Fasken Martineau DuMoulin LLP
Barristers and Solicitors
Patent and Trade-mark Agents

66 Wellington Street West
Suite 4200, Toronto Dominion Bank Tower
Box 20, Toronto-Dominion Centre
Toronto, Ontario, Canada M5K 1N6

416 366 8381 Telephone
416 364 7813 Facsimile

www.fasken.com

November 23, 2006

VIA E-MAIL

AUTORITÉ DES MARCHÉS FINANCIERS
Tour de la Bourse
800, square Victoria
C.P. 246, 22e étage
Montreal QC H4Z 1G3

Attention: Anne-Marie Beaudoin, Directrice du secrétariat

– and to –

ONTARIO SECURITIES COMMISSION
20 Queen Street West
P.O. Box 55, Suite 1903
Toronto ON M5H 3S8

Attention: Naizam Kanji, Manager, Mergers & Acquisitions

Dear Sirs/Mesdames:

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

This letter responds to the request of the Ontario Securities Commission (the "**OSC**") and the Autorité des marchés financiers (the "**AMF**") for comments on proposed Multilateral Instrument 61-101 - *Protection of Minority Security Holders in Special Transactions* (the "**Proposed Instrument**").

Issues Concerning Proposed Provisions in the Proposed Instrument

Service Agreements with a Related Party

We agree that the addition of categories (n) and (o) to the definition of "related party transaction" should not be subject to the requirement that a formal valuation be obtained given the difficulty in valuing such arrangement; however, we believe that a board of directors is faced with similar difficulties in assessing whether such arrangements are exempt from the minority approval requirements. For example, it may be difficult for a board to conclude that such an arrangement entered into for an indefinite term has a value of less than 25% of the issuer's market capitalization. The issue is further complicated to

the extent that one or more of such arrangements are determined to be "connected transactions". Should the proposed amendments be adopted, we believe that boards of directors may be forced to retain the services of financial advisers in order to assist them in their valuation of such arrangements. As a result, substantial costs will then be borne by issuers, which costs are not necessary, on a policy point of view, especially with regard to arrangements negotiated between arm's-length parties. Based on the foregoing, it would be advisable to re-evaluate the appropriateness of adding the agreements to the definition of "related party transaction". If no changes are made to the Proposed Instrument on this issue, we believe it appropriate to re-evaluate whether additional exemptions from the minority approval requirement should be included. As an example, it might be appropriate for the board to conclude that the terms of such an arrangement are not inconsistent with similar arrangements in the industry in which the issuer operates and, in those circumstances, minority approval would not be required.

Finally, if no changes are made to the Proposed Instrument on this issue, all arrangements in force at the time the amendments are adopted should be excluded and grandfathered.

Prohibition Against Directors Receiving Special Benefits

We do not agree with the proposed changes in section 7.1(3) of the Proposed Instrument. In particular, provided that there is no arrangement, commitment or understanding to make any such payment at the time that the independent directors are fulfilling their mandate, then the independence of the directors should not be tainted. We believe that the concerns of the regulators could be addressed by prohibiting any such payments if they are contingent or otherwise conditional on completion of the transaction. In this way, the relationship of the directors' independence to compensation arrangements would be similar to the requirements applicable to the independence of a valuator preparing a formal valuation. Furthermore, for greater certainty, we believe that the term "benefit" should be defined to exclude a circumstance in which an independent director remains a director of the entity resulting of the transaction following completion of the transaction.

If no changes are made to the Proposed Instrument on this issue, we believe that an exemption should be included in circumstances where an independent director receives such a benefit and where the intention to grant such benefit was formed after completion of the transaction, based on the criteria in paragraph (C) of the definition of "collateral benefit" other than the condition of sub-paragraph (iii) since the proposed amendment concerns payment of a benefit for which the intention was not formed before the transaction closed. As such, it seems impractical to require the disclosure of such benefit in the disclosure document for the transaction.

De Minimis Exemption – Beneficial Ownership Approach

We do not believe that it is advisable to use the beneficial ownership approach to the *de minimis* exemption in sections 4.1(c) and 5.1(c). It is very laborious and in many cases impossible to obtain such beneficial ownership information, particularly with respect to foreign companies. In many jurisdictions, only the registered securities holders list may be obtained (i.e. United Kingdom).

Where it is not feasible to access beneficial ownership information of the issuer, including in circumstances where the issuer is a foreign issuer, issuers should be able to determine if the exemption is available based on the registered holders.

Issues Concerning Substantive Provisions in Existing OSC Rule 61-501

In addition to our comments on the provisions of the Proposed Instrument which differ from OSC Rule 61-501, being the rule on which the Proposed Instrument is modelled, we have set out below our comments with respect to existing provisions within OSC Rule 61-501 which are incorporated into the Proposed Instrument.

Prior Valuations

We understand that due to recent accounting changes, a number of issuers have been required to obtain valuations of certain material assets, including entire divisions in some circumstances, in order to determine whether the issuer's goodwill is impaired and should consequently be written down. It would appear that such a valuation could be a "prior valuation" based on the current definition. We ask that you consider amending the definition of "prior valuation" to include an exemption for a valuation obtained primarily for purposes of determining whether the issuer's goodwill has been impaired. We believe that such an exemption is appropriate, given that the conclusions reached in the valuation will be reflected in the issuer's financial statements, if, and to the extent that, goodwill has been impaired, and it the valuation concludes that goodwill has not been impaired, then that absence of impairment will also be reflected in the issuer's financial statements.

Related Party Transaction - Joint Sales

We understand that paragraph (d) of the definition of "related party transaction", which relates to joint sales is difficult to apply in practice given that, among other things, it relates to the joint sale of "an asset". As a result, in the context of the joint sale of a business, this definition appears to require an evaluation as to whether the related party has received its proportionate share of the consideration for each individual asset of the business rather than an evaluation of the aggregate assets sold and the aggregate purchase

price. Accordingly, it would be appropriate to include a concept of a sale of assets "or a group of related assets" in the definition to clarify this issue. We also believe it would be helpful for the regulators to include some guidance in the companion policy as to how an issuer is to evaluate the consideration received, particularly in circumstances where the consideration paid to the various sellers may take different forms or where a portion of the purchase price is held back subject to the satisfaction of certain conditions.

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We trust that the foregoing will be given due consideration by staff of the OSC and the AMF. We would be pleased to discuss the foregoing with you in greater detail. In that regard, please do not hesitate to contact the undersigned.

Yours truly,

FASKEN MARTINEAU DuMOULIN LLP

(signed) Aaron Atkinson
Aaron Atkinson

(signed) Catherine Isabelle
Catherine Isabelle

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