Until recently, it was broadly believed that the duty of care, like the fiduciary duty, was owed only to the corporation. In 2004, the Supreme Court of Canada's decision in *Peoples v. Wise*,[1] however, made it clear that the duty of care is owed to a broader category of persons than the corporation and includes, for example, creditors. The precise scope of the duty of care remains to be determined. It may mean nothing more than that directors must continue to act in the best interests of the corporation, but that creditors and others may have a complaint if directors fail to exercise reasonable care in doing so. In other words, directors owe a duty to creditors to act in the best interests of the corporation. Alternatively, it may mean that in exercising their corporate duties, directors owe a duty to creditors and others to take their interests into account. This would be a significantly more radical shift in corporate law.

Are All Directors Equally Liable?

Peoples v. Wise made it clear that a director's standard of care was an objective one, not a subjective one. In other words, all directors are held to a minimum standard of care. This involves understanding the business, attending meetings, understanding the issues that arise in meetings, and seeking appropriate advice when they do not understand a particular issue.

However, there is a parallel concept of differential liability that makes it possible to hold certain directors liable when others are absolved from liability. More will likely be expected from directors who had or ought to have had more involvement with an issue than from directors who had no involvement or who should not necessarily have had involvement with an issue. For example, more will be expected of directors where:

- an issue came to their attention but not to the attention of others;
- they were part of management and were expected to have more day-to-day involvement in issues;
- they were part of a committee that was expected to have more detailed involvement in the issue; and
- they were appointed because they possessed particular skills that the issue demanded. (For example, if the board is dealing with a complex accounting issue, more may be expected of a director who was appointed for his or her accounting experience than from a non-accountant.)

The Business Judgment Defence

The fundamental defence to a breach of duty of care is the business judgment rule. It holds that decisions made honestly, in good faith, and in the best interests of the corporation will not be subject to judicial attack. The defence is available where the decision itself was reasonable and was the product of a reasonable decision-making process. In other words, directors must be able to establish that they actually brought judgment to bear on an issue, and did not merely rubber stamp what was before them.

In recent years, the reasonableness of the decision making process has become the focal point of judicial analysis. To demonstrate that directors have followed a reasonable process, they must be able to establish that they:

- spent a reasonable amount of time making the decision or, if only limited time was available, took appropriate steps to obtain more time;
- understood the issue;

[1] [2004] 3 S.C.R. 461.

- understood the implications of what they were deciding;
- sought qualified advice if they did not understand the issue;
- sought advice from appropriate advisers;[2]
- reviewed the external advice personally, rather than relying on a second-hand summary; and
- have met with the adviser to ask questions or to test the adviser's assumptions.

These are, of course, but some examples of benchmarks of a reasonable process. There will, depending on the circumstances, be many others. Similarly, the absence of one or more of these factors does not mean that a decision-making process was not reasonable. It is a question of fashioning a process to suit the decision's importance and complexity.

Care in Running the Business

When a particular issue is brought to the attention of the directors, they have a duty to investigate and have it resolved to their satisfaction. Simple delegation is inadequate. Directors have a duty to follow up with the person to whom they have delegated the task to ensure that the issue has been resolved. A simple report from the delegate stating that the issue has been resolved is, in most cases, inadequate.

Thus, for example, where directors knew that the corporation was approaching insolvency, they may have a heightened duty to ensure that tax remittances are being made in order to obtain the benefit of the due diligence defence to personal liability for tax remittances.

Reliance on Others

Directors are not expected to be experts in all things, nor are they expected be familiar with all of the details of the corporation's affairs. As a result, directors must rely on others for both factual information and expert advice. Directors can, when appropriate, rely on advice and information from management or professionals.

Reliance on Management

Directors are entitled to rely on information that comes from management, unless something about the information suggests that it is suspect, or unless there is an inherent conflict between management's interest in an issue and the board's role. For example, relying solely on management's view of value in a take-over bid, or relying solely on management's view about its own compensation, may not be appropriate.

While directors need not doubt information that comes from management, they must be alert to the possibility of bias or self-interest in whatever information they receive. Management may want to characterize information to put a positive spin on an issue or, in more serious cases, hide something outright. Directors must simply be aware of the possibility of characterized, incomplete, or inaccurate information, and must pursue suspicions of those instances where they arise.

Reliance on Professional Advice

A director's ability to rely on others is enshrined in most Canadian corporate statutes, which contain provisions to the effect that directors can rely in good faith on audited financial statements, or on "a report of a person whose profession lends credibility to a statement made by the professional person", provided the director has also otherwise exercised care, diligence, and skill.

