

October 5, 2006

VIA E-MAIL, FAX, AND COURIER

TO: Ontario Securities Commission

AND TO: Alberta Securities Commission
British Columbia Securities Commission
Saskatchewan Financial Services Commission
Manitoba Securities Commission
Nova Scotia Securities Commission
Securities Commission of Newfoundland and Labrador
Autorité des marchés financiers, Québec
New Brunswick Securities Commission

Dear Ladies and Gentlemen:

**Re: Atlas Cold Storage Income Trust –
Application for Relief from Collateral Benefit Prohibition**

I. INTRODUCTION

1. Bennett Jones LLP is acting as counsel to KingStreet Real Estate Growth LP No. 2 ("KingStreet") and Eimskip Atlas Canada, Inc. (the "Offeror") and Goodmans LLP is acting as counsel to Avion Group HF ("Avion") in connection with an offer (the "Offer") to purchase all of the outstanding trust units (the "Units") of Atlas Cold Storage Income Trust ("Atlas"). Collectively, KingStreet, the Offeror, and Avion, are referred to herein as the "Applicants".
2. We are applying under National Policy 12-201 *Mutual Reliance System for Exemptive Relief Applications* (the "MRRS Policy") for a decision under the securities legislation (the "Legislation") in Alberta, British Columbia, Saskatchewan, Manitoba, Nova Scotia and Newfoundland and Labrador, and Ontario (the "Jurisdictions") for relief pursuant to sections 104(2)(a) and 104(2)(c) of the *Securities Act* (Ontario) (the "Act") and the corresponding provisions in all of the Jurisdictions in the circumstances described herein.

II. PRINCIPAL REGULATOR

3. As the head and principal office of the Offeror and Atlas are located in Ontario, and having regard to existing submissions before the Ontario Securities Commission, we have selected Ontario as the principal regulator for this application.

III. BACKGROUND

4. On September 15, 2006, Atlas through its counsel applied for certain relief (the "Atlas Application") pursuant to subparagraphs 104(1)(a), 104(1)(b), 104(2)(b), and 104(1)(c) of the Act. Among other things, the Atlas Application asserted that the Offer would result in the provision of certain "collateral benefits" to KingStreet, contrary to the prohibition contained in subsection 97(2) of the Act. We responded to the Atlas Application by way of letter dated September 22, 2006, and additional submissions were made by the Applicants on the one hand, and Atlas on the other, in correspondence dated September 27 and 28, 2006, and October 2, 2006. Our prior correspondence is attached hereto.
5. We have been advised that Staff of the OSC does not agree with the positions taken by the Applicants on the "threshold" issue of whether or not the arrangements in question constituted or conferred "collateral benefits". Staff recommended that the Applicants seek an exemption order pursuant to subparagraphs 104(2)(a) and 104(2)(c) of the Act, and this application is made in response thereto. Terms used herein as defined have the same meaning herein as in our prior correspondence.

IV. RELIEF REQUESTED

6. The Applicants request that the OSC grant the following relief:
 - (a) An order pursuant to subparagraph 104(2)(a) of the Act deciding that, for the purposes of subsection 97(2) of the Act, the Junior Credit Facilities and the Avion Convertible Debentures (defined below) entered into in connection with the Offer are made for reasons other than to increase the value of the consideration paid to KingStreet for the Units held by KingStreet and that the Junior Credit Facilities can be entered into despite subsection 97(2) of the Act; and
 - (b) To the extent necessary, an order pursuant to subparagraph 104(2)(c) of the Act exempting the Applicants from the requirements of section 97 of the Act in connection with the Junior Credit Facilities and the Avion Convertible Debentures.

We request that the relief be granted as soon as reasonably practicable, and that if necessary, a hearing be convened in order to consider this application.

V. SUBMISSIONS

7. The central complaint about "collateral benefits" relates to the Junior Credit Facilities and Avion Convertible Debentures (described below). The terms of the Junior Credit Facilities and Avion Convertible Debentures are commercially reasonable and are consistent with industry standards. The Junior Credit Facilities and Avion Convertible Debentures are necessary for business purposes related to the financing, structuring, and the making of the Offer, and not for the purposes of increasing the value of the consideration to be paid to KingStreet for its Units.
8. Importantly, as KingStreet is a joint offeror holding a relatively small number of Units, the Applicants submit that the risk of mischief, which the prohibition against collateral benefits is intended to address, is not present in the current case. Specifically, there should be no concern that KingStreet's participation in the Junior Credit Facilities and Avion Convertible Debentures is intended to "buy" KingStreet's support for the Offer or cause it to improperly exert influence over Atlas in determining whether or not to recommend that holders of Units tender to the Offer.
9. In addition, the Applicants stated in prior correspondence that the agreement to consider forming a joint venture vehicle within three years, in order to effect a sale-leaseback of Atlas assets (the "Agreement to Consider") was not a "collateral benefit", in that an agreement to consider is not binding, has no value, and cannot be considered a "benefit". To prove the Applicants' point, the Applicants have entered into an agreement canceling the Agreement to Consider. If this ever was a collateral benefit, it has ceased to exist, and should no longer present any issue.
10. The Applicants repeat and rely upon their submissions in prior correspondence with respect to the various other complaints set out in the Atlas Application and subsequent correspondence.
11. It has been alleged that KingStreet has entered into collateral agreements, and will be receiving collateral benefits, in connection with the Offer. For the reasons set out in our correspondence of September 22 and 28, 2006, the Applicants disagree with this position. As Staff of the OSC has advised that it does not agree with the positions taken by the Applicants in this regard, however, the Applicants will accept, for the purposes of this application, that the Offer contains "benefits" to KingStreet. However, these "benefits" are necessary for business purposes related to the financing, structuring, and the making of the Offer, and not for the purposes of increasing the value of the consideration to be paid to KingStreet for its Units. In order to appreciate the basis for this assertion and the Applicants' position that it would not be contrary to the public interest for the OSC to grant the requested relief, it is necessary to understand that:
 - (a) KingStreet owns less than 5% of the outstanding Units, and its support for the Offer *qua* unitholder of Atlas is not crucial, or arguably even material, to the success of the Offer from the perspective of Avion and the Offeror, which should negate any inference that Avion had an incentive to "overpay" KingStreet for its support for the Offer. This stands in stark distinction to the "collateral benefit"

cases to which Staff has referred us – most notably and recently Sears Canada – where support for the bid by the recipient of the "benefit" was fundamental to the success of the transaction.

- (b) KingStreet's equity investment in Atlas, at the price under the Offer of \$7 per Unit, has a value of less than \$20 million, whereas its financing commitment to the Offeror (through Avion), totaling approximately \$126 million, is more than six times that amount. This should be viewed in contrast to the circumstance of a selling securityholder who is exiting an investment and may be induced to do so through the conferral of a collateral benefit. KingStreet is (as described in the paragraph immediately below) a joint offeror and, in substance, not a seller at all. This underscores the Applicants' position that any technical collateral benefits that might accrue to KingStreet through the various financing arrangements are clearly being entered into for a reason other than to increase the consideration paid to KingStreet for its Units.
- (c) As set out in our correspondence of September 22, 2006, having regard to the terms of the Letter Agreement (as defined below), pursuant to which, among other things and the fact that the Offer had been structured, and would be financed and implemented, by the mutual consent and cooperation of Avion and KingStreet, Avion and KingStreet concluded that they constituted joint offerors in light of the factors enumerated in Staff Notice 62-303 *Identifying the Offeror in a Take-over Bid* of the Canadian Securities Administrators (the "Notice"). This conclusion was further supported by the terms of the Lock-up Agreement, which was entered into subsequent to the date of the Letter Agreement and contains terms giving KingStreet the right and obligation, consensually with Avion, to control fundamental matters such as the timing, terms and conditions of the Offer. Also, as indicated above, the role that KingStreet served in initiating, structuring and negotiating the terms of the Offer was noted as an additional factor enumerated in the Notice that supported a conclusion that KingStreet was a joint offeror with Avion and the Offeror.

The Parties

- 12. The Offeror is a private company incorporated under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. The Offeror was incorporated for the purpose of making the Offer and has not carried on any business other than that incidental to making the Offer. The Offeror is a wholly-owned indirect subsidiary of Avion. The Offeror's head and registered offices are located at Toronto, Ontario. The authorized share capital of the Offeror is an unlimited number of common shares. As of the date hereof, the Offeror does not beneficially own any Units or any securities convertible or exchangeable for Units.
- 13. Avion is a limited liability company domiciled in Iceland. It was formed to invest in the transportation industry and currently has three business divisions: shipping and logistics; aviation services; and charter and leisure. Its head and registered offices are located at Kopavogur, Iceland. Avion beneficially owns 6,177,000 Units, representing

approximately 9.4% of the issued and outstanding Units calculated on a fully-diluted basis.

14. KingStreet is a private investment fund formed under the laws of Manitoba. Its general partner is KingStreet Real Estate Growth GP No. 2 Inc. KingStreet's head and registered offices are located at Toronto, Ontario. KingStreet and its affiliates beneficially own or exercise control or direction over 2,845,200 Units, representing approximately 4.3% of the issued and outstanding Units on a fully-diluted basis.
15. Atlas is an income trust established under the laws of the Province of Ontario. Atlas Cold Storage Holdings Inc. ("Atlas Holdings") is the administrator and operating entity of Atlas. Through Atlas Holdings, Atlas operates a Canadian and United States based network of public refrigerated warehouse facilities providing temperature controlled storage, a transportation management services business and a third party logistics management services business. The head and registered offices of Atlas are located at Toronto, Ontario. The Units are listed on the Toronto Stock Exchange (the "TSX"). Atlas is authorized to issue an unlimited number of Units and, as at June 30, 2006, 62,950,869 Units were issued and outstanding (65,507,326 on a fully-diluted basis).
16. SITQ Inc. ("SITQ") is a corporation incorporated pursuant to the laws of Quebec. SITQ's head and registered offices are located in Montreal, Quebec. SITQ's major shareholder is Caisse de dépôt et placement du Québec (the "Caisse"), which owns a 92.4% interest in SITQ.

