

**IN THE MATTER OF ESW CAPITAL, LLC**

- and -

**IN THE MATTER OF OPTIVA INC.**

**AMENDED APPLICATION OF ESW CAPITAL, LLC**

(In Connection with a Transactional Proceeding under Rule 16  
and under Section 104 of the *Securities Act*, RSO 1990, c S.5)

**A. ORDER SOUGHT**

The Applicant, ESW Capital, LLC (“**ESW**”), requests that the Ontario Securities Commission make the following orders:

1. An order granting exemptive relief from the requirement set forth in section 2.29.1(c) of National Instrument 62-104 - Take-Over Bids and Issuer Bids (“**NI 62-104**”) on the basis set out below pursuant to s. 104 of the Ontario *Securities Act* and s. 6.1 of NI 62-104;
2. An order for an expedited hearing; and
3. Such further and other relief as counsel may advise and the Commission may deem appropriate.

**B. GROUNDS**

The grounds for the request are:

**Overview**

4. Optiva Inc. (“**Optiva**”) is a TSX listed company and whose head office is located in Ontario.

5. The Applicant seeks exemptive relief from the minimum tender requirement under NI 62-104 (“**Majority of the Minority Requirement**”) to allow Optiva’s independent shareholders to have the choice whether or not to tender to ESW’s take-over bid to acquire any and all of Optiva subordinated voting shares (“**Shares**”).

6. Allowing each shareholder the right to decide whether or not to accept or reject a non-coercive take-over bid is a core objective of the regulation of take-over bids.

7. The Majority of the Minority Requirement was never intended as a tool for entrenchment by an insider block.

8. Yet, in its operation in the present circumstances, the Majority of the Minority Requirement has become just that – a tool for two of Optiva’s principal shareholders to entrench their *de facto* control of Optiva and to block the fundamental right of Optiva’s independent shareholders (who exercise control or direction over approximately 31.74% of Optiva’s Shares) to choose whether or not to tender to the ESW bid.

9. ESW submits that exemptive relief is appropriate in these unique circumstances in promoting the core intentions underlying NI 62-104. It accepts as a condition of that relief that its bid be subject to a modified minimum tender requirement based on greater than 50% of the non-insider shareholders tendering to its bid (i.e. shareholders other than the bidder ESW and the two

other insider shareholders, including affiliates and persons acting jointly or in concert).

### **Insider Block**

10. Besides an ESW affiliated entity, Optiva has two principal shareholders with 10% or more of the voting rights attached to the Shares, namely Maple Rock Capital Partners Inc. ("**Maple Rock**") and EdgePoint Investment Group Inc. ("**EdgePoint**").

11. As disclosed in Optiva's latest public disclosure, between them, Maple Rock and EdgePoint exercise control or direction over approximately 40.48% of the Shares (Maple Rock approximately 22.35% and EdgePoint approximately 18.13%).

12. Maple Rock and EdgePoint also hold over 86% of Optiva's secured debentures, which include covenants on how Optiva can distribute cash to shareholders, changes its capitalization through the purchase or sale of its own shares or incur subordinated debt.

13. Pursuant to director nomination agreements dated July 20, 2020 entered into between Optiva and each of Maple Rock and EdgePoint, Maple Rock and EdgePoint are each entitled to nominate (and have nominated) two of the eight directors to be elected by Optiva's shareholders at its forthcoming August 18, 2020 Annual and Special Shareholder Meeting, for a total of half of the directors.

14. As set forth in Optiva's June 26, 2020 news release, the remaining four nominees were selected subject to Maple Rock and EdgePoint's both agreeing to their nomination.

15. Accordingly, Maple Rock and EdgePoint have *de facto* control over Optiva through their combined control over the nomination of Optiva's board of directors, bearing in mind that over the last three annual general meetings the percentage of outstanding Shares voted in the election of directors has ranged between approximately 54% and 73% of the issued and outstanding Shares.

16. In those circumstances, with over 40% of combined ownership and control of Shares, Maple Rock and EdgePoint are assured their nominees and agreed upon nominees will be elected.

17. Since the start of the year, in matters concerning Optiva and in terms of ESW's bid (as discussed below), Maple Rock and EdgePoint have acted in lock-step with one another.

