April 20, 2009

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Ontario Securities Commission
Autorité des marchés financiers
New Brunswick Securities Commission
Nova Scotia 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

Attention:

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VIA EMAIL

Re: Request for Comment – Proposed repeal and replacement of:
NP 58-201 *Corporate Governance Guidelines*
NI 58-101 *Disclosure of Corporate Governance Practices*
NI 52-110 *Audit Committees*

This letter is submitted by the Business Law Section of the Ontario Bar Association (OBA) in response to the request for comment published December 19, 2008 by the Canadian Securities Administrators (CSA) on the proposed repeal and replacement of NP 58-201 *Corporate Governance Guidelines*, NI 58-101 *Disclosure of Corporate Governance Practices*, and NI 52-110 *Audit Committees* and Companion Policy 52-110CP *Audit Committees* (collectively, the "Current Materials") with NP 58-201 *Corporate Governance Principles*, NI 58-101 *Disclosure of Corporate Governance Practices*, and NI 52-110 *Audit Committees* and Companion Policy 52-110CP *Audit Committees* (collectively, the "Proposed Materials"). This letter was prepared by members of the Securities Law Subcommittee of the OBA Business Law Section.

ABOUT THE ONTARIO BAR ASSOCIATION

The Ontario Bar Association (OBA) is a branch of the Canadian Bar Association, an organization of lawyers formed to provide support by the profession to the profession so that it may render better service to its members and the public. The OBA represents 17,000 practising lawyers, non-practising lawyers, law professors, law students and judges. It is unique among professional associations for lawyers in Ontario in that its members are drawn from virtually every practice area and from every region.

GENERAL COMMENTS

While the Securities Law Subcommittee was aware that the CSA had committed to undertake a review of NP 58-201 *Corporate Governance Guidelines* and NI 58-101 *Disclosure of Corporate Governance Practices* (together, the "Current Governance Materials"), including in relation to their application to controlled companies, we had not expected that the entire existing governance regime would be proposed to be replaced with a new principles-based policy. The CSA state under Alternatives Considered that "both issuers and investors have raised concerns about the current governance regime", but no details are provided regarding these concerns (other than the effect on controlled issuers) or how the Proposed Materials resolve these concerns.

The request for comments states that the Proposed Materials are intended to enhance the standard of governance and confidence in the Canadian capital markets and that the CSA expect that the Proposed Materials will provide greater flexibility or perceived flexibility, improve the quality of disclosure of corporate governance practices provided to investors and better align with international standards. While we agree that governance has evolved since the Current Materials were published and support the enhancement of governance standards, we do not believe that the Proposed Materials will achieve this or the other stated goals.

We agree with the purpose of the Proposed Materials and that corporate governance practices may differ but be equally good practices; however, we disagree that the Proposed Materials should not "purport to establish minimum standards or best practices". Given the extensive consultation that led to the adoption by the Toronto Stock Exchange of "best practices guidelines" in 1995 from which the Current Materials were derived and given the evolution in corporate governance since then, the Proposed Materials appear to be a step backwards.

It is unclear how the Proposed Materials will provide greater flexibility or the perception of flexibility to issuers and their boards of directors than the Current Materials, given NI 58-201 only provides guidelines and clearly states that they are not intended to be prescriptive and are not enforced or followed by all issuers. It is also unclear how the Proposed Materials will result in improved quality of disclosure of corporate governance when it is not clear what disclosure is expected and what is expected of an issuer who has not put the practices in place. As well there will no longer be easy comparability amongst issuers or an included benchmark against which to measure governance practices.

We agree with the comments in the compliance review set out in CSA Staff Notice 58-303 that current corporate governance disclosure by issuers is often inadequate and does not provide clear

and complete accounts of governance practices, but do not agree that the Proposed Materials will provide improved disclosure. Additional review of and guidance on the disclosure expected would be more helpful to issuers. The stated reason for the development of the Current Materials was to enable the CSA to include corporate governance disclosure in their continuous disclosure reviews and use their regulatory authority to enforce better disclosure. Regardless of whether the Current Materials are maintained or the Proposed Materials are adopted, the best way to ensure improved disclosure is to conduct more frequent reviews of corporate governance disclosure and issue more notices such as CSA Staff Notice 58-303 which provides issuers with guidance as to what is deficient disclosure and what information should be provided. Providing this guidance, as well as encouraging issuers to go beyond the guidelines with their governance practices and disclosure, would be a preferable and more efficient method of improving practices and disclosure than implementing the Proposed Materials.

As well, we do not believe that the Proposed Materials better align with international standards, which typically follow a rules-based or a "comply or explain" approach. Replacing the current bright-line tests for director independence with a "principles-based approach", for example, is not consistent with the bright-line tests for independence mandated by the Securities and Exchange Commission and stock exchanges in the U.S. (which are quite similar to the bright-line tests in the Current Materials). We are of the view that it would be onerous for dual-listed issuers to be required to assess significantly different independence tests in Canada and the U.S. It will also be more time-consuming for investors to bring to mind the applicable independence tests for a particular market when reviewing issuers' disclosure.

In order to enhance the Canadian governance regime and confidence in Canadian capital markets, we suggest that it would be preferable to leave the Current Governance Materials in place and supplement them with the content of new Principles 6, 7 and 9, which provide additional useful information for investors. A CSA Staff Notice could be published to confirm the CSA's view that the Current Governance Materials are not prescriptive, to confirm that corporate governance practices of issuers may differ from the guidelines but be equally acceptable practices, and to encourage issuers to advance beyond the guidelines.

SPECIFIC COMMENTS

The following are our comments on certain of the specific questions set out in the request for comments, which are reproduced below in italics and numbered to correspond to the notice.

