December 13, 2004

British Columbia Securities Commission
Alberta Securities Commission
Saskatchewan Financial Services 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

Proposed National Policy 58-201 and Proposed National Instrument 58-101

Dear Sir/Madam,

On behalf of the Canadian Coalition for Good Governance, and the approximate $550 billion in assets managed for millions of Canadians we thank you for the opportunity of commenting on the proposed new policies.

In reviewing the proposed policies, we note many positive changes since the first draft was issued. We are particularly pleased that the corporate responses will be part of the Annual Proxy Statement.

There are, however, three issues in NP 58-201 or NI 58-101 about which we remain concerned:

1. Add to the code of ethics the concept of 'zero tolerance' for potential conflicts of interest
2. Ensure shareholders can vote for individual directors (not slates) and ensure that these votes are binding not simply indicative
3. Provide adequate resources to monitor compliance with the new governance guidelines and to allow others to monitor

The rest of this letter develops these issues and the attached memorandum expands on some other details in the proposed legislation.

1. Add to the code of ethics the concept of 'zero tolerance' for potential conflicts of interest

Subsection 3.8(a) needs to be strengthened to state that "conflicts of interest, including transactions and agreements in respect of which a director or executive officer has a material interest, must always be disclosed to and considered by directors who are not conflicted".

In addition, the Coalition would like to see whatever consequent changes are needed to ensure subsection 5(b) of Form 58-101F1 reflects a "zero tolerance" policy towards conflicts of interest.

The recent example of Royal Technologies is instructive. The threshold of materiality for purposes of board approval of management capital expenditures was $60mn. The threshold of materiality for management's potential conflict of interest should have been zero. Confusing the two concepts proved catastrophic to shareholders.

Every officer and director must be made aware that their fiduciary responsibility to the corporation requires that any and all potential conflicts must be considered by directors not conflicted.

Where there is dominant shareholder (either through equity control or voting control) we believe that there must be a **Conduct Review Committee** composed entirely of independent directors. This Conduct Review Committee will determine any and all areas of potential conflict from board and committee composition to payments to related party transactions. For companies controlled by a parent (public) company, the Conduct Review Committee should be composed entirely of directors who only sit on the board of that subsidiary company and no other in the group.

The mandate of a **Conduct Review Committee** would include the establishment of conflict of interest guidelines and processes. Over time protocols would be developed from the determinations made on individual cases.

The work of the committee would be disclosed in the annual proxy statement.

2. Ensure shareholders can vote for individual directors (not slates) and ensure that these votes are binding not simply indicative

There is support for individual director voting among current directors. We just completed a survey with McKinsey & Co of 230 directors from large Canadian companies. Some 65% of these directors indicated approval of an individual voting process.

The format of individual voting should be such that shareholders check a box beside a director's name to indicate their voting preference (as indicated in our best practice guidelines – see attached). At the moment only 18% of companies listed on the S&P/TSX present their directors to shareholders in this manner.

British, Australian and New Zealand law requires that shareholders vote FOR or AGAINST individual directors. In Canada we vote FOR or WITHOLD. The Coalition is most anxious to make voting for directors more than cosmetic. Either you should push to change the legislation or you should force boards to pass by-laws requiring a threshold level of votes to elect a director.

3. Provide adequate resources to monitor compliance with the new governance guidelines and to allow others to monitor compliance.

(a) We are deeply concerned about the monitoring of compliance within the current governance proposals.

The Coalition notes that having governance guidelines removed from the listing requirements of the Toronto Stock Exchange is a radical departure from American practice where governance matters, other than those relating to the Audit Committee, have remained with the exchanges.

This new regulatory responsibility raises several questions:

- Who exactly is going to monitor compliance? Which regulator? Which department?
- Will the funding be adequate?
- What will be the consequences to those companies not in compliance?

We note the complete absence of monitoring of the new disclosure requirements on voting results at Annual General Meetings. This is an unsatisfactory result.

(b) Any “comply or explain” regime is only useful if there is **effective** disclosure. Effective disclosure depends upon four principles:

- The material is easy to find
- The material is easy to understand
- The material is accurate and complete
- The material is provided in context so that the information has meaning

The Coalition understands that the securities regulators will be reviewing the disclosure of the guidelines as part of the continuous disclosure review and that the TSX is proposing revisions to the Company Manual that require issuers to disclosure their governance practices in accordance with NI 58-101, which will be monitored by the TSX.

The Coalition believes a tabular reporting format is the best way to monitor compliance both internally and for external evaluators, as is currently the case with the Dey 14 points.

The proposed disclosure instrument does not specify how compliance with the National Instrument should be undertaken. This will allow for an enormous amount of “free style” exposition and make it extremely difficult for anyone to evaluate compliance.