While directors are entitled to rely on independent professional advice, courts will examine whether the reliance was reasonable.

Reliance will generally be found to be reasonable if the adviser is an expert in the area, has received a full account of the relevant facts, and has not had the scope of their work unduly restricted.

This creates particular difficulties in situations where boards rely on professional advice sought by management. The fact that management produces a professional opinion in favour of a particular proposition may not make it reasonable to rely on that proposition if the directors do not know the purpose for which management obtained the opinion, the instruc-

[2] In some cases, advice from management may be appropriate; in others, external advisers chosen by management may be appropriate; and, in still others, external advisers selected by the board will be appropriate. The decision as to which is the appropriate type of adviser will depend on the presence of self-interest or the likelihood of the adviser being inclined to a particular view.

tions the adviser was given, the background facts the adviser was given, and what restraints, if any, management imposed on the adviser. The issue can be difficult because it involves matters of degree. Directors can probably properly rely on an opinion obtained by management to the effect that the corporation had the power to divest itself of a particular business. If, however, the opinion is more complex and involves a more nuanced, controversial issue (is the price in a take-over bid fair?), the directors would be expected to make additional inquiries before being entitled to rely on the advice.

The degree of interaction that directors have with advisers is also critical. Directors who merely accept a written report from an adviser may not be meeting their requisite standard of care. Meeting the requisite standard of care will often require discussions between the adviser and the directors to ensure that the adviser has not misunderstood the instructions or facts, and to ensure that the board tests the advice they are receiving. It is only by testing the advice (even from professionals) that the board can satisfy itself that the advice is appropriate.

Oppression

The *Canada Business Corporations Act* and the Business Corporations Acts of most Canadian provinces and territories contain what is known as the oppression remedy. The oppression remedy gives a stake holder a remedy where:

- any act or omission of the corporation or any of its affiliates effects a result that is oppressive, that is unfairly prejudicial to, or that unfairly disregards the interest of any security holders, director, or officer.;
- the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner that is that is oppressive, that is unfairly prejudicial to, or that unfairly disregards the interest of any security holders, director, or officer.; or
- the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner that is oppressive, that is unfairly prejudicial to, or that unfairly disregards the interest of any security holders, director, or officer.

The essence of the oppression remedy is that the applicant's reasonable expectations about a certain state of affairs must have been breached in some way.

Directors can be held personally liable for oppression. To be held liable, however, the applicant must make specific allegations against directors that could found a claim of oppression. The simple fact that an individual is a director of a corporation that has acted oppressively does not mean that personal liability would attach. Personal liability has been deemed appropriate where:

- the directors obtained personal benefit from their conduct;
- the directors have increased their control of the corporation through their conduct;
- the directors have breached some other duty they have by virtue of their directorship (i.e., duty to act in the best interests of the corporation);
- the directors have misused corporate power; and
- a remedy against the corporation would prejudice other stakeholders.

Miscellaneous Breaches of Constating Corporate Statutes

Most Canadian corporations impose personal liability on directors for a variety of matters, the most important of which are the following:

- liability for up to six months' unpaid wages;
- liability for issuing shares in return for consideration other than money, where the consideration is equivalent to less than the fair market value of the shares; and
- liability for consenting to a resolution whereby the corporation:
  - purchases its own shares which result in the corporation being unable to pay its debts as they come due,
  - pays unreasonable commissions to people who buy shares or procure people to by shares in the corporation,
  - pays out dividends resulting in the corporation being unable to pay its debts,

- indemnifies a director or officer who incurred an expense in settling an action or satisfying a judgment where the director or officer was not acting in the best interests of the corporation and there are no reasonable grounds to believe that the director or officer acted lawfully,
- pays out dissenting shareholders an amount different than fair market value, or pays out dissenting shareholders after an offer to do so has lapsed, or
- makes payments to shareholders that are found to be oppressive.

¶31-306 Securities Statutes

In the past, although directors could always be held liable for misrepresentations that they made, the difficulty in establishing liability was threefold: (1) tying the representation to the individual director; (2) establishing personal reliance by each investor; and (3) establishing that each investor's loss was attributable to the misrepresentation.

Canadian securities statutes render directors personally liable for statements made in a prospectus. Securities statutes overcome the three hurdles to misrepresentation actions by deeming attribution, reliance, and damage.

Since December 31, 2005, these presumptions have now been extended, in Ontario, beyond representations in a prospectus.

