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Toronto, December 13, 2004

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Securities Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
Nova Scotia Securities Commission
New Brunswick Securities Commission
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 the 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, ON M5H 3S8

- and of -

Anne-Marie Beaudoin
Directrice du secrétariat
Autorité des marchés financiers
Tour de la Bourse
800, square Victoria
C.P. 246-22 étage
Montréal, Quebec H4Z IG3

Dear Sirs/Madames:

RE: National Policy 58-201 *Corporate Governance Guidelines* and National Instrument 58-101 *Disclosure of Corporate Governance Practices*

This letter is submitted in response to the Request for Comments made by the Canadian Securities Administrators ("CSA") on:

1. National Policy 58-201 *Effective Corporate Governance* (the "Proposed Policy"); and

2. National Instrument 58-101 *Disclosure of Corporate Governance Practices* (the "Disclosure Instrument").

Ancillary comments regarding the proposed amendments to Multi-lateral Instrument 52-110 *Audit Committees* are also enclosed. This comment letter is being submitted by the Securities Law Group of Ogilvy Renault and also comments communicated to us by clients operating in the Canadian capital markets.

General

We welcome the introduction of a national approach to corporate governance and recognize the efforts of all CSA members in reaching a consensus. We also commend the new disclosure approach taken by the CSA in the Disclosure Instrument. We hope this will encourage issuers to make individual disclosure of standards they have adopted which are appropriate for their particular situation.

We do, however, have some residual concern that the multitude of "recommended" documents which underlie the governance guidelines contained in the Proposed Policy (which include board and committee mandates, position descriptions and various business codes) may lead issuers to concentrate on developing standard documentation rather than developing processes to ensure their good governance. We hope that the flexibility inherent in the Disclosure Instrument will be recognized by the CSA and will allow issuers to adopt such documentation that is appropriate to their circumstances.

Proposed Policy and Disclosure Instrument

1. ***Incorporation of Definition of Independence by reference to the Audit Committee Instrument.*** The definition of independence contained in the Proposed Policy and the Disclosure Instrument is derived from section 1.4 of the Audit Committee Instrument. Concurrently with the publication of the Proposed Policy and the Disclosure Instrument, amendments to the Audit Committee Instrument were also proposed. The amendments, if enacted, will sever from section 1.4 two relationships which would preclude

independence; namely the receipt of advisory fees (ss.1.4(3)(f)(ii)) and being an affiliated entity (ss.1.4(3)(g)). We understand from Ontario Securities Commission staff that the reference in the Proposed Policy and Disclosure Instrument is to section 1.4 in the Audit Committee Instrument as it is proposed to be amended. The intended result is that the relationships contained in subsections 1.4(3)(f)(ii) and 1.4(3)(g) which preclude independence for audit committee members are not meant to otherwise preclude independence for directors as a whole.

The proposed amendments to the Audit Committee Instrument are subject to a separate comment period as they are amending an instrument currently in force. It is important that the amendments to the Audit Committee Instrument come into effect at the same time as the Proposed Policy and Disclosure Instrument or the definition of independence for board members will not be what we understand was intended by the CSA. In the alternative, if the Proposed Policy and Disclosure Instrument are brought into force before the amendments to the Audit Committee Instrument, it will be necessary to amend the Proposed Policy and Disclosure Instrument to clarify that the two relationships set out above are not meant to preclude independence for directors other than those sitting on the audit committee.

2. ***Exemptions from Independence Guideline***. The Proposed Policy and Disclosure Instrument incorporate the definition of independence contained in the Audit Committee Instrument but do not incorporate the exemptions from the definition of independence contained in section 3 of the Audit Committee Instrument. We understand that the CSA has not incorporated the exemptions because, unlike the requirements of the Audit Committee Instrument, the Proposed Policy provides non-mandatory guidelines, and therefore, specific exemptions are not necessary. This fails to recognize, however, that the Disclosure Instrument is mandatory and the failure of the Proposed Policy and Disclosure Instrument to recognize the appropriate exemptions contained in section 3 of the Audit Committee Instrument will not allow an issuer to make the simplified disclosure that they are relying on a recognized policy exemption from the general guidelines.