**ESW's Announced Intention to Make a Take-Over Bid**

18. On July 27, 2020, by news release, ESW announced its intention to make an all cash offer to acquire any and all Optiva Shares ("**ESW Bid**").

19. ESW's Bid offers Optiva shareholders \$60 per Share which represents an exceptional premium to Optiva stock's trading history by all measures. For example, ESW's bid represents a 92% premium to the 60-day closing high of the

Shares and is higher than Optiva's closing price on the TSX on any day for more than three years.

20. The ESW Bid will allow any and all shareholders who wish to walk away from the infighting between Optiva's three principal shareholders to do so. This infighting was initiated upon Maple Rock launching a "proxy fight" in January 2020, and EdgePoint announcing its support of Maple Rock in February 2020, acknowledging that it is in "regular communication with Maple Rock."

21. For the reasons outlined below, as announced on July 27<sup>th</sup>, the ESW Bid will be formally launched upon an exemption by this Commission to the minimum tender requirements under NI 62-104 to exclude Maple Rock and Edgepoint's Shares from being included in the 50% + 1 issued and outstanding Shares that must be tendered to the ESW Bid.

### **Insiders Intend to Block ESW Bid**

22. Based on prior public disclosure, Maple Rock and EdgePoint have declared their intention not to tender to the ESW Bid, thereby blocking the remaining 32% of Optiva's shareholders from being able to exit Optiva at the significant premium presented by the ESW Bid.

23. Within short order, on the same day as ESW delivering to Optiva on June 26, 2020, a letter containing a preliminary, non-binding indication of a willingness to explore a possible acquisition of all of Optiva's Shares at \$30 per Share, Maple Rock and EdgePoint advised Optiva that, "they have no interest or

intention of selling their shares or voting in favour of any transaction on the non-binding, preliminary indicative terms suggested by ESW, or in pursuing any discussions with ESW regarding such a possible transaction.”

24. Thereafter, by news release dated June 26, 2020, Optiva announced that Maple Rock and EdgePoint had agreed to subscribe for up to US \$90 million of debentures to be issued by Optiva to finance Optiva’s unilateral election to redeem its preferred shares held by ESW’s affiliate on July 20<sup>th</sup>. The rights attaching to the preferred shares were approved by Optiva’s shareholders, including the right to nominate a majority of Optiva’s seven person board of directors.

25. As part of the debenture financing, and Maple Rock and EdgePoint’s subscription commitment thereunder, Optiva, Maple Rock and EdgePoint agreed to increase the Optiva board to eight persons and further agreed that of the eight board nominees to be proposed for election at the forthcoming annual meeting of shareholders on August 18, 2020, the nominees would be comprised of “... two of such director nominees being designated by EdgePoint, two being designated by Maple Rock and the remaining four having been mutually agreed among the Independent Committee [of the Board], EdgePoint and Maple Rock.” Furthermore, Maple Rock and EdgePoint agreed to vote their shares in favour of the election of that slate of eight nominees. None of the foregoing was put to Optiva’s shareholders for approval notwithstanding the announced scheduled shareholder meeting.

26. Through the unilateral redemption of the preferred shares financed by Maple Rock and EdgePoint, and ancillary agreements, Maple Rock and EdgePoint have effected a *de facto* change in who controls the nomination of Optiva's board from ESW's affiliate to Maple Rock and EdgePoint, without any shareholder approval.

27. Since the announcement of the ESW Bid on July 27, 2020, both EdgePoint (on July 27) and Maple Rock (on July 28) have issued news releases reiterating that they have no interest or intention of selling their Shares to ESW.

28. Neither EdgePoint nor Maple Rock, however, have made any offers to acquire the Shares of Optiva's independent shareholders. Rather, they intend to use the Majority of the Minority Requirement to entrench their control over Optiva.

#### **Majority of the Minority Requirement**

29. The purpose of the Majority of the Minority Requirement is to address shareholder coercion or pressure to tender, namely that in the face of a bidder's ability to reduce or waive its minimum tender condition, shareholders will be compelled to tender to a bid they do not otherwise like out of concern that they will miss the opportunity to tender and be left holding less liquid securities of a controlled company.