Chronology

17. As set out in our correspondence of September 22, 2006, in or about June 2006, KingStreet approached Avion to discuss the possibility of the two parties structuring a joint bid for Atlas. Avion and KingStreet had no prior relationship and had never done any business with one another prior this initial approach. The basis upon which Avion and KingStreet agreed to proceed in respect of the Offer was set forth in a letter of understanding between them dated July 21, 2006 (the "Letter Agreement"). Under the Letter Agreement, Avion and KingStreet agreed to proceed in respect of the Offer. Pursuant to the Letter Agreement, Avion and KingStreet agreed upon, among other things: (a) the structure of the Offer; (b) the financing of the Offeror; (c) their mutual financial obligations in respect of costs if the Offer was not successful (Avion and KingStreet are responsible for 70% and 30% of the costs of the Offer, respectively); (d) the exclusivity arrangements between themselves for 12 months following the date of the Letter Agreement, pursuant to which each agreed that it would not contact or approach or deal directly with Atlas or cause or assist to facilitate any contact or approach or other dealing except through the Offeror in accordance with the provisions of the Letter Agreement; (e) the selection of counsel; and (f) mutual indemnifications if either party breaches the provisions of the Letter Agreement. To conduct the Offer, Avion assumed ownership of the Offeror from KingStreet, with the directors and officers of the Offeror comprised of representative of each of Avion and KingStreet.

18. On August 3, 2006 Avion announced its intention to make a take-over bid to acquire all the outstanding Units of Atlas at a price of C\$7.00 cash per Unit. The aggregated cost of the Offer including transaction costs, will be approximately C\$585 million.
19. Also on August 3, 2006, the Offeror, Avion, and Kingstreet entered into a lock-up agreement (the "Lock-up Agreement"), in which Avion agreed to cause the Offeror to make the Offer no later than August 31, 2006, and Avion and KingStreet both agree to unconditionally and irrevocably accept the Offer in respect of all Units owned or controlled by them.
20. On August 4, 2006, Atlas announced that the Board of Trustees of Atlas and the Board of Directors of Atlas Holdings met that day to initially review Avion's August 3, 2006 announcement. Atlas also announced that the Board of Trustees had approved the adoption of the Unitholder Rights Plan, effective August 4, 2006.
21. On August 11, 2006, Atlas announced that, in connection with the Unitholder Rights Plan, it had been advised by the TSX that the TSX would be deferring its consideration of the acceptance for filing of the Unitholder Rights Plan until Atlas could confirm that it is not aware of any pending or threatened take-over bid, or until the TSX is satisfied that the OSC will not intervene in any take-over bid for Atlas.
22. On August 17, 2006, the Applicants made the Offer and mailed the Avion Circular. The details of the Offer are described in greater detail below.
23. On August 31, 2006, the Board of Trustees of Atlas formally responded to the Offer. In the Trustee's Circular dated August 30, 2006, the Board unanimously recommended that the Unitholders reject the Offer and not tender their Units.
24. On September 21, 2006, Avion announced that the Offer would be extended to October 6, 2006. In its response, issued the same day, Atlas reiterated its refusal to support the Offer and stated that Atlas is in continuing discussions with interested third parties.

The Offer

25. On August 17, 2006, Avion made a formal offer to acquire all outstanding Units of Atlas for a price of C\$7.00 per Unit. The Offer represents a premium of approximately 12%, based on the closing price of the Units on August 2, 2006.
26. The Offer was commenced on August 17, 2006 by delivery of the Avion Circular to holders of Units and was filed with Canadian securities regulatory authorities on the same day. The Offer was initially open for acceptance for 35 calendar days.
27. On September 21, 2006, the Offer was extended to October 6, 2006 – 64 days after the initial announcement and 50 days after the formal bid was made.
28. The Offer is subject to customary conditions including: (i) there having been deposited under the Offer and not withdrawn, a number of Units which (together with any Units held by or on behalf of the Offerer or any joint offerors) constitute at least 66 2/3% of the

Units, on a fully-diluted basis; and (ii) having obtained all government and regulatory approvals which Avion considers necessary.

29. The Offer is fully financed with secured credit facilities provided by RBC Capital Markets, CIBC World Markets Inc., KingStreet, SITQ, and Avion.

The Alleged "Collateral Benefits"

30. As indicated above, the Applicants will accept, for the purposes of this application, that the Offer contains "benefits" to KingStreet. However, these "benefits" are necessary for business purposes related to the financing, structuring, and the making of the Offer, and not for the purposes of increasing the value of the consideration to be paid to KingStreet for its Units.
31. The first impugned "benefit" identified by Atlas was the Agreement to Consider. This was one paragraph of the Letter Agreement, which read:

23. Subsequent Real Estate Transaction

It is the intention of KingStreet and Avion that within three years after the acquisition of the Units of Atlas, the parties will explore the formation of a corporation ("Propertyco") under the laws of Canada or of Ontario which shall be jointly owned by Avion and KingStreet, in proportions to be agreed between them. It is further intended that KingStreet and Avion shall jointly identify the real estate properties held by Atlas that are eligible for a sale-leaseback transaction and that Propertyco will purchase such properties from Atlas, subject to financing, and leaseback to Atlas. It is also the intention of the parties that the proceeds from any such sale-leaseback transaction(s) will be applied as set out in paragraph 3(d) and that the Convertible Debenture referred to in paragraph 4 regarding the KS Security shall be restructured as necessary.

32. The Applicants' position has always been that this agreement to "explore" is not binding, and has no value other than an expression of interest.
33. By letter agreement dated October 4, 2006, the Applicants amended the Letter Agreement by deleting paragraph 23. To the extent that Atlas believed that this was a "benefit", that benefit has now been extinguished. There are no other agreements dealing with the subject matter of the now-deleted paragraph 23.
34. The second impugned "benefit" relates to the Junior Credit Facilities. For reasons explained below, the Junior Credit Facilities were made for a business purpose, not for the purpose of increasing consideration payable to KingStreet for its Units.
35. The Junior Credit Facilities consist of three principal elements: the Mezzanine Facility; the Acquisition Facility; and the Participating Bond (collectively called the "Junior Credit Facilities"). The Junior Credit Facilities form the basis in which KingStreet (as to 60%)

and SITQ (as to 40%) (together the "Junior Lenders") have agreed to fund/purchase in connection with the Offer. The Junior Credit Facilities are secured by a single set of security documents.

36. In addition to the Junior Credit Facilities, the Offeror shall be obtaining acquisition financing from one or more institutional lenders including Royal Bank of Canada (the "Senior Credit Facilities") and \$220,000,000 acquisition financing from Avion or a subsidiary thereof (the "Avion Acquisition Financing").
37. The third impugned "benefit" relates to the Avion Convertible Debentures. Pursuant to a subscription agreement (the "Avion Subscription Agreement"), each of the Junior Lenders has agreed (on a several basis) to purchase 3 days prior to the bid closing (which, for clarity, means 3 days prior to the date upon which the initial advance of the Junior Credit Facilities is required to be made) for \$100,000,000 CDN (\$60,000,000 in the case of KS, and \$40,000,000 in the case of SITQ) principal amount of convertible debentures issued by Avion
38. The specific terms of the Junior Credit Facilities and the Avion Convertible Debentures are described in Schedule "A" to this letter.
39. The Applicants submit that the OSC should decide that, for the purposes of subsection 97(2) of the Act, the Junior Credit Facilities and the Avion Subscription Agreement entered into in connection with the Offer are made for business reasons other than to increase the value of the consideration paid to KingStreet for the Units held by KingStreet and that the Junior Credit Facilities can be entered into despite subsection 97(2) of the Act, and that it would not be contrary to the public interest for the OSC to do so.
40. The Applicants further submit that, to the extent necessary, the OSC should issue an order pursuant to subparagraph 104(2)(c) of the Act exempting the Applicants from the requirements of section 97 of the Act in connection with the Junior Credit Facilities and the Avion Subscription Agreement.

Section 97 and Subsection 104(2) of the Act

41. Section 97 of the Act requires that identical consideration be provided to securityholders of the same class. Subsection 97(1) of the Act prohibits facially differential treatment among securityholders. Subsection 97(2) of the Act prohibits bidders from doing indirectly what they cannot do directly.
42. The policies underlying this section were set out in *CDC Life Sciences Inc. (Re.)* (1988), 11 OSCB 2541 as follows:

[T]wo complementary policies inform the take-over bid provisions of the Act: the first is to ensure that all offerees have an equal opportunity to accept a bid on the basis of a determination made in the light of full disclosure relating to the offeror, the bid and the target company; the second is to ensure that holders of publicly

traded securities are treated equally by persons who purchase large numbers of securities, whether from a controlling person, from selected holders of significant blocks, or from security holders generally.

43. Subsection 104(2) provides for relief from the strict application of section 97 in circumstances when the policy behind section 97 does not apply, or when it would otherwise be inappropriate to apply section 97 to the "benefits" at issue. Subsection 104(2) states:

104(2) On application by an interested person and subject to such terms and conditions as the Commission may impose, if the Commission is satisfied that it would not be prejudicial to the public interest, the Commission may,

(a) decide for the purposes of subsection 97(2) that an agreement, commitment or understanding with a selling security holder is made for reasons other than to increase the value of the consideration paid to the selling security holder for the securities of the selling security holder and that the agreement, commitment or understanding may be entered into despite that subsection;

[...]

(c) exempt a person or company from any of the requirements of this Part or the regulations related to this Part.

44. When considering whether an agreement should be exempted from the provisions of section 97(2) of the Act, the OSC considers the "entirety of the substance" of the transaction, and "not isolated portions of them only". The OSC looks at the "economic substance" of the transaction. See *Noverco Inc. (Re)* (1990), 13 OSCB 3243.
45. It is axiomatic that when reviewing agreements alleged to confer collateral benefits, "[e]ach case must be decided on its own facts": *Noverco, supra*.
46. The test for whether an agreement is "commercially reasonable" is not whether it is "commercial perfection" or the best possible terms that could be available. Rather, the OSC should be concerned with whether the terms of the agreement are within a zone of reasonableness.

