31 Prince Charles Drive • Toronto • Ontario • Canada • M6A 2H1
(416) 785-5175

To: Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Nova Scotia Securities Commission
Securities Administration Branch, New Brunswick
Office of the Attorney General, Prince Edward Island
Securities Commission of Newfoundland and Labrador
Registrar of Securities, Government of Yukon
Registrar of Securities, Department of Justice,
Government of Northwest Territories
Registrar of Securities, Legal Registries Division, Department of Justice, Government of Nunavut

c/o John Stevenson, Secretary
Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario M5H 3S8

May 30, 2004

Dear Sirs:

Re: Multilateral Policies 58-201 and 58-101

I am writing in response to the request for comment on the proposed OSC Guidelines on Corporate Governance, proposed Multilateral Policies 58-201 and 58-101. The Commission has requested answers to several specific questions, and the consultative process seems to be based on the responses to those questions. However, the framing of the questions themselves, and the content of the guidelines, beg some significant questions, and in what should be a fundamental discussion of governance, some basic issues remain unaddressed. The purpose of this response is both to respond to the questions as asked, and to raise some further issues.

Who am I ?

I am a UK-qualified Corporate Secretary, who came to Canada in 1980, and I have been active in the corporate field since that time. In 1986 I started a company, Embersoft Inc., which developed and marketed a software package, **The Electronic Minute Book**®, for computerized maintenance of corporate records. This was Canada's first commercially-available entity management software.

Over time, corporate software has developed, and is slowly becoming a tool for tracking of corporate governance issues. At this time, I am also involved with a group named Pental Consulting, which is creating an advanced software tool for the self-assessment of governance, ethical responsibility, human relations and general ethical performance of corporations.

I am currently Chair of the Ontario Branch of Chartered Secretaries Canada (ICSA), the Canadian Division of the UK-based Institute of Chartered Secretaries and Administrators, the professional body for Corporate Secretaries. I am also Chair of the Editorial Committee of that body, which publishes the Institute's magazine *Corporate Governance Quarterly*.

The comments set out in this letter are solely mine, and have not been discussed with ICSA or Pental Consulting, and therefore do not represent their views, if any, on these issues.

Overview

In carrying out the work on the Pental tool, it has become clear that the activities of corporations, and the way in which they perform vis-à-vis all stakeholders, are more than just a function of their forms of governance. For that reason, I am very pleased to note the beginning of an ethical content to the Commission's proposals; an ethically-run corporation will have many fewer governance issues, and conversely, all the governance rules in the world will not stop unethical participants from raiding stakeholder value for their own ends.

It has long been my contention that the law of corporations is mostly left alone by governments, and is usually changed only when there is some major perceived abuse, or some "wrong to be righted", as perceived by the government of the day. For example, the UK introduced major changes in its Companies Act 1967, which were the attempt of the then-new Labour government to correct what it saw as inequities, especially in the areas of political and union contributions, and corporate reporting. In my view, the current flurry of activity over governance has much of the same feel about it. I truly believe that if Enron's house of cards had not collapsed, and if WorldCom had avoided detection, there would be little or no regulatory pressure on governance issues, and the actions that we now see as "abuses" would be continuing as part of the normal order.

Well, as we know, that did not happen, and reform is in the air. It therefore behooves us to examine the objectives of the suggested reforms, and then the means proposed to achieve them, and to ask the question, Will the proposals achieve the desired ends? In my opinion, the answer in respect of the current set of OSC proposals, is "no".

What's wrong with these proposals?

- The current OSC proposals focus almost exclusively on the Board, and within that focus, overwhelmingly on structure, rather than on actions. Enron's abuses were carried out by management, not by the Board, and we've already seen in the Hollinger case here in Canada how a powerful shareholder can browbeat a board, or stack it with friendly faces.
- Other comments have raised the issue of the limited pool of qualified independent directors in Canada; I will not do so here. However, the issue of independence is muddied; we concentrate on ensuring a board of independent directors, then we make them dependent on the company's results by giving them a stake in the business (with stock options or DSUs).
- The list of best practices includes committees and forms, and the proposals say that if the structures are not followed, the company should explain why. Yet the inclusion of this reporting in the AIF (which achieves only a limited circulation) rather than in the wider distribution of the proxy circular, ensures that the light shed is a pretty weak flashlight, rather than a searchlight.
- The requirement that a company should only report on its processes if there is no committee in place (ie for nomination and compensation) is the complete opposite of transparency. If the objective is for the shareholder to know whether a company is following its own rules, it should do so whether or not a committee is in place. The mere existence of a committee does not ensure that any process will be followed.

Where should we be going?

- Corporate law states that every company must have a constitution; usually these take the form of articles and by-laws, and these rules form the basis of the interaction between the company and its owners. In the same way, a **code of ethics** should be **mandatory**; this is the basis of the interaction between the company and its other stakeholders (such as employees, host communities, customers, suppliers, and the general public);

- Consideration should be given to the **dual-level board structure** seen in Germany and Ireland;
- There should be at least one **Director responsible for employee relations**, and through whom employee concerns could be brought to discussion at Board level;
- Certainly, management must have the right to manage on a day-to-day basis, but closer supervision by Directors should be an objective. To this end, **Directors need to be professionally qualified**, and they also need to give more time and attention to the affairs of the company. They therefore should have **fewer directorships** (maybe a maximum of four), and be **better paid** for the responsibilities in the directorships they retain;
- Every company should have a **Corporate Governance Officer**, who reports to the Board and who can only be hired or fired by the Board (or its Governance Committee). That person needs to have a broad understanding of corporate activity, accounting and legal issues, and (and this is the only "plug" in this document) **a properly professionally qualified Corporate Secretary would be ideal for that responsibility**.