Part XXIII.1 of the Ontario *Securities Act* now holds directors personally liable for any misrepresentation made in certain types of a corporate documents, or for oral statements made by an individual with authority to speak on behalf of the corporation where the statement is made in circumstances in which a reasonable person would believe that the information would be generally disclosed. Liability also extends to the failure to make timely disclosure. This is known as secondary market liability because it holds directors liable not only to purchasers of securities who purchased pursuant to a direct offering by the corporation but also holds directors personally liable to those who purchased on the secondary market (i.e., stock exchanges).

Part XXIII.1 deems an investor to have relied on the statement, and deems damages to equal the difference between the price at which the investor purchased the security and the price at which they sold it, providing the security is sold within 10 days of the misrepresentation.

The new provisions apply not just to reporting issuers in Ontario but to any public issuer with a real and substantial connection to Ontario.

A director is not liable if he or she can establish that, before the document was released, the director or company conducted or caused to be conducted a reasonable investigation and, at the time of the release of the document or the oral statement, the director and the corporation had no reasonable grounds to believe that the document or oral statement contained a misrepresentation.

In cases alleging a failure to make timely disclosure of material changes, directors are not liable if, before failure to make timely disclosure, they or the corporation caused a reasonable investigation to be conducted, and the director or corporation had no reasonable grounds to believe that a failure to make timely disclosure would occur.

Personal liability for directors is limited to the greater of $25,000 and 50% of the director's aggregate compensation of the corporation and its affiliates. The liability limit is not available where the director knew that a misrepresentation was being made or knew that timely disclosure was not being made.

¶31-308 Other Statutes

Statutes imposing more specific personal liability on directors fall into four broad categories:

- those that require collection or payment of monies, including the *Income Tax Act*, the *Canada Pension Plan*, the Canadian *Employment Insurance Act*, and the *Excise Tax Act*;
- those that deal with health and safety of the public or protection of the environment, such as Environmental Protection Acts;
- those that require information to be reported to a governmental agency; and
- more general statutes that hold directors personally liable for any infraction under the Act.

Outside of the constating corporate statues and the Securities Acts, the statutes providing for more specific liabilities usually include some type of defence for directors. For example, the taxing and environmental protection statutes contain due diligence defences, which exempt directors from personal liability if they exercised the degree of care that a reasonably prudent person would exercise in comparable circumstances to prevent the infraction from having occurred. Thus, where a corporation has failed to remit income taxes, a director could be excused from liability if they acted prudently to ensure that the corporation had in place appropriate mechanisms to segregate and remit income tax to the Canada Revenue Agency. Similarly, where environmental statutes impose liability for contamination, directors have a defence if they took reasonable steps to ensure that the corporation had in place mechanisms to prevent contamination from occurring.

Statutes requiring delivery of information to regulators, and statutes that impose more general personal liability for breach of the statute usually require that directors be personally involved in the infraction by directing, authorizing, assenting to or acquiescing, or participating in the commission of the offence for liability to attach.

A list of the specific statutes imposing personal liability on directors is attached in the legislation section of this chapter.

¶31-310 Tort Liability

Although directors and officers are not personally liable for torts that the corporation commits, they are personally liable for torts that they commit on behalf of the corporation. This liability attaches even if the director was acting in the best interests of the corporation and was acting without any benefit to himself or herself. The only exception to this is the tort of inducing breach of contract. The most common risk for directors and officers in this regard is the tort of misrepresentation. By way of example, representations about the corporation's financial status to lenders has resulted in personal liability for directors and officers. Representations in the securities context raise particular issues that are discussed above.

¶31-340 PRECEDENTS/PRACTICAL TOOLS

This section contains a number of checklists of appropriate questions for counsel to ask in helping to analyze various issues involving director and officer liability.

¶31-342 Checklist: Conflict of Interest

- ❒ Did the director disclose the conflict to the entire board?
- ❒ Is the disclosure in writing or contained in the minutes of the board meeting?
- ❒ Did the director disclose the full nature and extent of his or her interest including the full extent of the financial interest and the financial benefit they would obtain from the transaction?
- ❒ Was anything not disclosed to the board?
- ❒ Are the terms of the contract with the corporation comparable to arm's length terms?