The Standard of Review of Collateral Benefits to Joint Offerors

47. In the Applicants' initial responding letter dated September 20, 2006, the Applicants set out certain reasons why section 97(2) ought not to apply to joint offerors in any circumstance. Even if that principled position is not adopted to exclude the application of section 97(2) to all joint offerors, those same rationales ought to be considered when

determining the standard of review that the OSC should apply to "collateral benefits" conferred to joint offerors. As stated in the Applicants' earlier submissions:

- (a) The usual form of "collateral benefits" considered by the OSC in connection with this provision relates to employment agreements with officers or directors of the target company who are also securityholders. See, e.g., *Unocol Canada Resources (Re)* (2000), 23 OSCB 4961; *Altamira Financial Corp. (Re.)* (1989), 12 O.S.C.B. 320; *Synnex Canada Ltd. (Re.)* (2004), 27 O.S.C.B. 8371
 - (b) The "mischief" in those cases is the appearance that the offeror is "buying insiders off", perhaps with an ancillary concern that those officers or directors might improperly recommend shareholders tender their shares, having been influenced by the additional payment.
 - (c) The same "mischief" does not apply to a joint offeror. In a cash bid, the offeror will simply be paying itself for the shares: there is no net difference to an offeror shareholder between a \$100/share offer and a \$5/share offer: the offeror is simply paying itself "from one pocket to another". There obviously cannot be any concern that the offeror is seeking to improperly influence itself. Similarly, the remaining offeree shareholders cannot meaningfully complain that they are being treated differently than the offeror is treating itself.
48. The Applicants submit that where the probability of mischief is high, as in the case where collateral benefits are conferred on officers or directors who also hold shares, or where collateral benefits are conferred on key shareholders in order to "tip the balance" of the tender (as was the case, for example, in the OSC's recent *Sears Canada* decision), then the collateral benefits rightly should be viewed with suspicion and held to a high level of scrutiny.
49. But, as in the present case, where there can be no suggestion (and, given the relatively few Units held by KingStreet, hardly any benefit) of "buying a securityholder off" or the bidder seeking to confer additional consideration in order to secure the loyalty of key shareholders, a different standard of review should be applied. The Applicants submit that collateral benefits to joint offerors should receive a standard of review commensurate with the risk of mischief, which must be less than other types of collateral benefits.
50. Arguably because of the lack of mischief in conferring collateral benefits to joint offerors, in every reported case of a joint offeror applying for section 104(2)(c) relief, an exemption has been granted: *Caithness Resources, Inc. (Re)* (1990), 13 O.S.C.B. 5333; *Noverco Inc. (Re)* (1990), 13 O.S.C.B. 3243; *Sanivan Group Inc. (Re)* (1991), 14 O.S.C.B. 1197; *AIC Funds (Re)* (2001), 24 O.S.C.B. 93.

Junior Credit Facilities and Avion Convertible Debentures are Not Designed to Confer Additional Consideration on KingStreet for Its Units

51. With respect to the alleged "collateral benefits" flowing from the Junior Credit Facilities, there is a fundamental fact that cannot be overstated: KingStreet and its affiliates beneficially own or exercise control or direction over 2,845,200 Units, representing

approximately 4.3% of the issued and outstanding Units on a fully-diluted basis, having a value, at \$7 per Unit, of less than \$20 million. By contrast, KingStreet is entering into the Junior Credit Facilities and Avion Convertible Debenture, whereby it will be advancing \$126 million. Parties typically do not advance \$126 million of their own funds in order to provide some incremental benefit to the purchase of their own very small holding of securities. Indeed, any increase in the price to be paid pursuant to the Offer (including to KingStreet in respect of its Units) would be financed, in part, from the Acquisition Facility, the majority of which KingStreet is committed to funding. Viewed in this light, it becomes clear that KingStreet has an incentive to reduce as opposed to increase the price under the Offer, which is not consistent with the rational position that would be taken by a target securityholder (and recipient of collateral benefits.) Atlas' position with respect to this issue simply ignores commercial reality.

52. Moreover, the specific terms of the Junior Credit Facilities and the Avion Subscription Agreement are commercially reasonable and made for business purposes unrelated to conferring additional consideration to KingStreet for its Units. To understand why this is so, it may be helpful to first understand the nature of mezzanine financing. Mezzanine financing is typically advanced to a company that is not in a financially strong position and often is highly leveraged with problematic net income or cashflow is considered to be a high risk loan. Accordingly, such loans are typically characterized by (i) higher interest rates (ii) junior security (iii) subordination in right of payment and in right of enforcement (iv) higher upfront and other fees which must be paid at the commencement of the loan and typically are considerably higher than those paid in connection with a conventional senior loan (v) covenants and events of default which are reflective of the higher risk nature of such loans, and (vi) a contingent participation or equity component which only has value if there is improved financial performance of the company.
53. Complex financing arrangements such as the Junior Credit Facilities and the Avion Subscription Agreement cannot be parsed and individual elements examined in isolation. That is not how lenders and borrowers value mezzanine loans and it is not consistent with commercial reality. Rather, the totality of the transaction must be considered to determine whether the agreements as a whole are commercially reasonable and made for a business purpose, on the one hand, or for the purpose of conferring additional consideration to a securityholder, on the other.
54. The terms of the Junior Credit Facilities can be meaningfully divided into two general groups: the financial terms of the Junior Credit Facilities; and the non-financial terms of the Junior Credit Facilities.
55. With respect to the financial terms of the Junior Credit Facilities, the Applicants will file on October 6, 2006 letters from two Canadian national investment bankers that will address this issue.
56. The Convertible Debentures do not constitute part of the Junior Credit Facilities, but Avion has agreed that its obligations under such Convertible Debentures shall be secured by the same security as the Junior Credit Facilities. Both the interest rate and the conversion price for the Convertible Debentures were negotiated and fixed between the

Junior Lenders and Avion. The conversion price was agreed to by the parties based upon a consideration of the trading price of the shares of Avion since its initial public offering as at the date the conversion price was set, and that it was set significantly above such historical price. None of the terms of the Convertible Debentures are indicative of non-arm's length dealings.

57. With respect to the non-financial terms of the Junior Credit Facilities, the Applicants make the following additional submissions:
- (a) It is common practice for mezzanine loans to be customized and tailored to the specific nature of the borrower and the takeover target. For example, where the borrower or the target has specific taxation issues to consider, the loan documents will be tailored in order to address those issues. This is reflected in the Junior Credit Facilities which contain various provisions that are not found in all other mezzanine financing transactions, and which have been negotiated to address various commercial and tax considerations relevant to the specific circumstances of the Offeror as set out in the Junior Credit Facilities is consistent with, and reflective of, the arms-length nature of the lending relationship between the Junior Lenders and the Offeror.
 - (b) The rights and remedies of a mezzanine lender are generally more restricted than those of the senior lender; however, mezzanine lenders will customarily negotiate certain restricted remedies that allow them to preserve the value of their security upon default. The terms of the interlender arrangements contained in the Senior Credit Facilities provide for such rights and remedies for the Junior Lenders, and are consistent with like arm's length interlender arrangements.
 - (c) The tranching of the Junior Credit Facilities into the Mezzanine Loan, the Acquisition Facility and the Participating Bond is not inconsistent with other structured finance transactions wherein the parties attribute different financial and repayment terms to different components of the principal amount loaned. Accordingly, for example, although the Participating Bond may, on its own, have terms which are specifically crafted for this transaction, such Participating Bond is only one of three tranches of the same loan, which tranches are inseparable (are secured by the same security documents, and share the same representation, warranty and covenant package), and which must be considered as a single loan.
 - (d) The covenants, representations, warranties and other non-financial terms for the Junior Credit Facilities are reflective of arms length loan transactions, and will in fact, be based upon the covenants, representations and warranties contained in the Senior Credit Facilities, an arrangement that the Junior Lenders agreed to so as to ensure that there was consistency in the obligations of the Offeror to both the senior and junior lenders, and so as to ensure that no lesser obligations, remedies and restrictions were placed on the Offeror by the Junior Lender than the Senior Lender. This is further evidence that the non-financial terms are commercially reasonable, because they are consistent with terms that were acceptable to an arm's length commercial lender, being the Royal Bank of Canada.

VI. CONCLUSION

58. The Applicants submit that the Junior Credit Facilities and Avion Convertible Debentures entered into in connection with the Offer are made for reasons other than to increase the value of the consideration paid to KingStreet for the Units held by KingStreet. The OSC should decide that the Junior Credit Facilities and Avion Convertible Debentures can be entered into despite subsection 97(2) of the Act, and to the extent necessary, the OSC should issue an order pursuant to subparagraph 104(2)(c) of the Act exempting the Applicants from the requirements of section 97 of the Act in connection with the Junior Credit Facilities. It would not be contrary to the public interest for the OSC to so decide.
59. If necessary to achieve expeditious resolution of this matter, the Applicants request a hearing to be scheduled as soon as reasonable practicable to consider whether the relief sought in this application will be granted.
60. In support of this application, we enclose as Schedule B a verification statement of Avion, the general partner of KingStreet and the Offeror confirming our authority to prepare and file this application and confirming the facts contained herein.
61. A table of concordance, together with cheques representing applicable filing fees in each of the Jurisdictions will follow shortly. Having regard to the fact this matter is proceeding to a hearing, we are available to prepare a form of order should the Ontario Securities Commission prefer so.

If you have any questions or require additional information in respect of the foregoing, please contact us at the coordinates below.

Yours truly,

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**SCHEDULE A –
DESCRIPTION OF THE JUNIOR CREDIT FACILITIES
AND AVION CONVERTIBLE DEBENTURES**

The Junior Credit Facilities

2. The Junior Credit Facilities (this, and all defined terms used in this Schedule have the same meaning as that used in the Application) shall have common positive covenants, negative covenants, representations and warranties and events of default (the "Non-Financial Terms"), and except where the context does not permit same, it is the intention of the parties that the Non-Financial Terms shall mirror those contained in the loan documents for the Senior Credit Facilities. In addition, the security documents for the Junior Credit Facilities (the "Security") shall be in the same form as those which secure the Senior Credit Facilities.
3. The "Mezzanine Facility" is a credit facility established by the Junior Lenders in an aggregate principal amount of \$50,000,000 CDN. The Mezzanine Facility is intended to finance any shortfall (not to exceed \$50,000,000) in the ability of Offeror to secure \$300,000,000 in Senior Credit Facilities. Interest is payable monthly at a rate of 12%. Interest shall be payable to the extent of available net cash as per the heading "Repayment Priorities" below, and to the extent such net cash is not available, shall be added to principal until net cash is available or until subject to mandatory repayment.
4. The "Acquisition Facility" is a credit facility established by the Junior Lenders in an aggregate principal amount of \$80,000,000 CDN. The Acquisition Facility shall bear interest at a 10% cumulative return, payable monthly. The Offeror may repay it in whole and not part, prior to the end of the 3rd year of at 125% of par plus accrued interest, at the end of the fourth year at 112.5% of par plus accrued interest, and at the end of the term at par plus accrued interest. Any and all repayments must occur prior to any repayment of the Participating Bond. Interest shall be payable to the extent of available net cash as per the paragraph on "Repayment Priorities" below, and to the extent such net cash is not available, shall be added to principal until net cash is available or until subject to mandatory repayment.
5. The Offeror shall issue a bond pursuant to which the Junior Lenders shall be entitled to the redemption value described below (the "Participating Bond"). The Participating Bond shall have a term of 5 years subject to early mandatory repayment (such repayment not to be earlier than three years from the completion date of the bid), and subject to the terms of the Bond Call Right (as hereinafter defined), should the Acquisition Facility be prepaid as provided in the section on the Acquisition Facility set out at paragraph 29 above. The redemption value of the Participating Bond shall be The Borrower NAV less The Borrower Cost multiplied by 30% (the "Redemption Price"). It is agreed for the purposes of this calculation that the Borrower shall include all of the North American operations of Avion similar to those activities of the Company. For the purposes of the foregoing calculation, the following definitions apply:

