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April 5, 2004

DELIVERED

Ontario Securities Commission
20 Queen Street West
Suite 1900, Box 55
Toronto, Ontario
M5H 3S8

Attention: John Stevenson, Secretary

Dear Sirs:

Re: Request for Comments:
Proposed Amendments to OSC Rule 61-501 and Companion Policy 61-501CP *Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions*

This is our firm's response to your Request for Comments dated January 9, 2004, regarding the proposed amendments (the "Proposed Amendments") to OSC Rule 61-501 and Companion Policy 61-501CP: *Insider Bids, Issuer Bids, Going Private Transactions and Related Party Transactions*.

We have not repeated the comments we made in our letter dated July 14, 2003 regarding a previous draft of the Proposed Amendments. Instead, we have limited our comments to new matters arising from the revised version.

The Proposed Amendments generally require minority approval for transactions which result in the termination of an equity security without the holder's consent, where there is a related party element to the transaction. The provisions address a policy concern that the related party might favour the business combination for reasons other than the consideration it is receiving for its equity securities. The Rule addresses this concern by requiring the transaction to be approved by a majority of disinterested shareholders. We do not disagree with this general

approach. Rather, our comments are directed at a concern that the Rule as amended will capture transactions which do not raise this policy concern.

In particular, we do not think there should be a policy concern where the related party has another interest in the transaction, but that other interest is not material to the related party. In fact, in the published responses of the Commission to the comments it received, the Commission notes the appropriateness of a materiality test:

> "In response to the comments regarding consideration that would be paid to a related party for debt or other non-equity securities as a consequence of the business combination, this consideration could cause the related party to favour the business combination for reasons other than the price that would be paid for the equity securities. Since the interests of the related party are not necessarily aligned with those of the general body of holders of equity securities in that circumstance, minority approval would be an appropriate requirement, *subject to the applicable materiality tests in the collateral benefit definition.*" [1]

However, although the Commission appears to embrace the general concept of a materiality test, the Proposed Amendments include a materiality test only where minority approval is triggered by the related party receiving a "collateral benefit" relating to his or her employment arrangements. In that case, no minority approval would be required if the value of the benefit is less than 5% of the value received by the related party for his or her equity securities, as determined by an independent committee acting in good faith.[2]

We propose the following three changes to the Proposed Amendments to expand the scope of that materiality test:

(i) A similar materiality threshold should be applied for all "collateral benefits". There is no particular reason in our view that the materiality test is relevant only where the collateral benefits relate to employment arrangements.

(ii) A materiality test should also be applied where the business combination becomes subject to minority approval because a related party is party to a "connected transaction". As we mentioned in our previous comments, "connected transaction" is defined very broadly in the proposed amendments and includes, for example, transactions which are completed at "approximately the same time" as the business combination. Because the scope is so broad, we think it is particularly important to have a materiality threshold before the mere existence of such a connected

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1 (2004) 27 O.S.C.B. 557. (emphasis added)

2 Subclause (c)(iv)(B)(II) of the definition of "collateral benefit" in section 1.1 of the Rule as amended by the Proposed Amendment.

transaction would trigger the approval requirement. In our previous comments we suggested that the proposed amendments require minority approval for a business combination only in those circumstances where the connected transaction would be a "related party transaction" for which the issuer would otherwise be required to obtain minority approval. The Commission rejected that suggestion on the basis that the policy requiring minority approval should override the principle of eliminating excessive regulatory burdens.[3] However, it may be that some lesser materiality threshold would still be appropriate — perhaps, as in the case of collateral benefits, minority approval should be required only where the value of the connected transaction to the related party exceeds 5% of the consideration which the related party is receiving for its equity securities.

(iii) We would also advocate that a materiality test apply where a related party receives consideration for non-equity securities. In fact, it was in that context that the Commission itself raised the concept of a materiality test.[4] We would go further, though, and suggest that even where the consideration exceeds that materiality threshold, it would not be appropriate to require minority approval if there are non-related parties who are receiving the same consideration as the related party, on a per security basis (this could arise, for example, where the securities consist of publicly held debt or preferred shares). In those cases, the fact that arm's length third parties will be receiving the same consideration for their non-equity securities, should provide comfort that the terms of those arrangements are commercial and fair.

We appreciate your considering these comments and would be pleased to discuss any aspect of our submission with you.

Yours sincerely,

Sharon Geraghty

SG/ko
Encl: Diskette with copy of letter

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[3] (2004) 27 O.S.C.B. 566.

[4] See note 1 above.