¶31-344 Checklist: Corporate Opportunity Issues

- ❒ Was the corporation pursuing the opportunity in question?
- ❒ Was the corporation interested in pursuing the opportunity?
- ❒ Was this a contract that the board would have been interested in knowing about?
- ❒ If the board decided not to pursue the opportunity and the director pursued it:
    - ☐ Did the director seek permission from the board?
    - ☐ If the director sought permission, did he or she make full disclosure of the potential benefits of the opportunity?
    - ☐ Has the opportunity involved benefits of which the board was not made aware?
    - ☐ Why did the board decide not to pursue the opportunity?
    - ☐ Is there any possibility that the decision not to pursue the opportunity may have been influenced (however suddenly) by the desire to permit other directors to pursue the opportunity?

¶31-346 Checklist: Business Judgment Defences

- ❒ Is the board's decision reasonable?
- ❒ Why is it reasonable?
- ❒ Why was the decision more reasonable than the other options the directors considered?
- ❒ What specific factors led the board to make the decision?
- ❒ How much time did the directors spend making the decision?
- ❒ If only limited time was available, could the directors have obtained more time?
- ❒ What evidence is there that the directors understood the issue?
- ❒ What evidence is there that the directors understood the implications of what they were deciding?
- ❒ Did the directors ask questions about the proposal, challenge its underlying assumptions, or otherwise test it to ensure they understood it?
- ❒ Was this an issue on which it would have been appropriate for the board to seek advice?
- ❒ If the board did not seek advice, why not?
- ❒ If the board did seek advice, from whom did it seek the advice?
  - ☐ If the advice came from management, were there any reasons to believe that management's advice may have been slanted towards one outcome?
  - ☐ If so, did the directors have sufficient personal skill and knowledge to overcome that potential slant?
  - ☐ If advice was received from outsiders, were the advisers selected by the board or by management?
  - ☐ Did the directors review the professional advice personally or did they rely on secondhand summaries?
  - ☐ Did the directors meet with the adviser?
  - ☐ Did the directors ask questions of the adviser including questions to:
    - determine whether there were any limitations placed on the adviser's investigation;
    - determine whether the adviser approached the issue with any underlying assumptions;
    - determine if those underlying assumptions were valid;
    - understand the context of the decision; and
    - test the adviser's underlying assumptions or otherwise test the validity of the adviser's conclusions?

¶31-370 CASE LAW/LEGISLATION

¶31-372 Case Law

Duty To Act Honestly and in Good Faith and in the Best Interest of the Corporation.

Peoples v. Wise, [2004] 3 S.C.R. 461 — Directors do not owe a fiduciary duty to creditors of the corporation because the fiduciary duty in the *Canada Business Corporations Act* (CBCA) stems from paragraph 122(1)(*a*), which states that directors have a duty to "act honestly and in good faith with the view to the best interest of the corporation".

That duty is strictly limited to the corporation. In making this finding, the Supreme Court of Canada, however, pointed out that the claim was not being brought as a derivative action or as an oppression action, but purely as a claim under section 122 of the CBCA. In the context of a derivative or an oppression claim, the analysis and the result may be different. The directors' fiduciary duty does not change when a corporation approaches insolvency.

The duty of care under paragraph 122(1)(*b*) of the CBCA is broader, and is owed to creditors and other classes of persons.

The standard of care that directors owe is an objective standard that takes into account the factual aspects of the circumstances surrounding the director's actions as opposed to the subjective motivation of the director.

***PWA Corp v. Gemini Automated Distribution System Inc.* (1993), 8 B.L.R. (2d) 221 (Ont. Gen. Div.), affirmed (1993), 15 O.R. (3d) 730 (Ont. CA.), leave to appeal to S.C.C. refused (1993), 16 O.R. (3d) xvi** — Here, the directors appointed by a shareholder were aware of that shareholder's plans to withdraw from the business. In holding that the directors had a duty to advise the corporation's board of those plans, even though it may have been prejudicial to the interests of their nominator, the Court of Appeal stated:

> A director nominated by a particular shareholder of the corporation is not in any sense relieved of his or fiduciary duties to the corporation. A nominee director is not accorded an attenuated standard of loyalty to the corporation. The director must exercise his or her judgment in the interests of the corporation and comply with his duties of disclosure and must not subordinate the interest of the corporation to those of the director's patron.

Conflict of Interest

***Redekop v. Robco Construction Ltd.* (1978), 89 D.L.R. (3d) 507 (B.C S.C.)** — Simple disclosure of a conflict to the board is not sufficient to permit the contract to proceed. Explicit approval by the board is required.

***McAteer v. Devoncroft Developments Ltd.* (2001), 24 B.L.R. (3d) 1(Alta. Q.B.)** — A director was found to have a material interest in a transaction in which the corporation borrowed money from a trust, because her son was a beneficiary of the trust and she was one of its trustees.