1. ***Do you think Principles 6, 7 and 9 provide useful and appropriate guidance? Does this guidance appropriately supplement other corporate law and securities law (including legislation and decisions of Canadian courts) relating to these areas?***

   These principles provide useful guidance on areas that are important to be addressed. The principles should refer to the Board and not the issuer.

2. ***Does the level of detail in the commentary and examples of practices successfully provide guidance to issuers and assistance to investors without appearing to establish "best practices"?***

As noted in our general comments, we believe the CSA *should* establish some best practices that issuers should follow. We believe that the nine core corporate governance principles proposed are not simply principles that a board should consider (as noted in the request for comment) but these are basic practices that all boards, including those of venture issuers, should strive to implement. As noted in comment 1 above, all the principles should refer to the Board and not the issuer (i.e. – Principle 1 - the Board should establish the respective roles and responsibilities of the board and executive officers).

Principle 1

As noted in the Current Materials, the board is responsible for the stewardship of the issuer. This includes responsibility for the matters listed under "Usual responsibilities of the board"; therefore, the title and the lead in to the list should be changed to delete "Usual" and "usually".

Principle 8

Determining executive compensation policies is the role of the board, and the principle should be revised to make this clear. Directors and officers are required by corporate and common law to "act honestly and in good faith with a view to the best interests of the corporation"; the commentary should therefore make it clear that compensation should be structured to reward performance that is consistent with the obligation of directors and officers to act in the best interests of the issuer (rather than to "motivate them" to do so). We believe also that the principle should suggest that all issuers should have an independent compensation committee with access to independent advice.

3. In your view, what are the relative merits of a principles-based approach for disclosure, compared to a "comply or explain" model?

As noted above we believe the "comply or explain" model is a better choice for governance disclosure. It is not mandatory or prescriptive and it provides comparability and consistency in disclosure. Arguably, it is also a form of principles-based regulation.

4. Is the level of disclosure required under each of the principles appropriate both from an issuer's and an investor's point of view? Specifically, do you think the disclosure in respect of Principles 6, 7 and 9 provides useful information to investors?

As noted in our General Comments above we feel the Current Materials provide better disclosure and frankly clearer instructions for issuers to follow. As with the principles the disclosure requirements should refer to the board and not the issuer (Principle 1(a), 3(a), 5(a), 6(a), 8(a) and 9(a)).

Principle 1

The disclosure in the Current Materials focuses on the independence of the board and how it exercises independent judgement in carrying out their duties. We note that in the

Proposed Materials the commentary under this principle includes a discussion of independent judgement and we endorse this addition, but in our view there should be a corresponding requirement to disclose how the directors exercise independent judgement.

Principle 2

We support the additional disclosure required by clause (a), (b) and (c) as this reinforces that director qualifications and competencies are of the utmost importance and provides very important information to investors to assist in their evaluation of the board.

Principle 5

We believe issuers should continue to be required to file their code of conduct and disclosure should continue to be required on how the board monitors compliance with the code.

Principle 6

We believe issuers should continue to be required to describe any steps the board takes to ensure directors exercise independent judgement in considering transactions and agreements in respect of which a director or executive officer has a material interest.

Principle 7

In addition to a summary of policies, disclosure should include the framework developed for risk oversight.

Principle 8

We support the addition of (b)(iv), since like the auditor, independence of the compensation consultant is very important and this disclosure will assist investors in determining that independence.

5. ***Should venture issuers be subject to the same disclosure requirements concerning their corporate governance practices as non-venture issuers?***

If the CSA follows our recommendation and keeps the Current Materials, then we believe that the current disclosure requirements for venture issuers are sufficient. Should the Proposed Materials be adopted, we agree that venture issuers should be subject to the same disclosure requirements relating to their corporate governance practices. Additional guidance aimed specifically at suggested governance practices for venture issuers would be helpful and is not included in the Proposed Materials.

6. ***In your view, what are the relative merits of the proposed approach to independence compared to the current approach. In particular:***

a. Basing the determination of independence on perception rather than expectation; and
b. Guiding the board through indicia rather than imposing bright line tests?

We believe that the current approach to independence with the deletion of clause 1.4(8) and the addition of a guideline regarding conflicts of interest would be the best approach. We agree with the Alberta Securities Commission's concerns regarding the use of perception rather than expectation.

7. Is it sufficiently clear that the phrase "reasonably perceived" applies a reasonable person standard?

Please see our response to Question 6.

8. Is the guidance in the Proposed Audit Committee Policy sufficient to assist the board in making appropriate determinations of independence?

Please see our response to Question 6.

9. The proposed definition provides that independence is independence from the issuer and its management, and not from a control person or significant shareholder. Given this definition:
a. Should a relationship with a control person or significant shareholder be specified in section 3.1 of the Proposed Audit Committee Policy as a relationship that could affect independence?
b. Should such a relationship be solely addressed through Principle 6 – Recognize and manage conflicts of interest as proposed?
c. Is it appropriate to include as an example of a corporate governance practice that an appropriate number of independent directors on a board of directors and audit committee be unrelated to a control person or significant shareholder?

Please see our response to Question 6.

10. Does the required disclosure on director independence provide useful and appropriate information to investors?

Please see our response to Question 6.

11. Do you think our proposal regarding the effective date adequately addresses the needs of both venture and non-venture issuers?

Six months should be sufficient notice if the CSA follows our recommendation to improve on the Current Materials by adding the three new principles, rather than adopting the Proposed Materials.

We appreciate this opportunity to comment on the Proposed Materials. If you have any questions, please direct them to Eleanor Farrell (efarrell@cppib.ca, 416-868-6377).

Yours truly,

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