- (a) "The Borrower NAV" shall mean trailing EBITDAR for the 12 months immediately prior to the valuation date, multiplied by 10; and
 - (b) "The Borrower Cost" shall be (A) the greater of (i) the Acquisition Cost of the Company and (ii) trailing EBITDAR of the Company for the 12 months immediately preceding closing multiplied by 10, plus (B) any further acquisitions by Avion or Eimskip North America 2005 in similar businesses as the Company in North America valued as EBITDAR at time of acquisition multiplied by 10.
6. The Junior Lenders shall grant to Avion (the "Call Holder") the right (the "Bond Call Right") to acquire the Participating Bond from the Junior Lenders for a price equal to the Strike Price (as defined below) on any date (and immediately preceding such redemption) upon which the Participating Bond must be prepaid pursuant to the mandatory prepayment provisions under the heading "Participating Bond" above, provided that such right shall only be exercisable provided that (a) no Event of Default under the Junior Credit Facilities has occurred and is continuing at such time; and (b) the Acquisition Facility, including all accrued interest thereon, has been paid in full. Immediately upon the exercise of such Bond Call Right, the transfer of the Participating Bond to the Call Holder and the payment of the Strike Price, the Participating Bond shall, on its terms, be amended such that (i) it is non-transferable, (ii) it is no longer secured by the Security, and (iii) the mandatory payment thereunder of any amount in excess of the Strike Price is deferred until such time as the Mezzanine Facility and the Senior Credit Facilities and all other obligations outstanding to the lenders thereof, are repaid in full. For the purposes of the foregoing, "Strike Price" means (a) \$128,000,000 if the Bond Call Right is exercised at the end of the third year following the issuance of the Participating Bond, (b) \$144,000,000 if the Bond Call Right is exercised in the fourth year following the issuance of the Participating Bond, and (c) \$160,000,000 if the Bond Call Right is exercised in the fifth year following the issuance of the Participating Bond.
7. The Junior Credit Facilities will mature:
- (a) in the case of the Mezzanine Facility on the date that is 39 months following the closing date of the Senior Credit Facilities; and
 - (b) in the case of the Acquisition Facility and the Participating Bond, on the date that is five years following the closing date of the Senior Credit Facilities.
8. The Junior Lenders and the lender under the Avion Acquisition Facility (the "Secured Parties") shall enter into an interlender agreement (the "Interlender Agreement") which shall provide, *inter alia*, that, subject to the terms of the Senior Credit Facilities:
- (a) no repayment of the principal or premium (whether before or after default) under the Avion Acquisition Facility, the Acquisition Facility or the Participating Bond shall be made until the Mezzanine Facility (including, without limitation, all principal and interest thereunder) has been paid in full;
 - (b) no repayment of the principal or premium shall be made under the Avion Acquisition Facility unless the Acquisition Facility and the Participating Bond are

both repaid, and no prepayment of the Acquisition Facility shall be permitted except in accordance with paragraph 29 above;

- (c) the net cash proceeds from the operations of the business of the Company or the sale of any assets shall be applied:
- (i) firstly to repay amounts then due under the Senior Credit Facilities;
 - (ii) secondly to repay interest then due under the Mezzanine Facility and to prepay principal under the Mezzanine Facility until it is fully repaid;
 - (iii) thirdly, to repay all indebtedness under the Senior Credit Facilities until they are fully repaid;
 - (iv) fourthly, to pay the 10% cumulative return under the Acquisition Facility, until such time as the full amount of such return is received by the lender thereof;
 - (v) fifthly to pay the 10% cumulative return under the Avion Acquisition Facility, until such time as the full amount of such return is received by the lender thereof; and
 - (vi) sixthly, for the purposes of repaying the principal amount of the Acquisition Facility, the Avion Acquisition Facility and the Participating Bond, in accordance with paragraph (b) above, provided that, if no prepayment may be permitted pursuant to Section (b) due to such proceeds being insufficient, then such net cash proceeds shall not be distributed until otherwise required by the Facilities, and permitted by the Interlender Agreement (provided that such prepayments shall not be prevented due to there being unpaid amounts under the Participating Bond that were deferred as provided above (in the description of the Bond Call Right).

The Avion Convertible Debentures

9. Pursuant to the Avion Subscription Agreement, each of the Junior Lenders has agreed (on a several basis) to purchase 3 days prior to the bid closing (which, for clarity, means 3 days prior to the date upon which the initial advance of the Junior Credit Facilities is required to be made) for \$100,000,000 CDN (\$60,000,000 in the case of KS, and \$40,000,000 in the case of SITQ) principal amount of convertible debentures issued by Avion, which convertible debentures shall (i) have a five year term; (ii) not be voluntarily prepayable by Avion except on the 4th anniversary of the term; (iii) bear interest at 15% per annum on the principal amount (excluding accrued interest); (iv) require payment of interest only upon redemption or maturity (but not upon conversion); (v) be redeemable up to \$10,000,000 CDN (\$6,000,000 in the case of KingStreet and \$4,000,000 in the case of SITQ) at the end of each year for five years, and be redeemable in full at the end of years 3 and on maturity; and (vi) be convertible at any time into common shares of Avion at a price of IKR 40 per share. Any shares acquired by way of conversion shall be freely tradable.

10. The obligations of Avion under the Convertible Debenture and the Avion Subscription Agreement shall be an unconditional obligation and shall be guaranteed by the Offeror and the Investor pursuant to the Convertible Debenture Guarantee and secured by the Security.
11. On the date that the conversion price for the Convertible Debentures was set at IKR 40 per share, the shares of Avion closed at IKR 32.9, and on the day prior, such shares closed at IKR 33.

Garth M. Girvan

Direct: 416-601-7574

E-Mail: ggirvan@mccarthy.ca

September 15, 2006

VIA E-MAIL AND COURIER

Ontario Securities Commission
20 Queen Street West, Suite 1903
Toronto ON M5H 3S8

Attention: Mr. Naizam Kanji, Manager, Mergers and Acquisitions Team

Dear Sirs/Mesdames:

Re: Atlas Cold Storage Income Trust – Application under Section 104 of the Securities Act (Ontario)

We are counsel to Atlas Cold Storage Income Trust (the “Trust”) in connection with the unsolicited offer (the “Avion Offer”) made by Eimskip Atlas Canada, Inc. (the “Offeror”) on August 17, 2006 to purchase the outstanding trust units of the Trust (“Atlas Units”). The Avion Offer constitutes an “insider bid” for purposes of applicable securities laws.

Pursuant to an application dated August 2, 2006 (the “Avion Application”), the Offeror sought relief from the requirements of Ontario Securities Commission (the “OSC”) Rule 61-501 (“Rule 61-501”) that a Subsequent Acquisition Transaction (as defined in the Offeror’s take-over bid circular (the “Avion Circular”)) be approved at a meeting of the Trust’s unitholders and that an information circular be sent to the Trust’s unitholders in connection with the Subsequent Acquisition Transaction.

Overview

In our view:

- various arrangements entered into in connection with the Avion Offer appear to have the effect of providing collateral benefits to KingStreet Real Estate Growth LP No. 2 (together with its general partner KingStreet Real Estate Growth GP No.2, “KingStreet”) contrary to section 97 of the Act;
- the Avion Application and the Avion Circular insufficiently disclose certain material aspects of the Subsequent Acquisition Transaction proposed to be carried out by the Offeror following completion of the Avion Offer; and

September 15, 2006

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- the Avion Circular omits material information that is required to be disclosed under applicable securities laws.

Relief Requested

For these reasons, we submit that it would be appropriate and in the public interest for the OSC to obtain additional information relating to the issues raised in this letter from the Offeror and parties acting jointly or in concert with the Offeror and if our concerns are not satisfied then the OSC grant the following relief:

1. pursuant to section 104(1)(a) of the Securities Act (Ontario) (the Act”), an order restraining any further distribution of the Avion Circular in connection with the Avion Offer;
2. pursuant to section 104(1)(b) of the Act, an order requiring the Offeror to amend or vary the Avion Circular and distribute such amended or varied circular to those persons to whom the Avion Circular was required to be sent;
3. pursuant to section 104(2)(b), the variation of all time periods set out in the Act and the respective rules and regulations made thereunder such that those time periods run anew from the date that the Offeror sends the amended or varied documents described above;
4. pursuant to section 104(1)(c) of the Act, an order directing each of the Offeror, Avion Group HF (“Avion”) and KingStreet (collectively, “Avion”) to comply with Part XX of the Act and the rules and regulations relating thereto and restraining Avion and the Offeror from contravening such Part, rules and regulations, including section 97 of the Act; and
5. a revocation of any relief granted by the OSC in favour of Avion or the Offeror in connection with the Avion Offer.

Submissions

The Arrangements Between Avion, the Offeror and KingStreet Confer Collateral Benefits on KingStreet

Section 97(2) of the Act prohibits an offeror from entering into any collateral agreement, commitment or understanding with any securityholder of the offeree issuer that has the effect of providing to that securityholder with consideration of greater value than that offered to the other holders of the same class of securities. KingStreet and Avion are material unitholders of Atlas and have agreed to tender their holdings to the Avion Offer.

As described in greater detail below, the Avion Circular indicates that KingStreet and certain of its related parties have been given the opportunity to make available to the Offeror the KingStreet Credit Facilities (as defined below) and receive compensation therefor and to purchase the Avion Convertible Debentures (as defined below) from Avion (collectively, the “KingStreet Collateral Benefits”).

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The Avion Circular also states that KingStreet and the Offeror are joint actors for purposes of the Avion Offer but does not provide any basis for that determination and none is apparent from the disclosure in the Avion Circular. In fact:

- KingStreet does not own any securities of the Offeror; and
- rather than retain the Atlas Units currently held by KingStreet and its related parties, KingStreet has entered into a lock-up agreement with the Offeror pursuant to which KingStreet has agreed to tender those Atlas Units to the Avion Offer, thereby entitling KingStreet and its related parties to monetize their investment in Atlas Units while at the same time enjoying the benefits that will accrue to them under the KingStreet Facilities and the Avion Convertible Debentures. Those benefits will not be available to any other unitholder of the Trust;

We note that KingStreet has signed a certificate in the Avion Circular. We submit that the fact that KingStreet may have designated itself as a joint actor and signed the Avion Circular should not, in the circumstances of this transaction, permit KingStreet to circumvent the fundamental principle of equal treatment of all target securityholders underlying section 97 of the Act, and that the benefits afforded to KingStreet under the KingStreet Collateral Arrangements should be prohibited.