30. The Majority of the Minority Requirement was never intended to operate to eliminate shareholder choice. Nor is it intended to enable insiders to entrench

their position of control by dictating to independent shareholders when they may or may not choose to exit from the Company at a premium under a take-over bid.

31. The express availability of exemptive relief pursuant to section 6.1 of NI 62-104 from its provisions recognizes that take-over bids are fact specific and there can be circumstances where upholding a take-over bid requirement can result in the opposite of its intended purpose.

32. The exclusion of certain shares from the Majority of the Minority Requirement has previously been raised, *in obiter*, in joint reasons issued by the Ontario Securities Commission and the British Columbia Securities Commission in *Hecla Mining Co.* as a possible remedy in the face of tactics interfering with shareholder choice.

33. Other elements of the take-over regime under NI 62-104 already mitigate against the concern of shareholders being pressured to tender, such as the requirement that bids remain open for 105 days (s.2.29.1(a)) and the 10-day extension period to tender (s.2.32).

34. Furthermore, independent shareholders are presently subject to Optiva being *de facto* controlled by Maple Rock and EdgePoint. As such, any concern that shareholders who do not tender will be left with less liquid securities because the issuer is a controlled company does not apply as Optiva is *de facto* already a controlled company.



35. In the present circumstances, the Majority of the Minority Requirement operates to exacerbate liquidity concerns by allowing Maple Rock and EdgePoint to leverage their position to dictate to Optiva's independent shareholders when they can tender into a bid, hence rendering their Shares less liquid. This turns the objective of the Majority of the Minority Requirement on its head.

36. Hence, exemptive relief is appropriate and in the public interest in such circumstances where the Majority of the Minority requirement will operate to undermine the intent and objectives of take-over regulation by replacing shareholder choice with insider entrenchment.

37. ESW would accept, as a condition to exemptive relief, a requirement that a majority of the independent shareholders (i.e. shareholders other than ESW, Maple Rock and EdgePoint and their affiliates and joint actors) be required to tender to its bid, to mitigate against any lingering concern of pressure to tender.

38. For the foregoing reasons, ESW requests that the ESW Bid be exempted from the requirement under 2.29.1(c) of NI 62-104 on terms that its bid must otherwise be subject to the requirement that it may not take up securities deposited under its bid unless more than 50% of the outstanding subordinate voting shares of Optiva (excluding securities beneficially owned, or over which control or direction is exercised, by ESW, Maple Rock or EdgePoint or by any affiliate or person acting jointly or in concert therewith) have been deposited under the bid and not withdrawn.

39. The Applicant relies on section 104 of the Ontario *Securities Act* and section 6.1 of NI 62-104.

40. The Applicant further intends to rely upon section 4.7 of Multilateral Instrument 11-102 in each of the relevant jurisdictions in Canada (the “**Passport Application**”). The Passport Application, along with the verification statement and draft order sought by ESW, are attached to this Amended Application as **Schedule “A”**.

41. Such further and other grounds as counsel may advise and the Commission may permit.

### **C. EVIDENCE**

The Applicant intend to rely on the following evidence, as well a written memorandum and oral submissions, at the hearing:

- (a) The affidavit of Neeraj Gupta affirmed August 6, 2020;
- (b) The supplemental affidavit of Neeraj Gupta affirmed August 19, 2020;
- (c) The further supplemental affidavit of Neeraj Gupta affirmed August 28, 2020; and
- (d) Such further other evidence as counsel may advise and the Commission may permit.

Dated this 6th day of August, 2020

**AIRD & BERLIS LLP**  
Barristers and Solicitors  
Brookfield Place  
Suite 1800, Box 754  
181 Bay Street  
Toronto, Ontario  
M5J 2T9

