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June 11, 2007

## **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  
Ontario, Alberta, British Columbia, Manitoba, New Brunswick, Nova Scotia,  
Newfoundland & Labrador, Quebec and Saskatchewan  
(the Jurisdictions)

and

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

and

In the Matter of  
New World Gaming Partners Ltd. and Gateway Casinos Income Fund

## **MRRS Decision Document**

## **Background**

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from New World Gaming Partners Ltd. (the Offeror) for a decision under the securities legislation of the Jurisdictions (the Legislation) that, in connection with the Offeror's offer (the Offer) to purchase all of the issued and outstanding units (the Units) of Gateway Casinos Income Fund (the Fund) and all of the issued and outstanding convertible debentures (the Convertible Debentures) of the Fund, the GCI Purchase Agreement (as defined below) and the SOF Purchase Agreement (as defined

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below) have been made for reasons other than to increase the value of the consideration paid to the GCI Unitholders (as defined below) and Gateway Langley (as defined below) and may be entered into despite the provisions of the Legislation that prohibit an offeror who makes or intends to make a take-over bid 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 Collateral Benefit Prohibition Relief).

The Decision Makers in each of the Province of Ontario and the Province of Quebec have received an application from the Offeror for a decision under the Legislation of such Provinces that the provisions of the Legislation of such Provinces that require:

- (i) a Compulsory Acquisition (as defined below) or Subsequent Acquisition Transaction (as defined below), as applicable, to be approved at a meeting of the holders (the Unitholders) of Units; and
- (ii) an information circular to be sent to Unitholders in connection with either the Compulsory Acquisition or the Subsequent Acquisition Transaction, as applicable;

be waived (the Second Step Transaction Relief).

Under the Mutual Reliance Review System for Exemptive Relief Applications:

- (a) the Ontario Securities Commission (the OSC) 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 Offeror:

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### *The Offeror and the Parents*

1. The Offeror is a corporation governed by the *Canada Business Corporations Act*. The Offeror's head office is located at 100 Wellington Street West, Canadian Pacific Tower, TD Centre Suite 2200, Toronto, Ontario. The Offeror is not a reporting issuer in any jurisdiction.
2. The Offeror is indirectly owned as to 50% by each of Macquarie European Investments Pty Ltd. and Publishing and Broadcasting Limited (the Parents). Macquarie European Investments Pty Ltd. is a corporation governed by the laws of Australia and is an affiliate of Macquarie Bank Limited, a publicly listed investment bank governed by the laws of Australia. Publishing and Broadcasting Limited is a publicly listed corporation governed by the laws of Australia.
3. Neither the Offeror nor the Parents beneficially own any Units and have no current intention of acquiring any Units, other than pursuant to the Offer (as defined below), prior to the expiry date of the Offer.
4. The Offeror and the Parents are entirely at arm's length with and have no interest in, and no agreement, commitment or understanding with, the GCI Unitholders, GCI or Gateway Langley (each as defined below) with respect to any matter whatsoever other than the GCI Purchase Agreement, the SOF Purchase Agreement and the Lock-Up Agreements (as defined below).

### *The Fund*

5. The Fund is an unincorporated, open-ended limited purpose trust established under the laws of the Province of British Columbia by an amended and restated declaration of trust made as of November 14, 2002 (the Declaration of Trust). The Fund's head office is located at Suite 210, 4240 Manor Street, Burnaby, British Columbia. The Fund is a reporting issuer in each of the Jurisdictions.
6. The authorized capital of the Fund consists of an unlimited number of Units of which 32,036,303 are issued and outstanding as of May 8, 2007. The Convertible Debentures consist of \$35,000,000 principal amount of 5.35% convertible extendible unsecured subordinated debentures issued by the Fund on April 25, 2006.
7. The Units and the Convertible Debentures are listed and posted for trading on the Toronto Stock Exchange. The Units and the Convertible Debentures are

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held by CDS Clearing and Depository Services Inc. (CDS) in book-entry only form.