Failure to force a common disclosure format is tantamount to having “disclosure at will” rather than “comply or explain” and represents a significant setback for good governance in Canadian listed companies.

*****

The attached memorandum contains other important matters we believe must be addressed by the regulatory agencies before implementing the National Instrument.

Should there be an opportunity to meet with you to discuss our points of view we would be quick to respond.

Yours sincerely,

David R. Beatty O.B.E.
Managing Director

Memorandum:
Proposed National Policy 58-201 and Proposed National Instrument 58-101

With respect to National Policy 58-201, we submit the following comments:

PART 2 MEANING OF INDEPENDENCE

2.1 The definition of independence should be expanded to include not only Sec. 1.4 of Multilateral Instrument 52-110 *Audit Committees*, but also section 1.5, which further defines material relationships as any situation in which a individual receives, directly or indirectly, any remuneration from the issuer other than those fees related to his or her service as a director.

It is the view of the Coalition that a stricter definition of independence needs to be applied. Directors and boards are first and foremost representatives of shareholders and thus have a fiduciary duty to represent them. A director may be conflicted in performing their duties to shareholders when he or she has a direct or indirect business relationship with the issuer, which is over and above his or her board duties. Thus, to eliminate the potential for conflict, the definition of independence needs to be extended to include sections 1.4 and 1.5 from MI 52-110

PART 3 CORPORATE GOVERNANCE GUIDELINES

Meetings of Independent Directors

3.3 Meetings of independent directors (without management) encourage discussion of issues that may not normally occur at regular board meetings but emerge as a result of these board meetings. It is logical, therefore, that the meetings of independent directors occur coincidentally with each board meeting. The current wording of "regular" does not provide for meetings of independent directors to occur in conjunction with each board meeting. Therefore, we propose that the wording of this section be revised to:

At <u>each</u> board meeting, the independent directors should hold meetings at which members of management are not in attendance.

Nomination and Compensation Committee Composition

3.10 As stated in our submission of May 25, 2004, our membership is evenly split on the issue of requiring entirely independent nomination committees, as are regulators in other jurisdictions (NYSE requires 100% independent nomination committee and the UK Combined code states the nomination committee should be a majority of independent directors).

We maintain our belief that the independence rules as envisaged will make it difficult for companies with controlling shareholders to manage their nomination committees if 100% independence is the guideline.

3.14 The Coalition agrees with the listed competencies a nomination committee should consider before recommending an individual to the board. However, we also believe that in addition to the competencies and skills listed, thought should be given to the time commitment a candidate can devote to the board. Currently, reference is made to issuers recruiting individuals who have sufficient time and energy to devote to the task of being a director in a footnote in 3.6 *Orientation and Continuing Education.* We believe that the time a director can devote to his or her board duties is just as important a qualification as are the competencies he or she demonstrates. Therefore, a part *(d)* that makes reference to the nomination committee considering the time commitment an individual can make to the board should be added to this section.

The footnote reference to issuers recruiting individuals who can make the necessary time commitment to the board should be removed. This is misplaced as the time and energy a director can devote to the board should be discussed prior to their appointment to the board, rather than during the new director orientation process.

Our comments regarding National Instrument 58-101 are as follows:

PART 2 – DISCLOSURE AND FILING REQUIREMENTS

2.1 Required Disclosure

Please see the cover letter.

FORM 58-101F1
CORPORATE GOVERNANCE DISCLOSURE

1. Board of Directors: Publish Attendance Record

We disagree with the position that it is unnecessary for issuers to publish individual director attendance at board and committee meetings. A footnote to Section 3.6 of NP 58-201 states that an issuer should only recruit individuals who have sufficient time and energy to devote to the task of being a director.

Director attendance is invaluable information for shareholders to determine if a director is meeting the time commitment required. It is a simple metric for shareowners to determine who is doing the work and who is not. In a great number of Annual General Meetings voting results on individual directors closely match the attendance performance. Low voting against your peers is a very powerful signal to directors to show up or resign.

Institutions with proxy voting guidelines include director attendance as one of the criteria to determine if votes should be cast for or withheld for a director and all the governance measurement systems we are familiar with regard attendance as an important variable.

Therefore, we recommend including an additional disclosure point, "*(g)*", that requires disclosure of individual director attendance.

7. Compensation

The Compensation Committee should be required to name the compensation consultant who assisted the committee in determining executive compensation. This requirement should be included in a fourth point, labeled ***(d)***.

9. Assessments

We maintain that the disclosure of director, board and committee evaluation programs should be at a level that indicates a strong and viable program is in place. At this time we agree it may be unnecessary to include the requirement for issuers to disclose their evaluation processes "*with sufficiently high detail to assure investors that a strong and viable program is in place*". However, we would like to know that issuers who do not disclose with enough detail would be contacted and informed to improve their disclosure.