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December 22, 2005

Headnote

Mutual Reliance Review System for Exemptive Relief Applications - Securities Act s. 114(2) Takeover Bids - Exemption from the formal take over bid requirements in Part 13 of the Act - Issuer requires relief from prohibition against certain collateral agreements in s. 107(2) of the Act - The offeror issuer has entered into a collateral agreement with a shareholder of the offeree issuer; the agreement is entered into for valid business reasons, and not for the purpose of providing the shareholder with a benefit beyond what other shareholders of the offeree issuer will receive under the offer

Applicable British Columbia Provisions

Securities Act, R.S.B.C. 1996, c. 418, ss. 107(2), 114(2)(a)

In the Matter of
the Securities Legislation
of British Columbia, Alberta, Saskatchewan, Manitoba Ontario, Quebec, New
Brunswick, Nova Scotia and Newfoundland and Labrador (the Jurisdictions)

and

In the Matter of
the Mutual Reliance Review System for Exemptive Relief Applications

and

In the Matter of Industrial Alliance Insurance and Financial Services
(Offeror and Filer)
and
Clarington Corporation (Clarington)

MRRS Decision Document

Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filer for a decision pursuant to the securities legislation of the Jurisdictions (the Legislation) that, in connection with an offer dated November 18, 2005, as amended by a notice of variation dated December 5, 2005, by the Offeror to acquire all of the issued and outstanding common shares of Clarington, other than any common shares of Clarington owned directly or indirectly by the Offeror, and including common shares that may become issued and outstanding after the date of the offer upon the

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conversion, exchange or exercise of any securities of Clarington that are convertible into or exchangeable or exercisable for common shares, the Proposed Employment Arrangements (as defined below) entered into between the Offeror and Terence B. Stone, Adrian J. Brouwers and Salvatore Tino, who are all senior officers of Clarington, have been entered into for reasons other than to increase the value of the consideration paid to such senior officers for their respective common shares of Clarington and may be entered into despite the provision in the Legislation that prohibits an offeror who makes or intends to make a take-over bid and any person acting jointly or in concert with the offeror from entering into any collateral agreement, commitment or understanding with any holder or beneficial owner of securities of the offeree issuer that has the effect of providing to the holder or owner a consideration of greater value than that offered to other holders of the same class of securities (the Requested Relief);

Under the Mutual Reliance Review System for Exemptive Relief Applications

- (a) the Ontario Securities Commission is the principal regulator for this application, and
- (b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

Defined terms contained in National Instrument 14-101 Definitions have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Filer:

1. The Offeror is a corporation continued under Part 1A of the *Companies Act* (Québec) with its registered office located in Sillery, Québec.
2. The Offeror is a life and health insurance company.
3. The Offeror is a reporting issuer or the equivalent in all provinces of Canada and its common shares are listed for trading on the Toronto Stock Exchange (the TSX) under the symbol “IAG”.
4. Clarington is a corporation existing under the *Business Corporations Act* (Ontario) (the OBCA).
5. Clarington is an independent wealth management company and through its wholly-owned subsidiaries, ClaringtonFunds Inc. (ClaringtonFunds) and Clarington Investments Inc., promotes, manages and distributes mutual funds and closed-end funds.

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6. The Clarington Shares are listed on the TSX under the symbol “CFI”.
7. The authorized capital of Clarington consists of an unlimited number of Clarington Shares. According to Clarington, as at November 17, 2005, 13,242,690 Clarington Shares and options to acquire 1,555,550 Clarington Shares were issued and outstanding, which on a fully diluted basis would represent 14,798,240 Clarington Shares.
8. Clarington is a reporting issuer or the equivalent in all provinces and territories of Canada.
9. Pursuant to the Offer and the take-over bid circular (the Take-over Bid Circular) dated November 18, 2005, the Offeror proposes to acquire all of the issued and outstanding Clarington Shares, other than any Clarington Shares owned, directly or indirectly, by the Offeror, and Clarington Shares that may become issued and outstanding after the date of the Offer upon the conversion, exchange or exercise of any securities of Clarington that are convertible into or exchangeable or exercisable for Clarington Shares.
10. The Offer was mailed to registered shareholders of Clarington on November 20, 2005.
11. Pursuant to a notice of variation dated and mailed December 5, 2005 (the Notice of Variation), the Offeror amended the Offer by increasing the consideration payable under the Offer to \$15.00 from \$14.25 per Clarington Share (the Amended Offer).
12. The Amended Offer is made on the basis of, at the election of the holders of Clarington Shares (the Shareholders): (a) \$15.00 in cash in respect of each Clarington Share held; or (b) that fraction of one common share of the Offeror (the Offeror Shares) as is equal to the Exchange Ratio (as hereinafter defined), in respect of each Clarington Share held, or a combination of the foregoing. The Amended Offer is subject to conditions that are customary for transactions of this nature, including that all regulatory approvals be obtained and there be validly deposited under the Amended Offer and not withdrawn at the expiry time of the Amended Offer such number of Clarington Shares, which together with any Clarington Shares owned, directly or indirectly, by the Offeror, constitutes at least 66 2/3% of the Clarington Shares then outstanding as at the expiry time. For purposes of the Amended Offer the “Exchange Ratio” is defined as, subject to adjustment in certain circumstances as described in the Amended Offer the number, calculated to four decimal places, equal to the ascribed Amended Offer price of \$15.00 per Clarington