   A particular example of this is the lack of recognition of an exemption for closely controlled issuers. Under the NYSE Corporate Governance Rules, an issuer would be required to disclose that it was a controlled company relying on the controlled company exemption. Under the Disclosure Instrument, as there is no controlled issuer exemption from the definition of independence for directors, an issuer would need to explain why each of the directors were not independent and what the board did to facilitate its independent judgement ie. effectively make the policy argument for the controlled issuer exemption. The disclosure requirement should be consistent with the Audit Committee Instrument and set out that the issuer is relying on the controlled issuer exemption and the rationale for appointing the particular member. Given the large number of closely held issuers in the Canadian marketplace and the recognition of the exemption on a

policy basis by the CSA, we believe that this potential exemption should be directly available within the Proposed Policy and Disclosure Instrument.

The CSA should also consider whether it is not appropriate to include a temporary exemption for issuers who become subject to the Proposed Policy and Disclosure Instrument following an initial public offering (section 3.2 of the Audit committee Instrument), or who fall outside the independence definition of the Proposed Policy by virtue of events outside the control of the member (section 3.4 of the Audit Committee Instrument) or as a result of the death, disability or resignation of a member of the board of directors (section 3.5 of the Audit Committee Instrument) or in other temporary and exceptional circumstances (section 3.6 of the Audit Committee Instrument). The recognition by the CSA of these circumstances as being appropriate exceptions in the determination of the independence of directors should be reflected in the Proposed Policy and/or Disclosure Instrument, thereby simplifying the disclosure required in such circumstances for issuers.

3. ***Regularly Scheduled Meetings of Independent Directors.*** The Proposed Policy requires that the independent directors have regularly scheduled meetings and that the issuer disclose in its Information Circular the number of such meetings. Would the CSA consider clarifying that such meetings may be scheduled before or after meetings of the full board as this is a normal and practical procedure for most issuers?

4. ***Integrity of C.E.O. and other Executive Officers.*** The Proposed Policy continues to contain the requirement that the board should take responsibility in its mandate, to the extent feasible, for satisfying itself as to the integrity of the C.E.O. and other senior officers. In our prior comment letter on these initiatives dated May 31, 2004, we expressed the view that this item lacked clarity and would not provide meaningful disclosure or useful guidance to shareholders. It is not contained in the U.S. requirements. We are still of this view.

5. ***Monitoring Compliance with the Code.*** Section 3.9 of the Proposed Policy states that the board should be responsible for monitoring compliance with an issuer's Code of Business Conduct and Ethics (a "Code"). We are of the view that this should be amended to provide that the board should oversee the monitoring of compliance with the Code. In addition, Form 58-201 F-1, subsection 5(a)(ii) requires an issuer to explain whether and how the board ensures compliance with the Code. This is unrealistic as it is impossible for the board to ensure compliance with the Code. The more appropriate response is for the board to be satisfied that processes are in place that ensure the Code is being monitored and further ensure that departures from the Code are pre-approved or the offenders appropriately penalized.

6. ***Filing of Material Change Report upon a Material Departure from the Code by the board or a designated officer.*** As with other material changes that occur in the business and affairs of an issuer, it is the responsibility of the issuer to determine whether or not the obligation to file a material change report has occurred under the relevant securities

legislation. The Proposed Policy states that issuers are encouraged to consider the guidelines in developing their own corporate governance practices. We would, therefore, anticipate that the Codes of Business Conduct adopted by issuers will differ significantly from issuer to issuer. For these two reasons, we are of the view that it is inappropriate for the securities regulatory authorities to include a statement in section 3.9 of the Proposed Policy that they consider that conduct by a director or executive officer which constitutes a material departure from the a code will likely constitute a material change within the meaning of National Instrument 51-102 *Continuous Disclosure Obligations*. As stated in the Proposed Policy in the lead-in language to section 3.9, issuers must exercise their own judgments in making materiality determinations. Given that the Codes will be different and departures from such Codes will occur under particular and individual circumstances, we are of the view that it is impossible for the Canadian securities regulatory authorities to include such a blanket statement. The statement should be deleted.

Audit Committee Instrument Amendments.

We note that in sub-sections 1.4(3)(d) and 1.5(2)(a), the definition of "immediate family member" has been replaced by a more limited category of family members who will affect the determination of independence of a particular nominee or director. We note that these subsections include the category of step-child. Step-child has not, however, been separately delineated in the definition of "immediate family member". There appears to be an inconsistency. If it is the intention to include step-children in the definition of "immediate family member" this should be done or the category of step-child should be removed from the above mentioned sections.

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This letter has been prepared by the Securities Law Group of Ogilvy Renault. Each of the views expressed herein do not necessarily reflect the individual views of all Ogilvy Renault partners. If you have any questions concerning these comments, please contact Tracey Kernahan (Direct Line: 416-216-2045 or by e-mail at tkernahan@ogilvyrenault.com.

Yours very truly,