### *GCI Unitholders*

8. No. 306 Cathedral Ventures Ltd., 1262613 Ontario Limited, Spottswode Ventures Inc., No. 316 Cathedral Ventures Ltd., 630025 B.C. Ltd., No. 336 Cathedral Ventures Ltd., No. 326 Cathedral Ventures Ltd., Templar Ventures Ltd., 1428180 Ontario Ltd., 570108 B.C. Ltd., Tocher Holdings Ltd., Knight Ventures Ltd., Maxmillian Ventures Ltd., Nairbo Investments Ltd., Trian Equities Ltd. and Kieren Ventures Ltd. (the GCI Unitholders) and Gateway Langley Holdings Ltd. (Gateway Langley), a subsidiary of GCI (as defined below), collectively hold approximately 31.4% of the issued and outstanding Units on a fully diluted basis.
9. Trustees and officers of the Fund or their respective associates beneficially own or exercise control or direction over certain of the GCI Unitholders who own, in the aggregate, approximately 29.86% of the outstanding Units on a fully diluted basis.

### *Gateway Casinos Inc.*

10. Gateway Casinos Inc. (GCI) is a corporation governed by the *Canada Business Corporations Act*. The head office of GCI is located at Suite 210, 4240 Manor Street, Burnaby, British Columbia. GCI is not a reporting issuer in any jurisdiction. 100% of the issued and outstanding shares of GCI are owned directly or indirectly by the GCI Unitholders or their affiliates.
11. GCI owns all of the issued and outstanding shares of:
  - (a) Gateway Casinos Alberta Ltd. (the Gateway Alberta Shares);
  - (b) GC Parking Ltd. (the GC Parking Shares); and
  - (c) Gateway Langley.

### *Star of Fortune Gaming Management (B.C.) Corp.*

12. Star of Fortune Gaming Management (B.C.) Corp. (Star of Fortune) is a corporation governed by the *Business Corporations Act* (British Columbia). The head office of Star of Fortune is located at Suite 1908, 925 West Georgia Street, Vancouver, British Columbia. Star of Fortune is not a reporting issuer in any jurisdiction. 50% of the issued and outstanding shares of Star of

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Fortune are owned directly or indirectly by the GCI Unitholders or their affiliates. 50% of the issued and outstanding shares of Star of Fortune are owned directly or indirectly by third parties who are unrelated to the Fund, GCI, the GCI Unitholders or their respective affiliates.

### *The Auction*

13. Beginning in October 2006, the board of trustees of the Fund (the Trustees), in conjunction with the Fund's external advisors, commenced a detailed strategic alternative review process with the aim of creating and enhancing Unitholder value. As part of this process, the Fund and CIBC World Markets (CIBC WM) conducted an auction process (the Auction), which included among other things, contacting and following up with a number of key industry and financial participants considered to have the capacity and potential to purchase the Fund.
14. In connection with the Auction, the Fund established a special committee of Trustees (the Special Committee) (who are independent of the Fund's management, GCI, the GCI Unitholders and Gateway Langley) to review, consider and evaluate the strategic alternatives available to the Fund, to review any transaction proposals submitted as a part of the Auction and to make recommendations to the Board of Trustees. The Special Committee was also mandated to review any issues that may have arisen as a result of the involvement of GCI and the GCI Unitholders in any combined sale of the Fund, GCI and Star of Fortune.
15. The Special Committee engaged its own independent legal advisors and financial advisors in order to assist it in making its recommendations. In particular, RBC Dominion Securities Inc. (RBCDS) was retained by the Special Committee to deliver an opinion as to the fairness, from a financial point of view, of the consideration to be received by the Fund or its Unitholders, other than the "GCI Group" (which was defined to include, among others, the GCI Unitholders and Gateway Langley), under a potential transaction involving the sale of the Fund.
16. In November 2006, the Special Committee approved the proposed process of obtaining separate but concurrent bids for the Fund and for the assets of each of GCI and Star of Fortune. This process included a request to bidders to make bids for the Fund unconditional on the acquisition of the assets of GCI. After receiving the views of the Special Committee, the Fund determined that a concurrent auction process involving the Fund, GCI and Star of Fortune would maximize value for Unitholders.