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Share divided by that number that is equal to the volume weighted average closing price of the Offeror Shares on the TSX over the five (5) business days ending one business day prior to the initial expiry date of the Amended Offer.

13. If the Offeror takes up and pays for less than 90% but not less than 66 2/3% of the Clarington Shares (excluding Clarington Shares held at the date of the Offer by or on behalf of the Offeror or its associates and affiliates) but is unable to rely on the compulsory acquisition provisions under the OBCA, the Offeror currently intends to propose an amalgamation, statutory arrangement, amendment to articles, consolidation, capital reorganization or other transaction involving Clarington and the Offeror, or an affiliate of the Offeror, that would constitute a business combination under OSC Rule 61-501 and a going-private transaction under Regulation Q-27 of the Autorité des marchés financiers.
14. On November 6, 2005, the Offeror and certain Shareholders, including the Officers, (collectively, the Locked-Up Parties) entered into agreements (the Lock-Up Agreements) pursuant to which, among other things, the Locked-Up Parties agreed to deposit pursuant to the Offer and not withdraw, except under certain conditions provided for in the Lock-Up Agreements, 3,370,512 Clarington Shares, representing approximately 25% of the outstanding Clarington Shares exclusive of the Clarington Shares held by the Offeror.
15. On November 6, 2005, the Offeror and Clarington entered into an agreement (the Support Agreement) pursuant to which, among other things, the Offeror agreed to make the Offer on certain terms and conditions. The Support Agreement included certain representations and warranties of Clarington, including that its board of directors had determined that it would be advisable and in the best interests of Clarington that the board recommend acceptance of the Offer to Shareholders and for Clarington to co-operate with the Offeror in connection with the Offer and take all reasonable actions to support the Offer.
16. Stone is the Chairman and a director of Clarington.
17. Stone holds, directly and indirectly, or exercises control or direction over 1,527,011 Clarington Shares, representing approximately 10.3% of the issued and outstanding Clarington Shares (on a fully-diluted basis). Stone also currently holds options to purchase 233,000 Clarington Shares, pursuant to the Clarington stock option incentive plan (the Clarington Stock Option Plan), all of which may be exercised at a price that is less than the offer price. If such options were exercised in full, and taking into account his existing holdings or Clarington Shares over which he exercises control or direction, Stone would hold, directly or indirectly, or exercise control or direction over an aggregate

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of approximately 11.89% of the issued and outstanding Clarington Shares (on a fully-diluted basis).