The Avion Circular and Avion Application Contain Material Disclosure Deficiencies

A. The Avion Circular does not contain any meaningful discussion relating to the background of the Avion Offer. Pursuant to section 2.2 of OSC Rule 61-501, an offeror undertaking an insider bid must disclose the background to the insider bid. In particular, the Avion Circular states that “[each] of Avion and KingStreet is acting jointly and in concert with the Offeror in connection with the Offer” (at page 24). However, the circular does not describe the background of the circumstances that lead Avion and KingStreet to become joint actors of the Offeror. We note that neither the Avion Circular nor the early warning report filed by the Offeror in connection with the announcement of the Avion Offer indicate whether Avion and KingStreet are acting jointly and in concert with each other (and, if so, when those parties commenced doing so). We do not believe there is sufficient background in the Avion Circular to enable a conclusion to be drawn that Avion and KingStreet have not acted jointly and in concert in connection with the Avion Offer, and that they have only acted solely through the Offeror, a wholly-owned indirect subsidiary of Avion. In our view this is unlikely.

- the Offeror is a shell company formed less than a month prior to the date of the Avion Application and the announcement of Avion’s intention to make the Avion Offer;

September 15, 2006

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- Avion began acquiring Atlas Units on February 9, 2006 and KingStreet and its related persons and entities have held Atlas Units since at least August 18, 2005 (see section 10 of the Avion Circular);
- on February 28, 2006, Avion purchased 750,000 Atlas Units at a price of \$6.65 per unit and on that same day KingStreet sold 500,000 Atlas Units at the same price plus a further 490,000 Atlas Units at a price of \$6.50 per unit (see section 10 of the Avion Circular);
- Avion has effectively agreed to postpone and subordinate its funding for the Avion Offer in favour of financing to be provided by KingStreet to the Offeror in order to fund the purchase price of the Avion Offer and related security (the "KingStreet Credit Facilities") (see section 8 of the Avion Circular);
- KingStreet and a related party have agreed to purchase \$100 million aggregate principal amount of convertible debentures of Avion (the "Avion Convertible Debentures"). Those convertible debentures bear interest "at a level customary for an instrument of this type" and may not be prepaid by Avion for four years, thereby ensuring KingStreet a certain rate of return in connection with its participation in the Avion Offer (although the amount of this benefit is not determinable from the disclosure in the Avion Circular). The Avion Circular does not disclose the conversion price of those convertible debentures;
- the Avion Circular discloses that "it is the intention of Avion and KingStreet that within three years after the acquisition of the [Atlas Units] by the Offeror, Avion and KingStreet will consider the formation of a jointly owned corporation that would purchase certain properties from [Atlas] and lease such properties back to [Atlas]" (see section 5 of the Avion Circular). The Avion Circular does not provide any further details of the arrangements between Avion and KingStreet in this regard;

B. With respect to disclosure, we also submit that the Avion Circular fails to fully disclose the direct and indirect benefits to KingStreet, as a company acting jointly or in concert with the bidder, of accepting or refusing to accept the bid. Any such benefits are only implied in the Avion Circular. These details, required to be included in the Avion Circular by applicable securities legislation, may affect the decision of an Atlas Unitholder to accept or reject the Offer.

We submit that the disclosure in the Avion Circular with respect to the KingStreet Collateral Benefits is materially deficient and fails to comply with Item 19 of Form 32 and Items 8, 17 and 29 of Form 33 by failing to disclose any meaningful description of the covenants, events of default, interest rates, premiums or other payments to the lenders under the terms of the KingStreet Credit Facilities or the exercise price (including relative to the trading price of the Atlas shares at the date of the Avion Circular and the historic trading prices of those shares) of the Avion Convertible Debentures. In our view, fulsome disclosure of the terms of those collateral benefits is particularly warranted and in the public interest in these circumstances

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where the party receiving collateral benefits to the exclusion of the target's securityholders does so in the context of an insider bid.

C. We also submit that, contrary to Item 19 of Form 32 and Item 29 of Form 33 the details surrounding a possible Subsequent Acquisition Transaction are insufficiently described in the Avion Circular. It is not entirely clear how the Offeror intends to complete any amendments to the Trust's declaration of trust, given the restrictions in the declaration of trust on the voting of trust units of the Trust held by affiliates of the Trust or Atlas Cold Storage Holdings Inc. ("ACSHI"). Following the completion of the Offer, the Offeror and each of the Trust and ACSHI will be affiliates for the purposes of the declaration of trust. As such, the Trust does not believe that a subsequent acquisition transaction proposed by the Offeror can be completed on the terms contemplated in the Avion Circular. Unlike in the case of the take-over bid by Livingston International Income Fund for the units of PBB Global Logistics Income Fund, the Offeror has not sought from tendering holders of Atlas Units a power of attorney enabling the Offeror to vote those Atlas Units in advance of taking up Atlas Units under the Avion Offer.

We submit that it would be inappropriate for the OSC to grant the relief requested in the Avion Application when to do so would appear to run contrary to the terms of the Trust's declaration of trust and would be based upon only a vague description of what a Subsequent Acquisition Transaction would entail.

In addition, in light of the stated intention of the Offeror to break up the assets of the Trust and divide the spoils with KingStreet, we submit that those Atlas Unitholders that elect not to tender to the Avion Offer should not be denied the fundamental protections of Rule 61-501 and should have the benefit of a meeting and the related disclosure materials in determining whether to approve any such transaction.

We enclose a verification statement from a senior officer of the Trust's administrator in respect of this application and our firm's cheque in the amount of the applicable filing fee. Also enclosed are copies of the applicable order and the Avion Circular and the Trustees' Circular.

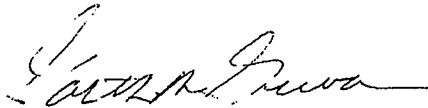
McCarthy Tétrault

September 15, 2006

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Should you have any questions regarding the foregoing, please contact me (416-601-7574), Blair Cowper-Smith (416-601-7988) or Jonathan Grant (416-601-7604).

Yours very truly,



Garth M. Girvan
GMG/mcj/kl
Enc.

c: Alan Bell, Bennett Jones LLP
G. Blair Cowper-Smith, McCarthy Tétrault LLP
Jonathan Grant, McCarthy Tétrault LLP

VERIFICATION AND AUTHORIZATION

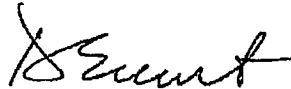
TO: Ontario Securities Commission

The making and filing of the application dated September 15, 2006 by McCarthy Tétrault LLP is authorized by Atlas Cold Storage Income Trust and the truth of the facts contained therein is confirmed.

Dated this 15th day of September, 2006.

ATLAS COLD STORAGE INCOME TRUST

By:



Name: Darrell R. Ewert

Title: Vice-President, Legal Affairs

McCarthy Tétrault LLP

DAY MONTH YEAR
15 Sep 2006

TD CANADA TRUST
TORONTO-DOMINION CENTRE BRANCH
55 KING STREET W & BAY ST.
TORONTO, ONTARIO M5K 1A2

SUITE 4700, TORONTO DOMINION BANK TOWER
TORONTO-DOMINION CENTRE, TORONTO, CANADA M5K 1E6

268811

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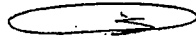
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Ontario Securities Commission

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COUNTERSIGNED

⑈ 268811⑈ ⑆ 10202⑈004⑆ 0690⑈0749449⑈

Payee: Ontario Securities Commission
Vendor ID:

Cheque #: 268811
Cheque Date: Sep 15/06

<u>Disb Date</u>	<u>Description</u>	<u>Client</u>	<u>Matter</u>	<u>Amount</u>
09/15/2006	Garth Girvan	196857	356295	\$3,000.00

Disbursements Total: \$3,000.00

VERIFICATION AND AUTHORIZATION

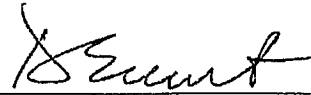
TO: Ontario Securities Commission

The making and filing of the application dated September 15, 2006 by McCarthy Tétrault LLP is authorized by Atlas Cold Storage Income Trust and the truth of the facts contained therein is confirmed.

Dated this 15th day of September, 2006.

ATLAS COLD STORAGE INCOME TRUST

By: _____



Name: Darrell R. Ewert

Title: Vice-President, Legal Affairs

September 22, 2006

VIA E-MAIL

Ontario Securities Commission
Suite 1903, PO Box 55
20 Queen Street West
Toronto, ON M5H 3S8

Attention: Michael Brown, Senior Legal Counsel
Erin O'Donovan, Senior Legal Counsel

Dear Mr. Brown and Ms. O'Donovan:

Re: Atlas Cold Storage Income Trust – Response to Application under Section 104 of the *Securities Act* (Ontario)

This letter is in response to the application made by Atlas Cold Storage Income Trust ("Atlas") to the Ontario Securities Commission (the "OSC") dated September 15, 2006 (the "Application") in relation to the offer (the "Offer") by Eimskip Atlas Canada, Inc. (the "Offeror") to acquire all of the outstanding trust units (the "Units") of Atlas. Our response is on behalf of the Offeror, KingStreet Real Estate Growth LP No. 2 ("KingStreet") and Avion Group HF ("Avion") (collectively, the "Respondents"). As previously advised, Bennett Jones LLP is acting as counsel to the Offeror and to KingStreet and Goodmans LLP is acting as counsel to Avion.

Summary of the Respondents' Position

The Respondents' position with respect to the Application can be summarized as follows:

- The "collateral benefit" prohibition has no application to the Offer:
 - There are no differential "benefits" granted to KingStreet, in its capacity as a holder of units of Atlas (a "Unitholder"), pursuant to the Offer that provides KingStreet a consideration of greater value than that offered to other holders of the same class of securities, as alleged by Atlas, or at all;
 - Even if KingStreet were to receive benefits in its capacity as a party financing the cash Offer, the "collateral benefit" prohibition in section 97 does not apply to

benefits accruing to an offeror itself or to a joint offeror in this capacity, when any such benefits have no relationship whatsoever with the consideration received by securityholders; and

- The take-over bid circular (the "Circular") adequately discloses all material aspects of the Subsequent Acquisition Transaction (as described in the Circular);
- The Circular adequately discloses all material information that is required to be disclosed under applicable securities laws.

Accordingly, the Respondents respectfully request that the Application be dismissed.

1. The Arrangements Between the Respondents Do Not Confer "Collateral Benefits"

The Application alleges that certain of the financing arrangements entered into in connection with the Offer appear to have the effect of conferring collateral benefits on KingStreet contrary to section 97(2) of the *Securities Act* (Ontario) (the "Act"). The ill-considered notion that a joint offeror could receive a collateral benefit under a takeover bid is not sustainable in logic, the provisions of the Act, or any precedent OSC decisions of which we are aware.

Before discussing the interpretation and application of section 97 of the Act, it is fundamental to understand why the Respondents (on the advice of their respective counsel) determined that KingStreet is a joint offeror. Once that is understood, it will be clear that complaints in the Application in this regard are without merit, and can be reduced to a complaint that the joint offerors are paying themselves and each other more than they are paying the rest of the Unitholders.