**Martin Kovnats**  
[mkovnats@airdberlis.com](mailto:mkovnats@airdberlis.com)

**Steve Tenai**  
[stenai@airdberlis.com](mailto:stenai@airdberlis.com)

**Sean Mason**  
[smason@airdberlis.com](mailto:smason@airdberlis.com)

**Miranda Spence**  
[mspence@airdberlis.com](mailto:mspence@airdberlis.com)

Tel: (416) 863-1500  
Fax: (416) 863-1515

Lawyers for the Applicant

**SCHEDULE "A"**

August 28, 2020

**BY EMAIL AND OSC PORTAL at [www.osc.gov.on.ca/filings](http://www.osc.gov.on.ca/filings)**

Ontario Securities Commission  
22<sup>nd</sup> Floor  
20 Queen Street West  
Toronto, Ontario  
M5H 3S8

Dear Sirs/Mesdames:

**RE: Optiva Inc. (the “Issuer”)  
Application for Exemptive Relief Pursuant to Section 6.1 of National  
Instrument 62-104 *Take Over Bids and Issuer Bids* (“NI 62-104”) and  
Section 104(2) of the *Securities Act* (Ontario) (the “Act”)**

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We are counsel to ESW Capital, LLC (the “**Applicant**”). On behalf of the Applicant, we are applying to the Ontario Securities Commission (the “**OSC**”) as principal regulator of the Issuer, for a decision pursuant to Section 104(2) of the Act and Section 6.1 of NI 62-104 requesting an exemption for the Applicant from the requirements of Section 2.29.1(c) of NI 62-104 (the “**Requested Relief**”).

We are filing this application pursuant to Multilateral Instrument 11-102 – *Passport System* (“**MI 11-102**”). We intend to rely on subsection 4.7(1) of MI 11-102 for the equivalent provisions of the securities legislation of each of the other Provinces of Canada (collectively with Ontario, the “**Jurisdictions**”).

Pursuant to Section 3.6(3) of National Policy 11-203 - *Process for Exemptive Relief Applications in Multiple Jurisdictions* (“**NP 11-203**”), the Applicant has selected the Ontario Securities Commission as the principal regulator (the “**Principal Regulator**”) for the Application, as the Issuer’s head office is located in Ontario.

No other applications have been filed in any other jurisdictions with respect to the subject matter of this application. Although a formal pre-filing submission pursuant to Section 4.2 of NP 11-203 has not been filed with the OSC, we have been in contact with the OSC with respect to the subject matter of this application and have been advised that a determination will proceed by way of a formal hearing. The OSC advised that, in addition to the hearing materials, the within application should also be provided to the OSC under the provisions of MI 11-102 and NP 11-203.

## A. Background

1. The Issuer was incorporated under the *Canada Business Corporations Act* on February November 1, 2006 under the name Redknee Solutions Inc. and was renamed Optiva Inc. on March 28, 2018.
2. The Issuer is a reporting issuer in the Jurisdictions and the OSC is the principal regulator for the Issuer.
3. The Subordinate Voting Shares of the Issuer (the “**Shares**”) are listed on the Toronto Stock Exchange under the symbol “OPT”.
4. The Applicant, through its affiliated entities (collectively, “**ESW**”) currently exercises control or direction over 1,476,851 Shares representing approximately 27.7% of the outstanding Shares.
5. On January 26, 2017 the Issuer completed a private placement of securities with ESW which included the issuance of preferred shares (the “**Preferred Shares**”) and warrants to acquire Shares pursuant to a subscription agreement entered into among ESW and the Issuer dated December 16, 2016 (the “**Subscription Agreement**”). The Subscription Agreement included a corollary right to nominate certain of the directors to the board of directors of the Issuer (the “**Board**”) so long as certain threshold requirements are met.
6. As disclosed in the Issuer’s Management Information Circular dated July 22, 2020, aside from ESW, the Issuer has two principal shareholders with 10% or more of the voting rights attached to the Shares, namely Maple Rock Capital Partners Inc. (“**Maple Rock**”) and EdgePoint Investment Group Inc. (“**EdgePoint**” and together with Maple Rock the “**Shareholder Block**”). The Shareholder Block exercise control or direction over approximately 40.5% of the Shares (maple Rock approximately 22.35% and EdgePoint approximately 18.13%).
7. ESW and the Shareholder Block have a history of discord. In January 2020 Maple Rock launched a “proxy fight” and EdgePoint announced its support of Maple Rock in February 2020 acknowledging that it is in “regular communication with Maple Rock.” Since the start of 2020, in matters concerning the Issuer and the ESW Bid (described below) the Shareholder Block have acted in lock-step with one another.
8. On June 26, 2020 ESW delivered a letter to the Issuer containing a preliminary, non-binding indication of a willingness to explore a possible acquisition of all of the Issuer’s Shares at \$30 per Share. The Issuer issued a press release the same day indicating that the Shareholder Block had advised the Issuer that “they have no interest or intention of selling their shares or voting in favour of any transaction on the non-binding, preliminary indicative terms suggested by ESW, or in pursuing any discussions with ESW regarding such a possible transaction.”
9. On June 29, 2020, ESW delivered a letter to the Issuer reiterating ESW’s interest in acquiring the Shares, and in respect of which, ESW was willing to increase its offer to a price of \$60 per Share.