18. Brouwers is President, Chief Executive Officer and a director of Clarington.
19. Brouwers holds, directly and indirectly, or exercises control or direction over 360,965 Clarington Shares, representing approximately 2.4% of the issued and outstanding Clarington Shares (on a fully-diluted basis). Brouwers also currently holds options to purchase 233,000 Clarington Shares pursuant to the Clarington Stock Option Plan, all of which may be exercised at a price that is less than the offer price. If such options were exercised in full, and taking into account his existing holdings or Clarington Shares over which he exercises control or direction, Brouwers would hold, directly or indirectly, or exercise control or direction over an aggregate of approximately 4.01% of the issued and outstanding Clarington Shares (on a fully-diluted basis).
20. Tino is Executive Vice-President and Chief Financial Officer of Clarington.
21. Tino holds, directly and indirectly, or exercises control or direction over 367,851 Clarington Shares, representing approximately 2.5% of the issued and outstanding Clarington Shares (on a fully-diluted basis). Tino also currently holds options to purchase 233,000 Clarington Shares pursuant to the Clarington Stock Option Plan, all of which may be exercised at a price that is less than the offer price. If such options were exercised in full, and taking into account his existing holdings or Clarington Shares over which he exercises control or direction, Tino would hold, directly or indirectly, or exercise control or direction over an aggregate of approximately 4.06% of the issued and outstanding Clarington Shares (on a fully-diluted basis).
22. ClaringtonFunds currently has employment agreements (the Existing Employment Agreements) with each of the Officers, that provide for, among other things, termination and non-competition and non-solicitation provisions. The terms and conditions of the Existing Employment Agreements are generally typical of agreements with similarly situated senior officers of companies with comparable businesses to Clarington.
23. The Existing Employment Agreements are for an indefinite term and can be terminated for cause or without cause. In the event of termination for cause, no payment in lieu of notice, severance payments, benefits, damages or any sums whatsoever with the exception of payment for services rendered or expenses incurred prior to its date of termination, will be required after the date of termination. In the event of termination by ClaringtonFunds without cause, the respective Officer would be entitled to receive his then current base

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salary, bonus and all benefits, all indexed for inflation, for a period of 36 months from the date the termination is effective.

24. The Existing Employment Agreements provide that each of the Officers may resign from their employment on three months' written notice. In such case, the Officer is not entitled to any salary, bonus or benefits after the date of termination, except to the extent such remuneration relates to the performed services or expenses incurred prior to the date of termination.
25. The Existing Employment Agreements also provide for non-competition and non-solicitation provisions, which shall be effective for a period of 12 months immediately following termination of the Employment Agreement.
26. The annual salaries currently paid under the Existing Employment Agreements to Stone, Brouwers and Tino are \$356,000, \$350,000 and \$350,000, respectively, in addition to benefits. The Officers are also eligible to receive payments related to Clarington's bonus pool and participate in the Clarington Stock Option Plan. Clarington advises that, during the quarter ended June 30, 2005, its Compensation Committee determined that each of Messrs. Stone, Brouwers and Tino would be eligible to receive a maximum bonus of \$75,000 in respect of the year ended September 30, 2005. To date, \$19,000 of this amount has been awarded and paid to each, and Clarington further advises that given Clarington's performance for the year ended September 30, 2005 and Clarington's past practices, it is anticipated that the full amount of the bonus will be paid to each.
27. The Offeror entered into certain amended arrangements (the Proposed Employment Arrangements) dated November 6, 2005 with the Officers, the principal terms of which are set forth below. The Proposed Employment Arrangements will commence upon successful completion of the Offer.
28. The Proposed Employment Arrangements provide that the Existing Employment Agreements will remain substantially the same as the current agreements, subject to the following exceptions:
 - (a) Stone will become the Vice-Chairman of ClaringtonFunds and Brouwers will become the Vice-Chairman and Executive Vice President of Sales and Marketing of ClaringtonFunds;
 - (b) Stone and Brouwers will report to the Chairman of the Board of Clarington and Tino will report to the President of Industrial Alliance Fund Management Inc. who will become the President of Clarington upon successful completion of the Offer.

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- (c) upon the termination without cause of the Officers, as the case may be, such person shall be entitled to receive his then current base salary, bonus and all benefits, all indexed annually for inflation, for a period of 36 months from the date of termination, provided that such payments to that person shall not exceed an aggregate maximum value of \$1.5 million. Under the Existing Employment Agreements, each of the Officers are entitled to receive the same amounts for a period of 36 months, but are not subject to a maximum amount;
- (d) each of the Officers may resign from their respective employment within the first 18 months of the effective date of the Offer (the “Initial Period”) on six months written notice and thereafter on three months written notice. Under the Existing Employment Agreements, each of the Officers must only provide ClaringtonFunds with three months written notice. In the event that an Officer elects to terminate his employment within the Initial Period, he shall not be entitled to receive any salary, bonus or benefits after the date of termination, except to the extent that such remuneration relates to services performed or expenses incurred prior to the date of termination. In the event that an Officer elects to terminate his employment at any time after the Initial Period, then he shall be entitled to receive his then current base salary, bonus and all benefits for a period of twelve months from the date of termination, provided that such payments shall not exceed an aggregate maximum value of \$500,000. Under the Existing Employment Agreements, the Officers are not entitled to any compensation if they elect to terminate their respective employment, except to the extent that such remuneration relates to services performed or expenses incurred prior to the date of termination;
- (e) the Officers shall not, during the term of their respective employment and until the later of 24 months following the effective date of the Offer or 12 months after the date of termination of their respective employment by any party for any reason, within Canada, engage in any business that is similar to or competitive with the business of ClaringtonFunds. Under the Existing Employment Agreements, the Officers must not compete with ClaringtonFunds for a period of 12 months following the termination of their respective employment; and
- (f) for a period of 24 months after the termination of their respective employment, the respective employee shall not contact any dealer who is engaged in the sale of mutual funds for the purpose of soliciting business away from ClaringtonFunds, or solicit or induce any individual who is at such time an employee of ClaringtonFunds to leave ClaringtonFunds for