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17. The Fund also expressed a preference to all Auction participants for a take-over bid structure, as opposed to other acquisition structures, due to simplicity and for tax efficiencies in favour of all Unitholders.
18. On March 26, 2007, the Fund received four binding and fully financed offers, including the offer submitted by the Offeror. Each of the four offers allocated separate purchase prices for each of the Units, the assets of GCI and the shares of Star of Fortune. The Trustees, after receiving input from CIBC WM, the Fund's legal advisors and the Special Committee and its legal advisors and financial advisors, determined that the final proposal from the Offeror was the superior transaction proposal and provided the most compelling and highest price for Unitholders. The final proposal from the Offeror was also the highest offer for the GCI assets and the shares of Star of Fortune on a combined basis. The Offeror has been advised by the Fund that the proportion of the aggregate purchase price allocated by the Offeror for the assets of GCI and the shares of Star of Fortune, on a combined basis, is consistent with the amounts allocated by the other bidders for such assets and shares in proportion to the aggregate purchase price offered by such other bidders.
19. On April 3, 2007, RBCDS issued its fairness opinions (the Fairness Opinions) that the consideration per Unit offered pursuant to the Offer is fair, from a financial point of view, to the Unitholders other than the GCI Group and that the consideration offered for the Convertible Debentures is fair, from a financial point of view, to the Debentureholders.
20. On April 3, 2007, the Special Committee unanimously recommended to the Trustees, and the Trustees unanimously selected, the Offeror's proposal as both the highest and most compelling of the four transaction proposals received. In addition to the purchase price, the Fund considered a number of other factors associated with the Offer which it viewed as compelling, including, among others, (i) the fact that one of the Parents, Publishing and Broadcasting Limited, is a sophisticated and experienced gaming operator; (ii) the nature of the guarantee provided by the Parents in the Support Agreement (defined below) and the deal certainty that this guarantee provided; (iii) the representations and warranties included in the Support Agreement; and (iv) the nature of the proposed "fiduciary out" and the amount and structure of the proposed break-fee contained in the Support Agreement.
21. On April 3, 2007, the Offeror, Macquarie Bank Limited, Publishing and Broadcasting Limited and the Fund entered into a support agreement (the Support Agreement) pursuant to which the Trustees agreed, subject to certain conditions, to recommend that the Unitholders and Debentureholders tender the Units and Convertible Debentures that they hold to the Offer. On April 23,

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2007, Macquarie Bank Limited assigned all of its rights and liabilities under the Support Agreement to Macquarie European Investments Pty Ltd.

22. On April 3, 2007, the Offeror and each of the GCI Unitholders and Gateway Langley entered into lock-up agreements (the Lock-up Agreements) pursuant to which the GCI Unitholders and Gateway Langley have agreed to tender all Units held by them to the Offer and to otherwise support the transactions contemplated by the Support Agreement.
23. In connection with the delivery of its Fairness Opinions, RBCDS also advised the Special Committee that, in its view, there was no basis to consider that there was any undervaluation of the Units pursuant to the Offer or overvaluation of the assets to be purchased from GCI pursuant to the GCI Purchase Agreement (as defined below) or Star of Fortune pursuant to the SOF Purchase Agreement (as defined below).
24. In connection with the review of the proposal submitted by the Offeror, it was determined that Royal Bank of Canada (Royal Bank), an affiliate of RBCDS, had been engaged by the Offeror to provide financing for the purchase of the Units and Convertible Debentures, the assets of GCI and the shares of Star of Fortune, and to act as co-lead arranger together with an unrelated lender acting as primary lead, of a lending syndicate. The Special Committee reviewed with representatives of RBCDS the origin of this involvement and received assurances that appropriate steps had been taken by RBCDS and Royal Bank to ensure confidentiality and independence of function in respect of each engagement. The Special Committee concluded that it was satisfied that, in light of the solicitation process followed and the advice given and steps taken by RBCDS during this process, that the potential involvement of the Royal Bank in the financing of the Offer did not compromise the recommendations given to the Special Committee by RBCDS in its capacity as the Special Committee's financial advisor. The Offeror has no reason to believe that any potential conflicts of interest were not adequately addressed by RBCDS and Royal Bank.

