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Anne-Marie Beaudoin
Directrice du secrétariat
Autorité des marchés financiers
Tour de la Bourse
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Montréal QC H4Z 1G3

Dear Ms. Beaudoin:

Re: Proposed Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions.*

This submission is made by the Securities Law Subcommittee of the Business Law Section of the Ontario Bar Association (the “**OBA Subcommittee**”) to the Autorité des marchés financiers and the Ontario Securities Commission in reply to the request for comments published August 25, 2006 on proposed Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transaction* (“**MI 61-101**”).

We are providing our comments on proposed MI 61-101 in response to the specific questions raised in the request for comments, as well as with respect to an additional matter. Our comments are as follows:

1. Service Agreements with a Related Party

(a) We agree that if the additional categories of “related party transactions” in paragraphs (n) and (o) are included, these new categories of related party transactions should not be subject to the formal valuation requirements for the following reasons:

- (i) Any valuation of a services contract would need to be based on a number of assumptions with respect to termination and accordingly may not convey meaningful information.
- (ii) A meaningful valuation would require the valuation of the consideration paid to the service provider as well as the

valuation of the services rendered. Future services to be rendered may not, in many instances, be objectively valued.

- (iii) The information which is of relevance to a shareholder in considering a services contract with a related party is the amount payable to the related party (or by the related party) and a comparison of the compensation payable for similar services.
- (b) We submit that employment contracts with senior executives which are approved by the board of directors should be expressly excluded from the requirements of proposed MI 61-101 for the following reasons:
- (i) The value of an employment contract for an indefinite term will depend in large measure on the assumptions made for its term. Accordingly, a number of issuers with smaller market capitalizations may be unable to determine conclusively that the value of an employment contract, especially if it has an indefinite term, does not exceed 25% of the amount of capitalization of an issuer, notwithstanding that the annual compensation is not significant in relation to the capitalization of the issuer. In addition, assumptions made about discretionary bonuses will impact on the valuation.
 - (ii) Boards of directors have traditionally established processes involving compensation committees for the consideration of compensation matters. We do not believe that issues relating to compensation of senior officers should be the subject of related party rules (and possibly shareholder approval requirements) as these matters clearly fall within the scope of a board's discretion.
 - (iii) The disclosure regime for executive compensation is prescribed by rules and regulations relating to proxy circulars. An alternative disclosure regime as it applies to related party transactions would not necessarily enhance the nature of disclosure relating to the services to be provided by a "named executive officer".

2. *Prohibition against independent directors receiving special benefits.*

We agree with the stated policy objective of prohibiting the payment of "success fees" to independent directors. However, any such prohibition should not limit the ability of the board to compensate directors for fulfilling their obligations as members of a special committee.

The text of the proposed amendment to subsection 7.1(3) limits the prohibition to a "payment for completion of the transaction". In order to alleviate concerns that the phrase "payment for completion of the transaction" may be interpreted broadly to include any payment for services rendered in the context of a successful transaction (whether contingent on the success of the transaction or not), we suggest that the prohibition be limited to "payments contingent on the completion of the transaction".

3. *Other*

We note that the proposed MI 61-101 includes a change in the definition of the word "controlled" with the result that where a person is entitled to elect a majority of the directors of an entity, such entity would be considered to be a subsidiary of that person, notwithstanding that the person may not hold voting securities which carry 50% of the votes for the election of directors. We acknowledge that a similar definition appears in section 1.3 of National Instrument 45-106 *Prospectus Exempt Distribution*. The impact of the change in the definition is to introduce an element of possible uncertainty as to whether the definition of "control" is limited to "control in law" or may include "control in fact". The reason for the uncertainty is that a person may be entitled to elect a majority of directors, notwithstanding that it does not hold a majority of the votes attached to all shares outstanding, as long as it holds a majority of the votes represented at a meeting.

If the intent of the proposed definition is to limit its application to "control in law", the addition of the words "in all circumstances" after the words "second person" should be considered. In the alternative, the definition could simply remain unamended from OSC Rule 61-501, which definition is consistent with the definition of subsidiary in a number of statutes including the *Canada Business Corporations Act*, the *Business Corporations Act* (Ontario) and the *Securities Act* (Ontario).

The above is respectfully submitted by the Subcommittee.

The members of the Subcommittee are listed in the attached Appendix – Members of Securities Law Subcommittee. Please note that not all of the members of the Subcommittee participated in or reviewed this submission, and that the views expressed are not necessarily those of the firms and organizations represented by members of the Subcommittee.

Thank you for this opportunity to comment. If you have any questions, please direct them to Richard Lococo (richard_lococo@manulife.com, 416-926-6620), Janne Duncan (jduncan@tor.fasken.com, 416-868-3357), Aaron Atkinson (aatkinson@tor.fasken.com, 416-865-5492), Philippe Tardif (ptardif@blgcanada.com, 416-367-6060) or Ken Klassen (kklassen@dwpv.com, 416-863-5568).

Yours truly,

Securities Law Subcommittee
Business Law Section
Ontario Bar Association

Appendix

Members of Securities Law Subcommittee

Richard A. Lococo (Chair), *Manulife Financial*
Simon Archer, *Barrister & Solicitor*
Aaron J. Atkinson/Janne M. Duncan, *Fasken Martineau DuMoulin LLP*
Timothy S. Baikie, *Canadian Trading and Quotation System Inc.*
Justin Beber/Kenneth R. Wiener, *Goodmans LLP*
Mary Condon, *Osgoode Hall Law School*
Gil I. Cornblum, *Dorsey & Whitney LLP*
Anoop Dogra, *Blake, Cassels & Graydon LLP*
Eleanor K. Farrell (Secretary), *CPP Investment Board*
Paul J. Franco, *Heenan Blaikie LLP*
Matthew Graham, *TD Bank Financial Group*
Margaret I. Gunawan, *Barclays Global Investors Canada Limited*
Henry A. Harris, *Gowling Lafleur Henderson LLP*
Barbara J. Hendrickson, *McMillan Binch Mendelsohn LLP*
Michael D. Innes, *Osler, Hoskin & Harcourt LLP*
Glen R. Johnson/Cornell C.V. Wright, *Torys LLP*
William R. Johnstone/Kathleen Skerrett, *Gardiner Roberts LLP*
David R. Kerr/Kay Y. Song, *Manulife Financial*
Samir Y.A. Khan, *Russell Investments Canada Limited*
Steven R. Kim, *CIBC World Markets*
Kenneth G. Klassen/J. Alexander Moore, *Davies Ward Phillips & Vineberg LLP*
Walter C. Lehman, *OMERS*
Susan I. McCallum, *Barrister & Solicitor*
Caroline Mingfok/Richard Wyruch, *Rockwater Capital Corporation*
Brian L. Prill, *McLean & Kerr LLP*
Richard Raymer, *Hodgson Russ LLP*
Warren M. Rudick, *Mackenzie Financial*
Shea T. Small, *McCarthy Tétrault LLP*
Robert N. Spiegel, *Stikeman, Graham, Keeley & Spiegel LLP*
Philippe Tardif, *Borden Ladner Gervais LLP*
D. Grant Vingoe, *Arnold & Porter LLP*
Arlene D. Wolfe, *Feltmate Delibato Heagle LLPI*

Liaison:

Erez Blumberger, *Ontario Securities Commission*
Luana DiCandia/Julie K. Shin, *Toronto Stock Exchange*