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any reason whatsoever, or hire or attempt to hire any individual who is at such time an employee of ClaringtonFunds. Under the Existing Employment Agreements, the Officers have each covenanted to not solicit business or employees from ClaringtonFunds for a period of 12 months following termination of employment.

29. The Officers have assembled a management and administrative team at Clarington based in large part upon their collective long-standing relationships in the Canadian mutual fund industry. It is through their bond with the Officers that many of these team members have joined Clarington and continued on in that capacity. In order to maintain continuity of management and retain the employee work force, it is essential to the Offeror that the Officers be motivated to stay on following the successful completion of the Offer to facilitate the integration of Clarington with the Offeror's mutual fund operations.
30. The severance provisions in the Proposed Employment Arrangements are premised, in part, upon recognition of the fact that each of the Officers faces a diminution in his role following the successful completion of the Offer, be it a narrowing of title and position or the imposition of a reporting requirement which previously did not exist. These changes could constitute the basis of a claim of constructive dismissal which, under the terms of the Existing Employment Agreements, could have entitled the Officers to 36 months' compensation (i.e. current base salary, bonus and all benefits, all indexed for inflation). In this respect, the severance arrangements in the Proposed Employment Arrangements reflect not only consideration to offset these changes, which could otherwise constitute a constructive dismissal but also a reduction from the damages that would be awarded if the Officers were to successfully argue that they had been constructively dismissed.
31. The severance provisions for the Officers are commensurate with the entitlements of similarly situated executives in the Canadian mutual fund industry.
32. The Proposed Employment Arrangements include a non-competition covenant which could extend well beyond the term of the non-competition covenant under the Existing Employment Agreement. The severance arrangements under the Proposed Employment Arrangements reflect a significant measure of compensation for the extended term of the non-competition covenant, such extended term representing an additional burden to each of the Officers not in the Existing Employment Arrangements.

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33. The Proposed Employment Arrangements were negotiated at arm's length and are on terms and conditions that are commercially reasonable.
34. Full particulars of the material terms of the Proposed Employment Arrangements were disclosed in the Take-over Bid Circular and the Directors' Circular dated December 6, 2005.
35. The Proposed Employment Arrangements are proposed to be entered into for valid business reasons unrelated to the Officers' holdings of Clarington Shares. The Proposed Employment Arrangements are not being entered into for the purpose of conferring an economic or collateral benefit on the Officers, in their capacity as Shareholders, that other Shareholders do not enjoy.
36. The receipt by each of the Officers of the Proposed Employment Arrangements is not conditional upon their support of the Offer.
37. The board of directors of Clarington has informed the Offeror that the independent committee of the board of directors of Clarington has determined that the value of the benefits to be received by each of the Officers under the Proposed Employment Arrangements, net of any offsetting costs to the respective Officer, being the value of the obligations of the Officers under the Proposed Employment Agreements, is less than five percent of the expected value to be received by each of the Officers as consideration for tendering their respective Common Shares to the Offer. Accordingly, on this basis, the value of the benefits to be received by each of the Officers under the Proposed Employment Arrangements is not a "collateral benefit" within the meaning of Section 1.1 of OSC Rule 61-501.

Decision

Each of the relevant Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted.

Paul M. Moore
Commissioner
Ontario Securities Commission

Susan Wolburgh Jenah
Commissioner
Ontario Securities Commission