### *GCI Purchase Agreement and SOF Purchase Agreement*

25. Pursuant to the terms of a share purchase agreement entered into contemporaneously with the Support Agreement dated April 3, 2007 between the Offeror, the Parents, GCI and Gateway Langley, among others (the GCI Purchase Agreement), the Offeror agreed, subject to certain conditions, to purchase from GCI the Gateway Alberta Shares and the GC Parking Shares and certain other assets from GCI and its affiliates, including certain accounts receivable of Gateway Langley. The purchase price to be received by entities

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ultimately controlled by the GCI Unitholders and Gateway Langley under the GCI Purchase Agreement will represent an amount equal to approximately 10.8% of the maximum amount payable by the Offeror for Units and Convertible Debentures under the Offer.

26. Pursuant to the terms of a share purchase agreement entered into contemporaneously with the Support Agreement dated April 3, 2007 between the Offeror, the Parents, GCI, and certain third parties that are unrelated to the Fund, GCI or the GCI Unitholders, among others (the SOF Purchase Agreement), the Offeror has agreed to purchase, among other things, GCI's 50% indirect interest in Star of Fortune Gaming Management (B.C.) Corp. (Star of Fortune). The purchase price to be received by entities ultimately controlled by the GCI Unitholders under the SOF Purchase Agreement will represent an amount equal to approximately 12.5% of the maximum amount payable by the Offeror for Units and Convertible Debentures under the Offer.
27. The GCI Purchase Agreement and the SOF Purchase Agreement have been entered into for business purposes and not for the purpose of providing the GCI Unitholders or Gateway Langley with greater consideration for their Units than the consideration to be received by the other Unitholders. To this end, in making its offers to acquire the assets of GCI and the shares of Star of Fortune, the Offeror considered the following:
  - a. There is common management between the Fund, GCI and Star of Fortune in that management of the operating subsidiaries of the Fund also provide management services to GCI and its subsidiaries and Star of Fortune pursuant to a management agreement entered into in November 2002. To the extent that the operations of the Fund, GCI and Star of Fortune were acquired by different parties, the Fund would risk the loss of certain of their executive officers.
  - b. The operations of GCI and Star of Fortune are comprised of immature gaming assets which were specifically excluded from the Fund's portfolio of mature gaming assets when the operations of the Fund converted into a publicly listed income fund. It has always been the Fund's intention to acquire these assets once they developed into mature revenue producing gaming facilities. In this regard, GCI and the Fund entered into a right of first offer agreement in November 2002 (the ROFO Agreement) pursuant to which the Fund received the option to purchase the assets or shares of GCI in the event of a third party offer. In addition, GCI and certain of the GCI Unitholders have provided the Fund with a pre-emptive right which permits the Fund to evaluate and pursue any proposed acquisitions in the gaming industry that GCI or its shareholders wish to pursue. The ROFO



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Agreement and related pre-emptive right enables GCI to source and develop various gaming opportunities which would not otherwise be available to the Fund for development, while providing the Fund with the ability to capitalize on these opportunities when appropriate in the future.