Corporate Opportunities

***Regal (Hastings) Ltd. v. Gulliver,* [1942] 1 All E.R. 378 (H.L.)** — Directors were prohibited from pursuing an opportunity, even after the corporation had declined to pursue it. The opportunity involved the purchase of additional movie theatres by a company in the business of operating movie theatres. While the corporation was considering the purchase, it received an offer for the downstream purchase of the theatres. The third party offered a superior price to the price at which the corporation could buy the theatres. The corporate directors declined to pursue the opportunity because the corporation did not have sufficient funds. Some of the directors then pursued the opportunity on their own.

***Zwicker v. Stanbury,* [1954] 1 D.L.R. 257 (S.C.C.)** — Here, directors of a corporation bought the corporation's mortgage from its mortgagee for 50% of the outstanding balance. The directors sought to justify the purchase on the basis that the corporation did not have adequate funds to buy out the mortgage itself. The Court held that the directors could not pursue a corporate opportunity even if the corporation was unable to pursue the opportunity.

***Peso Silver Mines Ltd. v. Cropper* (1966), 58 D.L.R. (2d) 1 (S.C.C.)** — Here the Supreme Court of

Canada allowed directors to pursue an opportunity that the corporation had decided not to pursue. After the corporation decided not to pursue the opportunity because its financial resources were fully committed elsewhere, one of the directors was approached independently about the opportunity. The Court indicated that the director did not use any confidential information that belonged to the corporation, or any other information that he received as a result of being a director.

***Canadian Aero Service Ltd. v. O'Malley* (1973), 40 D.L.R. (3d) 371 (S.C.C.)** — The Supreme Court of Canada recognized that there would be situations where profit must be disgorged, even if it was not gained at the expense of the company, because the transaction was not open to the company. Whether or not directors are precluded from pursuing an opportunity is determined by looking at all of the circumstances of a case, including:

> ... the position or office held, the nature of the corporate opportunity, its ripeness, its specificness and the director's or managerial officer's relation to it, the amount of knowledge possessed, the circumstances in which it was obtained and whether it was special or, indeed, even private, the factor of time and continuation of fiduciary duty where the alleged breach occurs after determination of the relationship with the company, and the circumstances under which the relationship was terminated, that is whether by retirement or resignation or discharge.

Standard of Care and the Business Judgment Rule

***Peoples v. Wise*, [2004] 3 S.C.R. 461** — The Supreme Court of Canada made the following statements about the business judgment rule:

> The establishment of good corporate governance rules should be a shield that protects directors from allegations that they have breached their duty of care. However, even with good corporate governance rules, directors' decisions can still be open to criticism from outsiders.
>
> Many decisions made in the course of business, although ultimately unsuccessful, are reasonable and defensible at the time they are made. Business decisions must sometimes be made, with high stakes and under considerable time pressure, in circumstances in which detailed information is not available. It might be tempting for some to see unsuccessful business decisions as unreasonable or imprudent in light of information that becomes available ex-post facto. Because of the risk of hindsight bias Canadian court have developed a rule of deference to business decisions called the "business judgment rule", adopting the American name for the rule.

The Court then quoted with approval from the Ontario Court of Appeal's decision in *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 at page 192:

> The court looks to see that the directors *made a reasonable* decision *not a perfect* decision. Provided the decision taken is within a range of reasonableness, the court ought not to substitute its opinion for that of the board even though subsequent events may have cast doubt on the board's determination. As long as the directors have selected one of several reasonable alternatives, deference is accorded to the board's decision. This formulation of deference to the decision of the board is known as the "business judgment rule". The fact that alternative transactions were rejected by the directors is irrelevant unless it can be shown that a particular alternative was definitely available and clearly more beneficial to the company than the chosen transaction. (at page 492 of the S.C.R. decision. Emphasis added by the S.C.C.)

Directors will have the benefit of the business judgment rule if:

> They acted prudently and on a reasonably informed basis. The decisions they make must be reasonable business decisions in light of all the circumstances about which the directors of officers knew or ought to have known. In determining whether directors have acted in a manner that breached the duty of care, it is worth repeating that perfection is not demanded. Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making, but they are capable, on the facts of any case, of determining whether an appropriate degree of prudence and diligence was brought to bear in reaching what is claimed to be a reasonable decision at the time it was made.