10. On July 27, 2020, by news release, the Applicant announced its intention to make an all cash offer to acquire Shares ("**ESW Bid**"). The ESW Bid offered the Issuer's shareholders \$60 per Share which was described by the Issuer's Chairman as "an extraordinary premium" to the stock's trading history, and represented a 92% premium to the 60-day closing high of the Shares and is higher than the Issuer's closing price on the TSX on any day for more than three years.
11. The ESW Bid would allow shareholders who wish to walk away from the infighting between the Issuer's three principal shareholders to do so.
12. Since the announcement of the ESW Bid on July 27, 2020, both EdgePoint (on July 27) and Maple Rock (on July 28) have issued news releases reiterating that they have no interest or intention of selling their Shares to ESW. Neither EdgePoint nor Maple Rock, however, have made any offers to acquire the Shares of the Issuer's Minority Shareholders (as defined below).
13. At the annual and special meeting of the Issuer held on August 18, 2020 shareholders of the Issuer were asked to consider and approve the adoption of a Shareholder Rights Plan that could be used as a defensive tactic against certain take-over bids including the ESW Bid. Greater than 60% of the minority shareholders of the Issuer (which for the absence of doubt means shareholders of the Issuer excluding the Filer, Maple Rock, and EdgePoint and any affiliates or persons acting jointly or in concert with any of them) (the "**Minority Shareholders**") voted against the adoption of the Shareholder Rights Plan by the Issuer.
14. As of the date hereof, the Applicant is aware of holders of at least 30% of the Shares held by Minority Shareholders having written emails or letters expressing their support for the ESW Bid and the Requested Relief.
15. The Applicant seeks exemptive relief from the minimum tender requirement under NI 62-104 (the "**Minimum Tender Requirement**") to allow the Issuer's Minority Shareholders to have the choice whether or not to tender to the ESW Bid.

**B. Reasons for Requested Relief**

16. The Applicant submits that it should receive exemptive relief from the Minimum Tender Requirement with respect to the ESW Bid because:
  - a) The Minimum Tender Requirement was never intended as a tool for entrenchment by an insider block. Yet, in its operation in the present circumstances, the Minimum Tender Requirement has become a tool for the Shareholder Block to entrench their de facto control of the Issuer and to block the fundamental right of the Issuer's Minority Shareholders (who exercise control or direction over approximately 31.74% of the Shares) to choose whether or not to tender to the ESW Bid.
  - b) The purpose of the Minimum Tender Requirement is to address shareholder coercion or pressure to tender, namely that in the face of a bidder's ability to reduce or waive its minimum tender condition, shareholders will be compelled to tender to a bid they do not otherwise like out of concern that they will miss the opportunity to tender and be left holding less liquid securities of a controlled company. The Issuer is currently being *de facto*

controlled by the Shareholder Block. As such, any concern that shareholders who do not tender will be left with less liquid securities because the issuer is a controlled company does not apply as the Issuer is *de facto* already a controlled company.