In the interests of keeping this response to a manageable length, there are several areas that I have not addressed; I would be pleased to respond to any questions you may have about issues raised or not raised in this document. Also, I have attached my individual responses to the specific questions you raised for comment, as an appendix to this letter.

Thank you for the opportunity to make this submission,

Yours truly,

Nigel Blumenthal
President, Embersoft Inc.

1. The Proposed Policy and Proposed Instrument describe best practices and require issuers to make disclosure in relation to those best practices.

(a) Will these initiatives provide useful guidance to issuers?

Issuers will be able to see what are set out as current best practices, but since there is no obligation to adopt them, they are only persuasive.

(b) Will these initiatives provide meaningful disclosure to investors?

The responses by companies might be useful for investors, who can then judge the extent to which their companies are following current best practices.

(c) Would disclosure be more meaningful to investors if issuers were required to describe their practices by reference to certain categories of governance principles rather than by reference to the best practices described in the Policy?

(d) What will be the effect on market participants, including investors and issuers, of our publishing best practices in Canada?

There is a danger of the current list of "best practices" becoming simply a target for companies to aim for, instead of thinking for themselves what would constitute good practices in their situation at this point in time. Sometimes a company is in a position where it should be exceeding current best practices.

2. The Proposed Instrument does not require an issuer to adopt a code of ethics, but issuers who do not have one must explain why they do not. If an issuer does adopt a code, the Proposed Instrument requires the issuer to file the code, as well as any amendments, on SEDAR. It also requires an issuer to prepare and file a news release respecting any express or implied waiver of the code.

(a) Will the text of the code of ethics provide useful disclosure for investors?

It's likely that most corporate codes would be the result of extensive legal discussions and careful phraseology, and therefore I feel that the actual text of the code probably would not provide much significant utility for the average investor. However, disclosure would aid in the overall transparency of the governance model.

(b) Will disclosure of waivers from the code provide useful disclosure for investors?

Yes.

(c) Since there is no requirement to have a code of ethics, will the obligations respecting filing the code and any amendments and reporting waivers from the code have the effect of discouraging issuers from adopting a code of ethics?

No; with any luck, it will discourage companies from granting such waivers. And if an issuer's main reason for not adopting a code was that the it would have to report waivers, that does not say much for the issuer.

3. The Proposed Instrument does not require issuers to have a compensation committee, nor does it require that committee to be entirely independent or to have a charter, but if an issuer does not have these structures, it must explain why not. An issuer is required to state whether it has a compensation committee, whether that committee is independent and whether it has a compensation committee charter. If there is a charter, the text of the charter must be disclosed. Additionally, the Proposed Instrument requires an issuer to disclose the process used to determine compensation, but that disclosure is only required if the issuer does not have a compensation committee.

(a) Would it be useful to investors for the issuer to disclose the process used to determine compensation, regardless of whether it has a compensation committee?

Yes. The mere existence of a committee is no guarantee of the existence of standards, or that any standards are met A company that was determined to use discriminatory

compensation practices and favouritism, for instance, could hide a lot of abuse behind the simple fact that a committee existed, and that therefore no disclosure was necessary. If the compensation process is not disclosed, the committee is effectively saying to the investor, "We know best, we're doing the right thing; trust us."

(b) Is disclosure of the text of the compensation committee's charter useful to investors?

Again, yes.

4. The Proposed Instrument does not require issuers to have a nominating committee, nor does it require that committee to be entirely independent or to have a charter, but if an issuer does not have these structures, it must explain why not. An issuer is required to state whether it has a nominating committee, whether any such committee is independent and whether it has a nominating committee charter. If there is a charter, the text of the charter must be disclosed. Additionally, the Proposed Instrument requires an issuer to disclose the process by which candidates are selected for board nomination, but that disclosure is only required if the issuer does not have a nominating committee.

(a) Would it be useful to investors for the issuer to disclose the process by which candidates are selected for board nomination, regardless of whether it has a nominating committee?

Yes. Once again, we see in these proposals the erroneous notion that the mere existence of a process makes disclosure unnecessary. This is contrary to governance principles, contrary to ethical management, and to the transparency on which governance is supposed to be based. Further, if there is no committee, it's likely that there is no formal process for selection, and so nothing useful would be revealed; few listed companies would want to report that their main qualification for board selection was the length of time that the Chairman had known the candidate.

(b) Is disclosure of the text of the nominating committee's charter useful to investors?

Yes; the investor can then gauge how well the nominating committee is doing its job, and whether the independent directors who comprise that committee are adding real value to the Board process.

5. The Proposed Instrument requires an issuer to disclose the process used to assess the performance of the board, committee chairs and CEO, but that disclosure is only required if the issuer does not have written position descriptions for those roles. Would it be useful for investors for the issuer to disclose the assessment process, regardless of whether it has written position descriptions?

Yes; see response to 4(a) above.