***Upm-Kymmene Corp. V. Upm-Kymmene Miramichi Inc.* (2002), 214 D.L.R. (4th) 496 Ont.SCJ (COMMERCIAL LIST); affirmed at 2004 Carswell Ont. 691 (C.A.)** — Directors were found to have breached their duty of care where they approved a compensation package that was recommended by a compensation consultant, but where the directors had provided no instructions to the consultant, used a consultant provided by management,

took no steps to inform themselves of the instructions that had been given to the consultant, and did not ask questions about the qualifiers and inconsistencies contained in the consultant's report. In coming to this conclusion, the Court made the following findings:

- A prudent board should have taken more time to slow down the approval process and examine the compensation package in greater detail.
- Directors acted improperly by not engaging in any analysis of the compensation package, and by approving a bonus tied to market capitalization of a resource company whose market capitalization depended upon world resource prices.
- Directors acted improperly by approving a compensation package based on American comparators, without determining whether their use was appropriate.
- Directors acted improperly by approving a compensation package for a new senior executive position when the board already had a full-time CEO and CFO, without determining why the position was necessary.

In describing the content of the business judgment rule and the judicial approach to it, the Court stated:

> ... directors are only protected to the extent that their actions actually evidence their business judgment. The principle of deference pre-supposes that directors are scrupulous in their deliberations and demonstrate diligence in arriving at decisions. Courts are entitled to consider the content of their decision and the extent of the information on which it was based and to measure this against the facts as they existed at the time the impugned decision was made. Although board decisions are not subject to microscopic examination with perfect vision of hindsight, they are subject to examination.

In commenting on the degree to which directors could rely on the work of committees of the board the Court stated:

> The business judgment rule cannot apply where the Board of Directors acts on the advice of a director's committee that makes an uninformed recommendation. Although it was not unreasonable for the board to assume the Committee had done a careful job, this did not relieve the directors of their independent obligation to make an informed decision on a reasonable basis. In order to act in the best interest of the shareholders of Repap, each director was required to understand the terms and meaning of the agreement and to consider it carefully against the circumstances of Repap at the time. They were required to review the Mercer opinion carefully and evaluate it thoughtfully against the circumstances of Repap at the time. This did not happen.

¶31-374 Legislation

Conflict of Interest

Canada Business Corporations Act, section 120

Sec. 120. Disclosure of interest

(1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of any interest that he or she has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer

(*a*) is a party to the contract or transaction;

(*b*) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or

(*c*) has a material interest in a party to the contract or transaction.

(2) *Time of disclosure for director* The disclosure required by subsection (1) shall be made, in the case of a director,

(*a*) at the meeting at which a proposed contract or transaction is first considered;

(*b*) if the director was not, at the time of the meeting referred to in paragraph (a), interested in a proposed contract or transaction, at the first meeting after he or she becomes so interested;

(*c*) if the director becomes interested after a contract or transaction is made, at the first meeting after he or she becomes so interested; or

(*d*) if an individual who is interested in a contract or transaction later becomes a director, at the first meeting after he or she becomes a director.

(3) *Time of disclosure for officer* The disclosure required by subsection (1) shall be made, in the case of an officer who is not a director,

(*a*) immediately after he or she becomes aware that the contract, transaction, proposed contract or proposed transaction is to be considered or has been considered at a meeting;

(*b*) if the officer becomes interested after a contract or transaction is made, immediately after he or she becomes so interested; or

(*c*) if an individual who is interested in a contract later becomes an officer, immediately after he or she becomes an officer.

(4) *Time of disclosure for director or officer* If a material contract or material transaction, whether entered into or proposed, is one that, in the ordinary course of the corporation's business, would not require approval by the directors or shareholders, a director or officer shall disclose, in writing to the corporation or request to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of his or her interest immediately after he or she becomes aware of the contract or transaction.

(5) *Voting* A director required to make a disclosure under subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction [sic] unless the contract or transaction

(*a*) relates primarily to his or her remuneration as a director, officer, employee or agent of the corporation or an affiliate;

(*b*) is for indemnity or insurance under section 124; or

(*c*) is with an affiliate.

(6) *Continuing disclosure* For the purposes of this section, a general notice to the directors declaring that a director or an officer is to be regarded as interested, for any of the following reasons, in a contract or transaction made with a party, is a sufficient declaration of interest in relation to the contract or transaction:

(*a*) the director or officer is a director or officer, or acting in a similar capacity, of a party referred to in paragraph (1)(b) or (c);

(*b*) the director or officer has a material interest in the party; or

(*c*) there has been a material change in the nature of the director's or the officer's interest in the party.

(6.1) *Access to disclosures* The shareholders of the corporation may examine the portions of any minutes of meetings of directors or of committees of directors that contain disclosures under this section, and any other documents that contain those disclosures, during the usual business hours of the corporation.