- c) The express availability of exemptive relief pursuant to section 6.1 of NI 62-104 from its provisions recognizes that take-over bids are fact specific and there can be circumstances where upholding a take-over bid requirement can result in the opposite of its intended purpose.
- d) To the best of our knowledge, the Requested Relief is novel, however the exclusion of certain shares from the Minimum Tender Requirement has previously been raised, in obiter, in joint reasons issued by the OSC and the British Columbia Securities Commission in *Hecla Mining Co.* as a possible remedy in the face of tactics interfering with shareholder choice.
- e) Other elements of the take-over bid regime under NI 62-104 already mitigate against the concern of shareholders being pressured to tender, such as the requirement that bids remain open for 105 days (s.2.29.1(a)) and the 10-day extension period to tender (s.2.32).
- f) Exemptive relief is appropriate and in the public interest in the current circumstances where the Minimum Tender Requirement will operate to undermine the intent and objectives of take-over bid regulation by replacing shareholder choice with insider entrenchment.

### **C. Requested Relief**

- 17. On behalf of the Applicant, we respectfully request that the ESW Bid be exempted from the Minimum Tender Requirement subject to the conditions further set out in the draft order enclosed herewith, which includes, amongst other conditions, that the ESW Bid be subject to a modified minimum tender requirement based on greater than 50% of the Shares held by Minority Shareholders being tendered to the bid.

### **D. Enclosures**

- 18. In support of the application please find attached the following enclosures:
  - a) A verification statement executed by an officer of the Applicant; and
  - b) A draft of the proposed decision document.

Filing fees in the amount of \$4,800 payable to the OSC was paid by credit card through the OSC portal at the time of filing the within application.

We trust that the foregoing is satisfactory. Please do not hesitate to contact the undersigned should you have any additional questions in connection with the matters herein.

Yours truly,

AIRD & BERLIS LLP





*“Sean Mason”*

Sean Mason

cc: Andrew Price, Chief Financial Officer, ESW Capital, LLC  
Neeraj Gupta, Head of Corporate Development/M&A, ESW Capital, LLC  
Martin Kovnats, Aird & Berlis LLP  
Steve Tenai, Aird & Berlis LLP  
Miranda Spence, Aird & Berlis LLP

**VERIFICATION STATEMENT**

ESW Capital, LLC, on behalf of itself and its affiliated entities, hereby authorizes the making and filing of the attached application dated August 28, 2020 by Aird & Berlis LLP for exemptive relief, and confirms the truth and accuracy of the facts contained in therein.

**DATED** the 28th day of August, 2020.

**ESW CAPITAL, LLC**

BY: Andrew S Price  
Andrew S Price (Aug 27, 2020 10:25 CDT)  
Name: Andrew Price  
Title: Chief Financial Officer

Citation: \_\_\_\_\_

Date: \_\_\_\_\_

In the Matter of  
the Securities Legislation of  
Ontario (the **Jurisdiction**)  
and  
In the Matter of  
**the Process for Exemptive Relief Applications in Multiple Jurisdictions**  
and  
In the Matter of  
ESW Capital, LLC (the **Filer**)  
and  
Optiva Inc. (the **Issuer**)  
Decision

### **Background**

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) for an exemption from the take-over bid and issuer bid requirements of subsection 2.29.1(c) of National Instrument 62-104-*Take-Over Bids and Issuer Bids* (**NI 62-104**) (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

- (a) The Ontario Securities Commission is the principal regulator for this application, and
- (b) The Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in Alberta, British Columbia, Manitoba, New Brunswick, Newfoundland, Nova Scotia, Prince Edward Island, Quebec, and Saskatchewan (the **Passport Jurisdictions** and together with Ontario, the **Jurisdictions**).

### **Interpretation**

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

### **Representations**

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

1. The Issuer is a corporation governed by the *Canada Business Corporations Act*.
2. The head office and registered office of the Issuer is located at 2233 Argentinia Rd, East Tower, Suite 302, Mississauga, Ontario L5N 2X7.
3. The Issuer is a reporting issuer in the Jurisdictions and its Subordinate Voting Shares (the **Shares**) are listed for trading on the Toronto Stock Exchange (the **TSX**) under the symbol "OPT".