A. KingStreet is a Joint Offeror

The Application (a) questions the determination that KingStreet is a joint offeror and (b) alleges that the disclosure in the Circular does not provide a basis for that determination. Although there is no requirement to disclose the basis for the determination of joint offeror status in a take-over bid circular, we note that there are in fact several bases for this conclusion.

The basis upon which Avion and KingStreet agreed to proceed in respect of the Offer was set forth in a letter of understanding between them dated July 21, 2006 (the "Letter Agreement"). Under the Letter Agreement, Avion and KingStreet agreed to proceed in respect of the Offer. Among other matters, the parties agreed upon (i) the structure of the Offer; (ii) the financing of the Offeror; (iii) their mutual financial obligations in respect of the costs if the Offer was not successful (KingStreet and Avion are responsible for 30% and 70% respectively); (iv) the exclusivity arrangements between themselves for 12 months following the date of the letter pursuant to which each agreed that it would not contact or approach or deal directly with Atlas or cause or assist to facilitate any contact or approach or other dealing except through the Offeror in accordance with the provisions of the letter; (v) the selection of counsel; and (vi) mutual indemnifications if either party breaches the provisions of the Letter Agreement.

The Letter Agreement also provided that the Offeror would be financed in part by a loan from a Canadian chartered bank "on such terms and conditions as Avion and KingStreet may approve".

We note that KingStreet has been issued the participating bond as described in the Circular pursuant to which it is entitled to receive 30% of the residual net income of the Offeror for a period of five years subject to a three-year redemption which provides for an equity calculated make-whole payment.

Not only was the Offer structured, financed and implemented by the mutual consent and cooperation of Avion and KingStreet, but their mutual consent is also required in respect of certain operational activities of Atlas such as financings, acquisitions and divestitures.

Moreover, the lockup agreement (the "Lock-Up Agreement") among KingStreet, Avion and Offeror, which is clearly disclosed in the Circular, contains customary terms giving KingStreet the right and the obligation, consensually with Avion, to control fundamental matters such as the timing, and the terms and the conditions of the Offer. The Lock-Up Agreement evidences that KingStreet played a significant role in initiating, structuring and negotiating the Offer and that KingStreet has control over the terms of the Offer, which are two of the key factors enumerated in CSA Staff Notice 62-303 *Identifying the Offeror in a Take-over Bid* (the "Notice").

Finally, as disclosed in the Circular, two senior representatives of KingStreet, Messrs. Love and Mazzocco, were appointed, respectively, one as a director and one as an officer, of the Offeror upon its incorporation and each has signed the certificate of the Offeror in those capacities. KingStreet has accordingly played a role in the formation of the Offeror, which is a factor enumerated in the Notice.

The totality of these arrangements was a joint venture undertaking in which KingStreet and Avion were to participate in the risks and rewards as purchasers whether or not the Offer succeeded. The determination that Avion and KingStreet are acting jointly and in concert between themselves and with the Offeror is uncontestable, and the relevant facts and circumstances are inconsistent with any other rational determination. Viewed in this light, the suggestion that KingStreet is the beneficiary of an improper "collateral benefit" in its capacity as a Unitholder is not consistent with the intent or the wording of section 97(2) of the Act.

We have previously explained all of these issues in connection with an application we made to the securities commissions of Alberta, British Columbia, Saskatchewan, Manitoba, New Brunswick, Nova Scotia and Newfoundland & Labrador for a waiver of the valuation requirement in the securities legislation of those provinces, in response to which we were asked to provide submissions as to why KingStreet is a joint offeror. In our submissions, which were accepted, we noted that KingStreet's role in the Offer exemplifies several of the factors enumerated in the Notice.

To the extent that there is any doubt whether a party is a joint offeror (which there is not in this case), it should be resolved in favour of a determination that the party is a joint offeror, because of the underlying policy that securityholders should benefit from the certificate from such party and have such party stand behind the disclosure. This is the implication of the Notice.

In short, KingStreet was instrumental as a joint offeror under the Offer in organizing the Offeror, the design, structuring and financing of the Offeror and the pricing, timing and conditions of the

Offer. Indeed, if the Respondents had determined that KingStreet was not a joint offeror, it is virtually inconceivable that Atlas would not have complained to the OSC about that.

B. Section 97(2) Does Not Apply to "Benefits" Accruing to the Offerors Themselves

Section 97(2) of the Act must be read in its context: *Sears Canada Inc. (Re.)* (OSC, August 8, 2006), at para. 201. The initial paragraph of section 97 sets out the "mischief" that is being addressed:

97(1) Identical consideration – Subject to the regulations, where a take-over bid or issuer bid is made, all holders of the same class of securities shall be offered identical consideration.

Section 97 is concerned with takeover bids that treat individuals within a class of securityholders differentially. The policies underlying this section were set out in *CDC Life Sciences Inc. (Re.)* (1988), 11 OSCB 2541 as follows:

[T]wo complementary policies inform the take-over bid provisions of the Act: the first is to ensure that all offerees have an equal opportunity to accept a bid on the basis of a determination made in the light of full disclosure relating to the offeror, the bid and the target company; the second is to ensure that holders of publicly traded securities are treated equally by persons who purchase large numbers of securities, whether from a controlling person, from selected holders of significant blocks, or from security holders generally.

Section 97(1) deals with bids that differentiate on their face between securityholders. No allegation is made in this case that the Offer treats any Unitholders differently on its face: every Unitholder, including KingStreet, will receive C\$7.00 in cash per Unit.

Section 97(2) prohibits bidders from doing indirectly what they cannot do directly. It states:

97(2) Collateral benefit – If an offeror makes or intends to make a take-over bid or issuer bid, neither the offeror nor any person or company acting jointly or in concert with the offeror shall enter 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 the other holders of the same class of securities.

Therefore, the Application would have merit as it relates to this complaint if the Offer conferred differential benefits directly or indirectly. The usual form of "collateral benefits" considered by the OSC in connection with this provision relates to employment agreements with officers or directors of the target company who are also securityholders. The "mischief" in those cases is the appearance that the offeror is "buying insiders off", perhaps with an ancillary concern that those

officers or directors might improperly recommend shareholders tender their shares, having been influenced by the additional payment.

The Respondents are unaware of any cases applying this principle in circumstances such as the present case, being collateral benefits received by the *offeror* (or someone acting jointly and in concert with the offeror) who also happens (almost coincidentally) to be an offeree shareholder. The reason why the principle has not been applied to offeror securityholders is because there is no policy reason to do so. In a cash bid, the offeror will simply be paying itself for the shares: there is no net difference to an offeror shareholder between a \$100/share offer and a \$5/share offer: the offeror is simply paying itself "from one pocket to another". There obviously cannot be any concern that the offeror is seeking to improperly influence itself. Similarly, the remaining offeree shareholders cannot meaningfully complain that they are being treated differently than the offeror is treating itself.

In the present case, KingStreet entered into the various financing arrangements to which the Application refers in its capacity as an offeror funding the Offer. Any benefits that may accrue to KingStreet as a result of such financing arrangements arise from KingStreet's status as a joint offeror and purchaser of Atlas. They are not collateral benefits.

If the Respondents had structured the Offer such that KingStreet were to retain ownership of its Atlas Units and – as a direct joint owner with the Offeror – participate in the Offer solely on the "buy-side", the "concern" about collateral benefits articulated in the Application would disappear. In either scenario, the economics of the overall transaction to all of the relevant stakeholders (KingStreet, Avion and Atlas' public Unitholders) would be identical. Characterizing the current structure as giving rise to collateral benefits when the alternative structure would not is the ultimate triumph of form over substance, and no public interest would be served by a regulatory determination that distinguishes between the two structures.

2. Neither the Circular nor the Avion Application Contains Material Disclosure Deficiencies

The Application identifies certain approaches to disclosure that it "believes" would be helpful. These beliefs, while perhaps interesting to the author of them, are not founded on the provisions of securities law and have no basis in the public interest mandate that underscores such law.

A. Background to the Offer

The Application alleges that the Circular does not comply with the requirements of section 2.2 of OSC Rule 61-501 regarding disclosure of the background to the Offer. Section 2.2(1)(a) of Rule 61-501 requires that the offeror in an insider bid disclose "the background to the insider bid". The disclosure in section 3 of the Circular chronicles the acquisitions of Units by Avion and KingStreet that result in the Offer being an "insider bid". In our view, this is precisely the background information contemplated by an instrument regulating insider bids. Information regarding the "circumstances that lead [*sic*] Avion and KingStreet to become joint actors of the Offeror" is neither relevant nor required by section 2.2(1)(a) of Rule 61-501. There is no requirement for persons who are joint offerors under a bid to disclose in the circular the reasons,

analysis and conclusions as to their status, and no useful public interest would be served by such disclosure.

The background disclosure requirement in section 2.2 of OSC Rule 61-501 is not predicated on the "belief" of the author of Application. In fact, there is no material information to be added to the Circular. KingStreet was advised in early June of this year by an arm's length former significant Atlas unitholder that it knew Avion was a significant holder of Units and that a conversation between KingStreet and Avion may be in their mutual best interests. Prior to that time, KingStreet did not know of Avion and had not had any previous communications directly or indirectly with Avion or any of its advisors. Later that month, representatives of KingStreet met with representatives of Avion to discuss whether there was any interest in cooperating on a transaction relating to Atlas. Subsequent meetings and discussions resulted in the Offer. Accordingly, it was concluded that such two-sentence disclosure was not material to a unitholder of Atlas in the context of a cash offer for all the Units of Atlas.

B. Benefits to KingStreet of Accepting or Refusing to Accept the Offer

The Application alleges that the Offer fails to disclose the benefits to KingStreet of accepting or refusing to accept the Offer and therefore does not comply with Item 19 of Form 32, which requires disclosure of all other material facts known to the Offeror and not otherwise disclosed which would reasonably be expected to affect the decision of a Unitholder to accept or reject the Offer. In our view, the consequences to any offeror, including KingStreet, of acceptance or refusal to accept the Offer are obvious and we therefore submit that there are no facts known to the Offeror that would reasonably affect a Unitholder's decision to accept or reject the Offer.

The Application also alleges that the description of the financing arrangements in the Circular does not comply with Items 8, 17 and 29 of Form 33. Item 8 requires disclosure of the source of funds to be used for payment and the terms of any loan including the circumstances under which it must be repaid and the proposed method of repayment. In this regard, we submit that the disclosure in Section 8 of the Circular is not only fully compliant with Item 8 of Form 33 but it also is more detailed than the disclosure that is customarily provided in take-over bid circulars. We also note that Item 21 of Form 32 states that an insider bid should include Form 33 disclosure that has been "appropriately modified" to the circumstances. Given that the Offer is an all cash transaction, we suggest that Item 8 disclosure is irrelevant.