(7) *Avoidance standards* A contract or transaction for which disclosure is required under subsection (1) is not invalid, and the director or officer is not accountable to the corporation or its shareholders for any profit realized from the contract or transaction, because of the director's or officer's interest in the contract or transaction or because the director was present or was counted to determine whether a quorum existed at the meeting of directors or committee of directors that considered the contract or transaction, if

(*a*) disclosure of the interest was made in accordance with subsections (1) to (6);

(*b*) the directors approved the contract or transaction; and

(*c*) the contract or transaction was reasonable and fair to the corporation when it was approved.

(7.1) *Confirmation by shareholders* Even if the conditions of subsection (7) are not met, a director or officer, acting honestly and in good faith, is not accountable to the corporation or to its shareholders for any profit realized from a contract or transaction for which disclosure is required under subsection (1), and the contract or transaction is not invalid by reason only of the interest of the director or officer in the contract or transaction, if

(*a*) the contract or transaction is approved or confirmed by special resolution at a meeting of the shareholders;

(*b*) disclosure of the interest was made to the shareholders in a manner sufficient to indicate its nature before the contract or transaction was approved or confirmed; and

(*c*) the contract or transaction was reasonable and fair to the corporation when it was approved or confirmed.

(8) *Application to court* If a director or an officer of a corporation fails to comply with this section, a court may, on application of the corporation or any of its shareholders, set aside the contract or transaction on any terms that it thinks fit, or require the director or officer to account to the corporation for any profit or gain realized on it, or do both those things.

Duty & Standard of Standard Care

Canada Business Corporations Act, section 122

Sec. 122. Duty of care of directors and officers

(1) Every director and officer of a corporation in exercising their powers and discharging their duties shall

(*a*) act honestly and in good faith with a view to the best interest of the corporation; and

(*b*) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.

(2) *Duty to comply* Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.

(3) *No exculpation* Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof.

Specific Statutes Imposing Personal Liability on Officers and Directors

- *Advance Payments for Crops Act*, R.S. 1985, c. C-49, s. 13(4).
- *Agricultural Marketing Programs Act*, 1997, c. 20, s. 38(2).
- *Air Travellers Security Charge Act*, 2002, c. 9, ss. 5, 67, and 81(1).
- *Antarctic Environmental Protection Act*, 2003, c. 20, ss. 51(1) and 51(2).
- *Bank Act*, 1991, c. 46, s. 986.
- *Bankruptcy and Insolvency Act*, R.S. 1985, c. B-3, ss. 101(2) and 204.
- *Canada Agricultural Products Act*, R.S. 1985, c. 20 (4th Supp.), s. 36.
- *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ss. 32(4), 118(1), 118(2), 119(1), 122(1), 122(2), 130(4), 131(4), 149(4), 150(4), 153(9), 171(9), 235(5), and 250(2).
- *Canada Cooperatives Act*, 1998, c. 1, s. 101(1).
- *Canada Deposit Insurance Corporation Act*, R.S. 1985, c. C-3, s. 48.
- *Canada Labour Code*, R.S. 1985, c. L-2, s. 251.18.
- *Canada Pension Plan*, R.S. 1985, c. C-8, ss. 21.1(1) and 103(2).
- *Canada Transportation Act*, 1996, c. 10, ss. 56.7(4) and 175.
- *Canadian Environmental Protection Act*, 1999, c. 33, ss. 280(1), 280.1(1), 280.1(2), 280.1(3), and 280.3(2).
- *Canadian Ownership and Control Determination Act*, R.S. 1985, c. C-20, s. 25.
- *Canadian Wheat Board Act*, R.S. 1985, c. C-24, s. 68(4).
- *Citizenship Act*, R.S. 1985, c. C-29, s. 36(2).
- *Competition Act*, R.S. 1985, c. C-34, ss. 53(5) and 65(4).
- *Consumer Packaging and Labelling Act*, R.S. 1985, c. C-38, s. 20(3).
- *Cooperative Credit Associations Act*, 1991, c. 48, s. 467.
- *Corporations Returns Act*, R.S. 1985, c. C-43, s. 9(2).
- *Cultural Property Export and Import Act*, R.S. 1985, c. C-51, s. 46.
- *Customs Act*, R.S. 1985, c. 1 (2nd Supp.), s. 158.
- *Defence Production Act*, R.S. 1985, c. D-1, s. 46.
- *Electricity and Gas Inspection Act*, R.S. 1985, c. E-4, s. 35(2).
- *Employment Insurance Act*, 1996, c. 23, ss. 46.1(1), 83(1), 107, and 125(17).
- *Energy Administration Act*, R.S. 1985, c. E-6, ss. 31(2) and 48(2).
- *Energy Efficiency Act*, 1992, c. 36, s. 29.
- *Energy Monitoring Act*, R.S. 1985, c. E-8, s. 40.
- *Excise Act*, 2002, c. 22, s. 226.
- *Excise Tax Act*, R.S. 1985, c. E-15, ss. 96(3), 323(1), and 330.
- *Export and Import of Rough Diamonds Act*, 2002, c. 25, s. 42.