- c. From a business perspective, while the acquisition of the Fund, on its own, would provide the Offeror with consistent and solid revenues, it is the concurrent acquisition of the assets of GCI and shares of Star of Fortune that is anticipated to increase the Offeror's internal rates of return, as well as provide the Offeror with more significant market share in the gaming and entertainment sector in western Canada.
  - d. Although the consummation of the transactions contemplated by the GCI Purchase Agreement and the SOF Purchase Agreement are not conditions to the completion of the Offer, the Offeror would not have agreed to make the Offer or to have entered into the Support Agreement without having also obtained the right to acquire the assets and shares to be acquired pursuant to the GCI Purchase Agreement and the SOF Purchase Agreement.
  - e. The British Columbia Lottery Corporation (the BCLC) has expressed a preference that existing management be retained and employed by the purchaser of the Fund, the assets of GCI and the shares of Star of Fortune, which is the Offeror's intent. The BCLC has also indicated a preference that common management of the Fund and Star of Fortune be maintained in order to ensure that certain development and re-development programs are completed as planned and approved.
28. The GCI Purchase Agreement and the SOF Purchase Agreement were negotiated at arm's length and separate from the Support Agreement. The GCI Unitholders were represented by separate legal counsel from the Fund.
29. Notwithstanding the GCI Purchase Agreement and the SOF Purchase Agreement, the consideration paid to the GCI Unitholders for their Units to be deposited under the Offer is identical to the consideration to be paid to all other Unitholders.

### *The Offer*

30. The Offeror has made the Offer to purchase all of the issued and outstanding Units of the Fund (including any Units issuable upon the conversion of any Convertible Debentures prior to the expiry of the Offer) at a price per Unit of \$25.26 in cash and all of the issued and outstanding Convertible Debentures at

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a price per Convertible Debenture of \$1,322.51 per \$1,000 principal amount of Convertible Debentures in cash plus accrued but unpaid interest on the principal amount of the Convertible Debentures up to the date that the Offeror first takes up Units and Convertible Debentures tendered pursuant to the Offer. The \$25.26 price being offered for the Units assumes that the Fund will not declare or pay any dividends or other distributions on the Units in excess of its regular monthly distribution in an amount not to exceed \$0.125 per Unit.

31. The Offer has been made by way of a single offer and a take-over bid circular that was mailed simultaneously to all holders of Units and Convertible Debentures on May 14, 2007 and prepared in accordance with applicable securities legislation and such other terms and conditions as required by law.
32. The Offer will be conditional on, among other things, there being validly deposited under the Offer and not withdrawn at the expiry time at least  $66\frac{2}{3}\%$  of the Units (the Minimum Tender Condition). The Minimum Tender Condition cannot be waived by the Offeror without the consent of the Fund. For the Minimum Tender Condition to be satisfied, a majority of Units held by Unitholders, other than the GCI Unitholders, will need to be tendered to the Offer.
33. If the conditions to the Offer are satisfied (or waived by the Offeror with the consent of the Fund) and the Offeror takes up and pays for Units deposited pursuant to the Offer, the Offeror must pursue and consummate a transaction to acquire the remaining Units under the terms of the Support Agreement.
34. It is currently the Offeror's intention that:
  - (a) if the Offer is accepted by Unitholders of not less than 90% of the Units (a Compulsory Acquisition) the Offeror may proceed with a compulsory acquisition of the Units not deposited to the Offer as permitted by the Declaration of Trust for the same consideration per Unit as was paid under the Offer;
  - (b) if a Compulsory Acquisition as permitted under the Declaration of Trust is not available to the Offeror, the Offeror will acquire the Units not deposited to the Offer by:
    - (i) causing the Declaration of Trust to be amended as permitted pursuant to its terms (the Declaration of Trust Amendment) to provide that a subsequent acquisition transaction may be effected if the Offeror and its affiliates, after take-up and payment of Units deposited under the Offer, hold not less than  $66\frac{2}{3}\%$  of the then outstanding Units or to

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make such other amendment as is necessary and permitted under the Declaration of Trust, in order to provide for the acquisition of the Units not deposited to the Offer in each case at the same price as the price paid under the Offer (the acquisition following such amendment referred to herein as a Subsequent Acquisition Transaction); and