KingStreet is advancing approximately \$130 million to the Offeror for purposes of financing the Offer. It makes no sense to suggest that it is not monetizing its investment in Atlas and it has in effect paid itself for its own Units and advanced additional amounts as an investor in the Offeror. The financial results would have been identical if it had transferred its Units to the Offeror for Units from the Offeror and advanced less money under its credit facilities to the Offeror. The Offeror has been uniquely and financially structured from a commercial point of view in large measure because of the commenced \$350 million class action suit against Atlas. The financing of the Offer took into account this contingent liability.

Item 17 of Form 33 requires disclosure of any benefits, if known, to insiders that would result from a contemplated material change or subsequent transaction. This disclosure is provided in

section 22 of the Circular, which states that there are no such benefits to the knowledge of the Offeror, Avion and KingStreet.

Item 29 of Form 33 requires the same disclosure as Item 19 of Form 32, which we have addressed in the first paragraph of this heading.

C. Subsequent Acquisition Transaction

The Application alleges that the Circular provides insufficient details on how a subsequent acquisition transaction would be completed in light of section 12.7(b) of the Atlas Declaration of Trust (the "DOT"). This provision is common in trust indentures and, similar to the "corporate incest" rules, prevents an issuer from voting debt securities held by the issuer itself or persons controlled by the issuer. The Application states that (presumably in the view of Atlas' counsel) "it is not entirely clear how the Offeror intends to complete any amendments to the... [DOT] [i.e., those necessary to effect a Subsequent Acquisition Transaction] given the restrictions in the [DOT] on the voting of trust units held by affiliates." With respect, if anything is "entirely clear," it is that the interpretation of this provision contended by Atlas cannot be supported. It could, for example, lead to a result that a holder of more than 50% of the Units (i.e., a *de jure* majority holder) would be disenfranchised from voting on the annual election of trustees, and would constitute a permanent take-over defence – one that prohibits the holder of a majority of Atlas's equity securities from ever voting them in any circumstances.

In addition to being inconsistent with the widely understood purpose of provisions of this nature, the interpretation suggested by Atlas is conspicuously absent from all of Atlas' public disclosure concerning the voting rights attaching to the Units. From a more technical perspective, we also note that the meaning of "affiliate" in section 12.7(b) of the DOT is also suspect. In particular, "Affiliate" is defined broadly in section 1.1 of the DOT, but not used in section 12.7(b), suggesting that a more restrictive interpretation should be applied in this case. We would be pleased to amplify our submissions in this regard if necessary. As a matter of contractual interpretation, we would respectfully submit that a court of law would be the appropriate forum to adjudicate this matter, if Atlas intends to act on the contrary interpretation.

Finally, the Application has alleged that relief we received from the requirements of Rule 61-501 (Ontario) and Regulation Q-27 (Quebec) to hold a meeting of Unitholders in connection with the Subsequent Acquisition Transaction (the "Meeting Exemption") would deny Unitholders the fundamental protections of Rule 61-501. We disagree. The Meeting Exemption is conditional on the Offeror obtaining minority approval by written resolution. As you (and Atlas' counsel) are also aware, relief of this nature is contemplated by section 3.1 of the Companion Policy to Rule 61-501, is well supported by precedent and is essentially an acknowledgement that there is no rationale for forcing an issuer to incur the expense of a meeting when the outcome is clear and the protections of Rule 61-501 are not compromised.

We trust the foregoing will be of assistance to you. Should you have any questions, please contact us at the phone numbers or email addresses listed below.

Yours truly,

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September 27, 2006

Michael Brown, Senior Legal Counsel and
Erin O'Donovan, Senior Legal Counsel
Ontario Securities Commission
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Toronto, Ontario
M5H 3S8

Dear Mr. Brown and Ms. O'Donovan:

**Re: Atlas Cold Storage Income Trust – Application under Section 104 of the
Securities Act (Ontario)**

Further to our letter of September 15, 2006 (the "Application"), the response of counsel to Avion Group HF ("Avion") and KingStreet Real Estate Growth LP No. 2 ("KingStreet") dated September 22, 2006 (the "Avion Letter") and our subsequent telephone discussions with Ms. O'Donovan, you have requested our views as to the application of the decisions of the Ontario Securities Commission (the "Commission") in the matters of *Noverco Inc.*, *Caithness Resources, Inc.*, *Sanivan Group, Inc.*, and *AIC Limited*¹. (collectively, the "Prior OSC Decisions") to the Avion Offer. We are also writing in response to the Avion Letter. Capitalized terms used in this letter, but not otherwise defined, have the meanings given to them in the Application.

The Prior OSC Decisions and the Collateral Benefits Prohibition

You have asked for our views with respect to the application of the Prior OSC Decisions to the various arrangements entered into between Avion, KingStreet and the Offeror in connection with the Avion Offer. The Prior OSC Decisions involve circumstances where the Commission considered the collateral benefits prohibition (the "Collateral Benefits

¹ See *In the matter of Noverco Inc. 2425 – 4526 Quebec Inc., The Canam Manac Group Inc., La Caisse de Depot et Placement du Quebec and Societe Quebecoise D'Initiatives Petrolieres* (1990), 13 OSCB 33477; *Caithness Resources, Inc., Gregory H. Hoyle, Geoffrey Hoyle, William H. Bird, Caithness Alaska Gold Limited II, Central Alaska Operations, Ltd., PCC Acquisition Corp and Palomar Capital Corp.* (1990, 13 OSCB 5333; *In the matter of Sanivan Group Inc.* (1991), 14 OSCB 1197; and *In the matter of AIC Limited, 1450473 Ontario Inc., AIC Advantage Fund, AIC Advantage Fund II, AIC Canadian Focused Fund and AIC Diversified Canadian Fund* (December 7, 2000).

Prohibition”) in Section 97(2) of the *Securities Act* (the “Act”) in the context of take-over bids involving joint actors. The relevance of the Prior OSC Decisions includes the following:

- Each of the transactions described in the Prior OSC Decisions involved a take-over bid by true joint offerors in that each offeror had a continuing equity interest in the entity formed to make the take-over bid and in the target business following completion of the bid.
- Consistent with the recent decision of the Commission in the *Sears Canada*² case, the Prior OSC Decisions take a broad approach with respect to ambit of the Collateral Benefits Prohibition in order to protect shareholders in the context of a take-over bid and the important principle of identical consideration.
- In each case, the joint offerors and their legal counsel concluded that the arrangements entered into between the joint offerors conferred a collateral benefit on one or more of the joint offerors for purposes of what is now Section 97(2) of the Act and sought discretionary relief from the Collateral Benefits Prohibition, notwithstanding the fact that each such party was a joint offeror and with the objective being to show that the collateral benefit was not intended to confer additional consideration to a party relating to its shareholdings.
- The fact that the selling securityholder entitled to the collateral benefit was also a joint offeror did not permit the securityholder to avoid the Collateral Benefits Prohibition nor to treat the securityholdings of the joint offeror in the target company as a mere coincidence.
- In each case, the joint offerors were able to demonstrate to the satisfaction of the Commission that the arrangements giving rise to the collateral benefits were entered into for purposes other than to increase the consideration paid to the applicable selling securityholder (i.e. the arrangements were entered into for business purposes related to making the offer and the ongoing business of the target company).
- The principles from these cases, however, include the following :
 - (i) it is appropriate where there are collateral benefits to obtain relief before the bid is made so as to enable the regulator to impose applicable and appropriate conditions on the relief, which might

² See *Re Sears Canada Inc., Sears Holdings Corporation, and SHLD Acquisition Corp.* (August 8, 2006).

- include enhanced disclosure and enhanced protections for minority shareholders;
- (ii) where there are collateral benefits, it is important for the disclosure in the bidder's take-over bid circular to fully explain and describe the collateral benefits so that recipients of the offer can decide, with full information, how they will respond and whether they are being treated fairly;
 - (iii) in appropriate circumstances, joint offerors should provide additional protections for the benefit of the shareholders of the target such as is illustrated in the Noverco case where a higher minority squeeze out threshold was voluntarily imposed with the idea being that the target company shareholders would have an improved opportunity to participate in a subsequent reorganization which might carry with it significant value; in this regard, we have made the point in our earlier correspondence that Atlas unitholders that elect not to tender to the Avion Offer should not be denied the opportunity to consider, approve and participate in any subsequent transaction.

In the Avion Letter, counsel for Avion and KingStreet maintain that any benefits that will accrue to KingStreet as a result of the financing to be provided by KingStreet will "arise from KingStreet's status as a joint offeror and purchaser of Atlas", and a result they are not collateral benefits. We disagree. The Collateral Benefits Prohibition cannot be avoided simply on the basis that the parties to a collateral agreement, commitment or understanding happen to be joint actors if one of those parties is also a holder or beneficial owner of securities of the offeree issuer (as is KingStreet and one of its affiliates vis-a-vis Atlas) and the agreement, commitment or understanding has the effect of providing to the holder or owner a consideration of greater value than that offered to the other holders of the same class of securities. In any event, KingStreet is not a purchaser of Atlas but rather a seller of Atlas, a lender to Avion in connection with the Avion Offer and possible joint venture partner of Avion in the future with respect to the assets of Atlas. KingStreet will not acquire any interest in Atlas as a result of the Avion Offer; the Avion Letter makes clear that this structure was deliberately chosen by KingStreet to reduce its risk to certain potential liabilities of Atlas. Having chosen this course of action, Avion and KingStreet cannot simply ignore the Collateral Benefits Prohibition. The KingStreet Collateral Arrangements are collateral benefits for purposes of Section 97(2) of the Act.

The Commission has recognized in prior decisions involving the Collateral Benefits Prohibition (most recently, the *Sears Canada* case) that "value can be inferred from the very fact that a shareholder entered into a [collateral] agreement" (See *Sears Canada Inc., supra*) and that a securityholder would only do so if "it saw some value to itself in so doing" (*Re CDC Life Sciences Inc., Caisse de depot et placement du Quebec and Institut Merieux S.A.* (1988), 11 OSCB 2541). In the present case, we submit that KingStreet and its affiliate

would only have agreed to provide such financing in order to reap the benefits associated with those arrangements and to have the benefit of an understanding between Avion and KingStreet as to the sale of Atlas properties to KingStreet following completion of the Avion Offer. Given the magnitude of financing to be provided by KingStreet and the subordinate status of that debt, it is reasonable to conclude that KingStreet sees value in both the return on that debt and the intended future joint venture with Avion and therefore that the KingStreet Collateral Arrangements confer greater consideration on KingStreet and its affiliate than that offered to Atlas' other unitholders under the Avion Offer. Accordingly, the KingStreet Collateral Arrangements are contrary to Section 97(2) of the Act.