- *Exports and Imports Permits Act*, R.S. 1985, c. E-19, s. 20.
- *Feeds Act*, R.S. 1985, c. F-9, s. 10(2).
- *Financial Administration Act*, R.S. 1985, c. F-11, s. 115(1).
- *Fisheries Act*, R.S.C. 1985, c. F-14, s. 78.2.
- *Fishing and Recreational Harbours Act*, R.S. 1985, c. F-24, s. 21.
- *Foreign Publishers Advertising Services Act*, 1999, c. 23, s. 11.
- *Hazardous Materials Information Review Act*, R.S. 1985, c. 24 (3rd Supp.), s. 49(2).
- *Hazardous Products Act*, R.S. 1985, c. H-3, s. 28(2).
- *Health of Animals Act*, 1990, c. 21, s. 71.
- *Income Tax Act*, R.S.C. 1985, c. 1 (5th Supp.), ss. 227.1(1) and 242.
- *Insurance Companies Act*, 1991, c. 47, s. 1028.
- *International Boundary Waters Treaty Act*, R.S. 1985, c. I-17, s. 24.
- *Livestock Feed Assistance Act*, R.S. 1985, c. L-10, s. 20(2).
- *Marine Transportation Security Act*, 1994, c. 40, s. 28(4).
- *Meat Inspection Act*, R.S. 1985, c. 25 (1st Supp.), s. 24.
- *Migratory Birds Convention Act, 1994*, 1994, c. 22, ss. 5.4, 5.5, and 13(1.2).
- *Motor Vehicle Transport Act*, 1987, R.S. 1985, c. 29 (3rd Supp.), s. 20.
- *National Energy Board Act*, R.S. 1985, c. N-7, s. 121(2).
- *Northern Pipeline Act*, R.S. 1985, c. N-26, s. 38(2).
- *Pension Benefits Standards Act, 1985*, R.S. 1985, c. 32 (2nd Supp.), s. 38(5).
- *Petroleum and Gas Revenue Tax Act*, R.S. 1985, c. P-12, s. 41.
- *Plant Protection Act*, 1990, c. 22, s. 54.
- *Proceeds of Crime (Money Laundering) and Terrorist Financing Act*, 2000, c. 17, s. 78.
- *Quarantine Act*, 2005, c. 20, ss. 73(1) and 73(2).
- *Railway Safety Act*, R.S. 1985 c. 32 (4th Supp.), s. 43.
- *Remote Sensing Space Systems Act*, 2005, c. 45, s. 40.
- *Species Risk Act*, 2002, c. 29, s. 98.
- *Tobacco Act*, 1997, c. 13, s. 50.
- *Transportation of Dangerous Goods Act*, 1992, c. 34, s. 39.
- *Trust and Loan Companies Act*, 1991, c. 45, s. 535.
- *Weather Modification Information Act*, R.S. 1985, c. W-5, s. 7(2).
- *Weights and Measures Act*, R.S. 1985, c. W-6, s. 35(3).
- *Wild Animal and Plant Protection and Regulation of International and Interprovincial Trade Act*, 1992, c. 52, s. 24.

¶31-390 FURTHER INFORMATION

¶31-396 Publications

Archibald, Todd L. *et al*, *Regulatory and Corporate Liability: From Due Diligence to Risk Management* (Aurora: Canada Law Book, 2004).

Hansell, Carol, *Directors' and Officers' in Canada: Law and Practice* (Toronto: Carswell, 1999)

Koehnen, Markus, *Oppression and Related Remedies* (Toronto: Thomson Carswell, 2004).

Morritt, David S. *et al*, *The Oppression Remedy* (Aurora: Canada Law Book, 2004).

Sarra, Janis P., *Director and Officer Liability in Corporate Insolvency: A Comprehensive Guide to Rights and Obligations* (Markham: Butterworths, 2002).