FRASER MILNER CASGRAIN LLP

November 23, 2006

Autorité des marchés financiers
Ontario Securities Commission

Dear Sirs/Mesdames:

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

We are pleased to have the opportunity to comment on proposed Multilateral Instrument 61-101 (the "Instrument") in response to your Request for Comments dated August 25, 2006.

General

1. We urge you in the strongest terms to bring the Instrument into effect at the earliest possible time, even if this necessitates making adjustments to the draft to reflect the fact that proposed National Instrument 62-104 is not yet in effect. Since the commendable decision has now been made to unite OSC Rule 61-501 and AMF Regulation Q-27, there is no justification for prolonging the inconsistencies between the two instruments and the unnecessary regulatory burden this entails. When National Instrument 62-104 is ready to come into force in its final form, consequential amendments to the Instrument could readily be made at that time.

Section 1.1

2. The proposed changes to the definition of "beneficially owns" need to be adjusted in our view. The words "of a security holder" may be confusing to readers who are not experienced with the Instrument and its predecessors, because the security holder appears to be the object of the ownership, rather than the securities. This could be addressed by changing "of" to "by", but in light of the other changes to the definition that we are recommending below, we suggest eliminating the words "of a security holder".

3. Paragraph (a) of the definition of "beneficially owns" does not recognize the fact that subsections 1(5) and 1(6) of the Ontario *Securities Act* would produce undesirable results when applied to the Instrument. For example, those provisions would make a subsidiary the deemed owner of securities held by its parent, which would cause the subsidiary to be deemed to control its sister companies and even its own parent company that was in turn controlled by another parent company. This would make a number of provisions of the

Instrument unworkable, including the concept of a "downstream transaction". One way to address this would be to change the proposed definition of "beneficially owns" to the following:

> "beneficially owns" includes direct or indirect ownership, and
>
> (a) a person is deemed to beneficially own securities that are beneficially owned by its subsidiary entity,
>
> (b) despite any other provision of securities legislation, a person is not deemed to beneficially own securities that are beneficially owned by its affiliated entity that is not its subsidiary entity, and
>
> (c) [same as proposed (b)].

4. In the definition of "CBCA", "Canada Business Corporations Act" should be italicized as in the definition of "OBCA".

5. In definition of "issuer insider" in the clean version of the draft, paragraph (c) is designated as "(d)", and the last two lines are not properly aligned under the subparagraphs.

6. In the definition of "related party", the proposed exclusion of a bona fide lender does not operate properly because it would allow persons who meet the description of a related party in paragraph (b), (c), (f), (g) or (h) of the definition to avoid being considered a related party by <u>also</u> being a bona fide lender. One way to address this problem would be to delete the first seven words of paragraph (a) in the definition of "bona fide lender" and replace them with "meets the description of one or more lettered paragraphs in the definition of related party".

7. Paragraphs (n) and (o) in the definition of "related party transaction" are, in our view, unworkable in the context of the 25% of market capitalization exemption as drafted, and should either be deleted or accompanied by a detailed description in the Instrument as to how the 25% exemption applies to them. For example, the Instrument could provide that, for transactions described in paragraphs (n) and (o), the 25% exemption applies if the issuer reasonably believes that the consideration for the services will not exceed 25% of the issuer's current market capitalization over the three-year period commencing with the first payment. (If this type of approach is taken, we would also suggest clarifying in the Companion Policy that paragraphs (n) and (o) only apply if the person providing or receiving the services is a related party at the time of the determination of the terms of the services arrangement, not if the person becomes a related party only as a result of or in connection with the services arrangement.) However, any formula may be difficult to apply in practice and lend itself to avoidance techniques. In our view, the better course of action would be to address the subject of services involving related parties as part of a separate instrument (or a future separate part of this Instrument) that expands on the existing regulatory regime for disclosure of related party transactions generally.

Removal of Section 1.6 of Current OSC Rule 61-501

8. It is unclear to us why section 1.6 of current OSC Rule 61-501 is no longer required, unless certain relevant provisions of the Ontario *Securities Act* will be amended prior to the Instrument coming into force. In particular, section 1.6 appears to be necessary in light of subsection 1(1.1) of the *Securities Act* in combination with paragraph 28 of subsection 143(1), especially to ensure that the OSC has rule-making authority over business combinations.

Section 2.4

9. In clause (1)(c)(ii)(A), "securityholder" should be two words, as in the rest of the Instrument.

Section 4.1

10. In subparagraph (c)(i), "a" should be changed to "the", as in subparagraph (c)(ii).

Section 4.4

11. In the introductory words to paragraph (1)(g), consideration might be given to removing "or a wholly-owned subsidiary of the issuer", since if only a wholly-owned subsidiary undergoes a combination, and not the issuer itself, the transaction will not be a business combination.

Section 5.1

12. In subparagraph (c)(i), "a" should be changed to "the", as in subparagraph (c)(ii).

Section 7.1

13. We question the removal of "Subject to subsections (2) and (3)" in subsection (1). The Instrument should make it clear that subsections (2) and (3) qualify subsection (1). If, for example, an issuer determines that a particular director is capable of exercising independent judgment in connection with a transaction despite meeting the description in subsection (2), then subsection (1) will be in conflict with subsection (2). The current wording clarifies that this conflict must be resolved by designating those directors as not independent, and in our view this should continue to be the case.

14. We have some difficulty with the drafting of proposed subsection (3), and we recommend that the subject of post-closing compensation be addressed in a somewhat different manner. A post-closing prohibition should apply only to members of the independent committee, not to independent directors generally. Otherwise, an anomalous situation would be created in which directors who were not on the independent committee but who qualified as independent under subsection (2) would be subject to the prohibition in subsection (3), but directors who did not qualify as independent would not be subject to the prohibition. In addition, a prohibition that is open-ended in terms of type of benefit

and time period is, in our view, too far-reaching. For example, it may be in the best interest of the successor issuer to hire a member of the independent committee as an employee at some point in the future even though the hiring would technically occur "as a consequence of the transaction". We recommend that the prohibition focus on preventing a situation where independent committee members could reasonably be perceived to be paid a reward for the completion of the transaction, even if the decision to pay the reward is made post-closing. One way to accomplish this would be to leave paragraph (e) as it is currently, and add the following or similar wording as subsection (4):

> (4) A member of an independent committee for a transaction to which this Instrument applies shall not receive any payment or other benefit from the issuer, an interested party or a successor to any of them by reason of the completion of the transaction.

Section 9.1

15. In subsection (2), we suggest changing the last words commencing with "to this Instrument,..." to "referred to in subsection (1)".

Companion Policy – Section 1.1

16. In the last sentence, we suggest changing "view" to "views".

Thank you for considering these comments. If you wish to discuss any of them, please contact Ralph Shay at 416-863-4419 or ralph.shay@fmc-law.com.

Yours truly,

FRASER MILNER CASGRAIN LLP