4. The Filer and its affiliated entities are not in default of any requirement of securities legislation applicable to them.
5. The authorized capital stock of the Issuer consists of an unlimited number of Shares, and 800,000 class A preferred shares. As at the date of the application filed for the Exemption Sought (the **Application**), there were 5,316,057 Shares and no preferred shares issued and outstanding.
6. The Filer, together with its affiliates, owns or controls approximately 27.7% of the Shares on an undiluted basis or approximately 38.9% on a partially diluted basis, assuming the exercise of all of the subordinate voting share warrants owned or controlled by the Filer and its affiliates.
7. Maple Rock Capital Partners Inc. (**Maple Rock**) owns or controls approximately 22.35% of the Shares and EdgePoint Investment Group Inc. (**EdgePoint** and together with Maple Rock, the **Shareholder Block**) owns or controls approximately 18.13% of the Shares. The Shareholder Block, together, owns or controls approximately 40.5% of the Shares.
8. On June 26, 2020 the Filer delivered a letter to the Issuer including a preliminary, non-binding indication of a willingness to explore a possible acquisition of all of the Shares at a price of \$30 per Share. The Issuer issued a press release the same day indicating that the Shareholder Block had advised the Issuer that "they have no interest or intention of selling their shares or voting in favour of any transaction on the non-binding, preliminary indicative terms suggested by [the Filer], or in pursuing any discussions with [the Filer] regarding such a possible transaction."
9. On June 29, 2020, the Filer delivered a letter to the Issuer reiterating its interest in acquiring the Shares, and increasing its offer to a price of \$60 per Share.
10. On July 27, 2020, the Filer announced by news release its intention to make an all-cash offer to acquire Shares for a purchase price of \$60 per Share by way of a take-over bid, as such term is defined in NI 62-104 (the **Offer**). Having regard to the Shareholder Block's stated unwillingness to accept the Offer, the Filer indicated that the Offer would be contingent upon receipt of the Exemption Sought.
11. As of the date of the Offer, the Offer price represented a 92% premium to the 60-day closing high of the Shares and was higher than the Issuer's closing price on the TSX on any day for more than three years.
12. EdgePoint (on July 27) and Maple Rock (on July 28) have both issued news releases reiterating that they have no interest or intention of tendering their Shares in the Offer.
13. Neither EdgePoint nor Maple Rock have made any offers to acquire the Shares of the Issuer's Minority Shareholders (as defined in paragraph 14).
14. At the annual and special meeting of the Issuer held on August 18, 2020 shareholders of the Issuer were asked to consider and approve the adoption of a Shareholder Rights Plan that could be used as a defensive tactic against certain take-over bids including the Offer. Greater than 60% of the minority shareholders of the Issuer (which for the absence of doubt means shareholders of the Issuer excluding the Filer, Maple Rock, and

EdgePoint and any affiliates or persons acting jointly or in concert with any of them) (the **Minority Shareholders**) voted against the adoption of the Shareholder Rights Plan by the Issuer.

15. As of the date of the Application, the Filer is aware of holders of at least 30% of the Shares held by Minority Shareholders having written emails or letters expressing their support for the Offer and the Exemption Sought.
16. The Filer seeks exemptive relief from the provisions of subsection 2.29.1(c) of NI 62-104 (the **Minimum Tender Requirement**) to allow the Issuer's Minority Shareholders to have the choice whether or not to tender to the Offer provided greater than 50% of the Shares held by Minority Shareholders are deposited in the Offer.

### Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that:

- a. Greater than 50% of the Shares are tendered to the bid, excluding Shares held or controlled by the Filer and the Shareholder Block and any affiliates or persons acting jointly or in concert with any of them (the **Modified Tender Requirement**).
- b. The Offer complies materially with all other requirements of the *Securities Act* (Ontario) and National Instrument 62-103 – *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues*.
- c. The Offer complies materially with all requirements of the TSX as such requirements relate to take-over bids.
- d. Should the Offer succeed, the Filer will not trade in the Shares, or securities of the Issuer convertible, exercisable or otherwise exchangeable for Shares, either as a buyer or a seller, with the Shareholder Block, at a price greater than the price per Share paid by the Filer under the Offer for a period of one calendar year following the date that the Offer is made.
- e. The take-over bid circular relating to the Offer includes a clear and unambiguous explanation of the fact that the Filer has obtained an exemption from the Minimum Tender Requirement and, in connection with such exemption, the Offer is subject to the Modified Tender Requirement.

[name of signatory for the Ontario Securities Commission]

[Title of Signatory]

Ontario Securities Commission