(ii) proceeding with a Subsequent Acquisition Transaction in respect of the Units not deposited to the Offer as permitted by the Declaration of Trust, as so amended; and

(c) in connection with either a Compulsory Acquisition, if available and if the Offeror elects to proceed thereunder, or a Subsequent Acquisition Transaction, the Offeror currently intends to amend the provisions of the Declaration of Trust by the Written Resolution (as defined below), to provide that Units held by non-tendering Unitholders will be deemed to have been transferred to the Offeror immediately on the giving of the Offeror's notice, as prescribed by the Declaration of Trust, and that those non-tendering Unitholders will cease to have any rights as Unitholders from and after that time, other than the right to be paid the same consideration that the Offeror would have paid to the non-tendering Unitholders if they had tendered those Units to the Offer (the Notice Amendment).

(d) in order to effect either a Compulsory Acquisition, if available and if the Offeror elects to proceed thereunder, or a Subsequent Acquisition Transaction in accordance with the foregoing, rather than seeking Unitholders' approval of the Declaration of Trust Amendment at a special meeting of the Unitholders to be called for such purpose, the Offeror will rely on section 12.10 of the Declaration of Trust, which specifies that a resolution in writing executed by Unitholders holding more than 66 $\frac{2}{3}$ % of the outstanding votes required to vote in favour thereof at a meeting of Unitholders to approve that resolution shall be as valid and binding as if such Unitholders had exercised at that time all of their voting rights in favour of such resolution at a meeting of Unitholders duly called for that purpose (the Written Resolution), which Written Resolution will approve, among other things, the Declaration of Trust Amendment, the Notice Amendment and any Compulsory Acquisition or Subsequent Acquisition Transaction undertaken in accordance therewith, as applicable.

35. Notwithstanding section 12.10 of the Declaration of Trust, the Compulsory Acquisition or the Subsequent Acquisition Transaction will constitute a "business combination" (as defined in OSC Rule 61-501 – *Insider Bids, Issuer Bids, Business Combinations and Related Party Transactions* (61-501)) and a

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“going-private transaction” (as defined in Québec Regulation Q-27 – *Respecting Protection of Minority Securityholders in the course of Certain Transactions* (Regulation Q-27)) and will require approval at a meeting of Unitholders called for that purpose.

36. To effect either a Compulsory Acquisition or a Subsequent Acquisition Transaction, as applicable, the Offeror will obtain minority approval, as that term is defined in the Legislation, calculated in accordance with the terms of Section 8.2 of the Regulation Q-27 and Section 8.2 of 61-501 (the Minority Approval), albeit not at a meeting of Unitholders, but by Written Resolution.
37. In obtaining Minority Approval, the Offeror will exclude the votes attaching to all Units beneficially owned, directly or indirectly, or controlled or directed by any of the GCI Unitholders or Gateway Langley, and the relevant interested parties and related parties of any of the GCI Unitholders or Gateway Langley, and any person or company acting jointly or in concert with any of the GCI Unitholders or Gateway Langley in respect of the relevant transactions.
38. The take-over bid circular that will be provided to Unitholders in connection with the Offer contains all disclosure required by applicable securities laws, including, without limitation, the take-over bid provisions and form requirements of the securities legislation in the Jurisdictions and the provisions of 61-501 relating to the disclosure required to be included in a disclosure document for a formal bid in respect of a second-step business combination.

### **Decision**

Each of the 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 Collateral Benefit Prohibition Relief is granted.

James Turner  
Ontario Securities Commission

Margot C. Howard  
Ontario Securities Commission

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

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The decision of the Decision Makers in the Province of Ontario and the Province of Quebec under the Legislation of such Provinces is that the Second Step Transaction Relief is granted provided that Minority Approval shall have been obtained, albeit not at a meeting of Unitholders, but by Written Resolution.

Naizam Kanji  
Manager  
Ontario Securities Commission