The Disclosure in the Avion Circular and the Offeror's Early Warning Report

The Avion Offer is an insider bid. Accordingly, the Offeror is required (pursuant to Form 33 and OSC Rule 61-501) to include significantly enhanced disclosure regarding the background to the bid and the arrangements between the Offeror and KingStreet, as a joint actor, and the benefits that will accrue to it as a result; Atlas' other unitholders should be aware of arrangements with significant shareholders. As the Avion Letter indicates, Avion and KingStreet are also joint actors and formalized their relationship with respect to the Avion Offer in a written agreement between the parties dated July 21, 2006 (the "July Joint Actor Agreement"). Neither the Avion Circular nor the early warning report of the Offeror dated August 3, 2006 (the "Avion Early Warning Report") discloses this fact.

We note that neither the Avion Circular nor the Avion Early Warning Report includes any reference to the July Joint Actor Agreement. The terms of the July Joint Actor Agreement should be fully disclosed in the Avion Circular as they are material to an Atlas unitholder, particularly in the context of an insider bid. The need for full and complete disclosure is addressed quite specifically in paragraph 19 of the *AIC Limited* decision.

We submit that a copy of the agreement should be made available to Atlas and to Staff in order to enable them to properly and fully examine the arrangements between Avion and KingStreet in order to assess the completeness of the disclosure in the Avion Circular and the Avion Early Warning Report (including compliance with section 1(g) of Appendix E to National Instrument 62-103) and to determine whether Avion and KingStreet, as joint actors since at least July 21, 2006, have complied with the requirements of Section 101 of the Act.

The Proposed Subsequent Acquisition Transaction

In the Avion Letter, counsel for Avion and KingStreet state that, because the word "affiliate" is not upper-cased, a "more restrictive interpretation" should be given to that term in Section 12.7 (b) of the Trust's declaration of trust (the "DOT"). Even if one were to accept that rather suspect and self-serving approach to contractual interpretation, it is difficult to see how the result would be materially different if one were to apply the definition of affiliate in the Act or Canadian business corporations statutes, which would require one to exclude units held by those parties that control the Trust. Presumably counsel is not suggesting that the

September 27, 2006

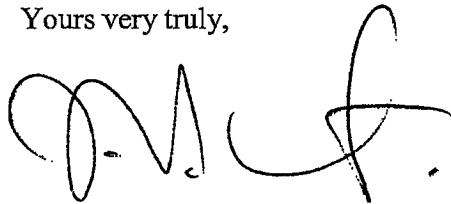
- 5 -

Ontario Securities Commission

Offeror, upon acquiring 66 2/3's of the voting units of the Trust (or 50.1 % for that matter), would not control the Trust. It is widely understood that this prohibition is common to income fund DOT's and does, in fact, present a hurdle for potential acquirors. However, as the PBB case demonstrated, the issue can be addressed through proper structuring of the bid. As indicated in the Application, the Avion Circular should disclose the fact that units of the Trust held by its affiliates must be excluded from any vote of unitholders on a Subsequent Acquisition Transaction and should render the relief sought by Atlas in that regard, inappropriate.

If you wish to discuss these matters further, please do not hesitate to contact me (416-601-7604) or Gary Girvan (416-601-7574).

Yours very truly,



Jonathan Grant
JG/aw

cc: Alan Bell, Bennett Jones, LLP
Steven H. Halperin, Goodmans, LLP
Blair Cowper-Smith
Garth Girvan

September 28, 2006

VIA E-MAIL

Ontario Securities Commission
Suite 1903, PO Box 55
20 Queen Street West
Toronto, ON M5H 3S8

Attention: Naizam Kanji /Erin O'Donovan

Dear Mr. Kanji and Ms. O'Donovan:

Re: Atlas Cold Storage Income Trust – Response to Application under Section 104 of the *Securities Act* (Ontario)

You have asked for additional clarification on our submissions provided on September 22, 2006. Specifically, you have asked for us to assume that the section 97(2) prohibition can apply to joint offerors, and in such circumstances, why the prohibition does not apply in the circumstances of this transaction. This letter is intended to provide that clarification. Defined terms used in this letter have the same meaning as those used in the September 22, 2006 letter.

1. The "collateral benefit" prohibition in section 97(2) is triggered only if "a collateral agreement" exists "...that has the effect of providing ... a consideration of greater value". In the present case, there is no such agreement between KingStreet and Avion or the Offeror. Indeed, arguably the only "collateral agreement" is the Lock-up Agreement, which expressly provides that KingStreet will only receive \$7 cash under the Offer.
2. The financing agreements between KingStreet and Avion (the "Financing Agreements") are fundamental to the structuring and financing of the Offer. They are not "collateral" agreements; they are "principal" agreements. That is, these agreements, which obligate KingStreet to advance \$126 million as an essential and fundamental element in the financing of the Offer for 100% of Atlas, should not be characterized as "collateral" to an agreement whereby KingStreet has agreed to sell less than 5% of the outstanding Units of Atlas for approximately \$20 million. In reality, KingStreet's holding of Units and their sale pursuant to the Offer are incidental to KingStreet's principal role as joint offeror and co-financier of the Offer.

3. The Financing Agreements oblige/entitle KingStreet to: (a) lend \$18 million and \$48 million, respectively; (b) receive the participating bond; and (c) purchase \$60 million of convertible debentures in the Offeror's Icelandic public parent (as part of the parent's financing of the bid), all of which arrangements are on arm's length, commercial terms.
4. The commercial nature of these arrangements is supported and validated by the involvement of SITQ Inc. ("SITQ"), a subsidiary of one of Canada's largest and most sophisticated institutional investors, which is at arm's length from the Offeror and is not a Unitholder. SITQ is participating *pari passu* with KingStreet in these arrangements, on a 40-60 basis, upon identical terms and conditions. Thus, it would be illogical and inaccurate to find that these arrangements constitute "benefits" (and incremental consideration to KingStreet in its capacity as a Unitholder), when these arrangements are identical to those being entered into by a third party lender (i.e., SITQ). Similarly the banks in the syndicate that are providing the senior term loan facility may own Units.
5. As stated, KingStreet beneficially owns or exercises control or direction over less than 5% of the Units which represents less than \$20 million at \$7 per Unit. This represents less than 16% of its investment as a lender: KingStreet is funding approximately \$130 million for the Offer, on exactly the same terms as a non-equity participant, SITQ. This transaction is clearly not a monetization of its holdings.
6. KingStreet and Avion have agreed to consider forming a joint venture vehicle within three years, in order to effect a sale-leaseback of Atlas assets. An agreement to consider, with no obligation to enter into a definitive agreement, can hardly constitute a benefit and does not confer incremental value on KingStreet in its capacity as a Unitholder. Indeed, a sale-lease transaction is another form of debt financing the attractiveness of which to the borrower will depend on a number of factors, including cashflow considerations, at the relevant time. Accordingly, there is no certainty that any such transaction will ever occur.
7. The precedent OSC decisions to which we were referred can be distinguished from the present case on a number of bases:
 - a. These cases involve arrangements among significant shareholders (in three of the cases, controlling shareholders holding in excess of 50% in the target company, sometimes in excess of 75%), the principal purpose of which is to structure the consideration to be received by these shareholders in respect of their existing holdings in the target issuer and their rights with respect to their remaining equity interests following completion of the bid;
 - b. In each of the cases cited, support for the bid by the joint actor(s)/offeree shareholder(s) was crucial to the success of the bid (having regard to the magnitude of equity ownership in question), raising legitimate concerns that the potential for incremental benefit through collateral agreements could improperly

induce that support, whereas in this case, KingStreet's less than 5% equity interest in Atlas is clearly not pivotal, or even material, to the outcome of the Offer;

- c. Without commenting on whether the relief granted in each of these circumstances was in fact required, as a result of the focus of these arrangements upon the existing holdings of the parties and the manner in which these securities were to be disposed of in the context of but not necessarily pursuant to the bid, it is somewhat understandable why the parties in these cases might have determined that these arrangements could be perceived as providing a benefit to the holders and, consequently, that it would be desirable to obtain relief;
 - d. By contrast, as indicated above, the principal purpose of the Financing Agreements is the financing of the bid, which is being implemented on commercial terms that are independent of KingStreet's holdings and, accordingly should not be construed as conferring a benefit in respect of such holdings; and
 - e. None of the cases dealt with a party acting solely in a lending relationship, such as the case here.
8. It is our primary position that there are no "benefits" that are being provided in connection with the Offer that "provides" any Unitholder greater consideration than that offered to other Unitholders. The agreements at issue are lending agreements negotiated on an arm's length basis with lenders, one of whom owns no Units. However, even if it were determined that the arrangements between KingStreet and Avion constitute a "collateral benefit", we would submit that there is a compelling case for exemptive relief from the collateral benefit prohibition pursuant to paragraph 104(2) of the Act. In our submission, this is manifestly a case where it would not be prejudicial to the public interest for the OSC to decide that the Financing Agreements were entered into "for reasons other than to increase the consideration paid" to KingStreet in its capacity as a Unitholder of Atlas. We would further submit that the terms of the Financing Agreements, in the context of the Offer and KingStreet's incidental status as a Unitholder, make this a much "easier" case for such relief than existed in any of the precedent OSC decisions discussed above.

We trust the foregoing will be of assistance to you. Should you have any questions, please contact us at the phone numbers or email addresses listed below.

Yours truly,

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October 2, 2006

Michael Brown, Senior Legal Counsel and
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Dear Mr. Brown and Ms. O'Donovan:

**Re: Atlas Cold Storage Income Trust – Application under Section 104 of the
Securities Act (Ontario)**

We have reviewed the letter of Bennett Jones LLP and Goodmans LLP dated September 28, 2006 in relation to the above-noted matter.

Capitalized terms used, but not otherwise defined, in this letter have the meanings given to them in the Application.

We note the following:

- (i) In paragraph 4, Avion states that SITQ Inc. is at arm's length from the Offeror and is not a Unitholder. We would encourage Staff to satisfy itself that SITQ Inc. and its parent company are at arm's length with KingStreet, given that KingStreet is acting jointly and in concert with both the Offeror and Avion in connection with the Avion Offer. Further, we do not agree that an agreement made with a target securityholder is not a benefit simply because it is made on terms that are the same as those negotiated with an arm's length party. That is not the standard set out in Section 97(2) of the Act and is contrary to the general principles that a broad approach should be taken when applying the Collateral Benefits Prohibition.
- (ii) In paragraph 6, Avion indicates that an agreement to consider a possible transaction cannot constitute a benefit or offer incremental value for purposes of Section 97(2) of the Act. As indicated in our letter of September 27, 2006, the Commission has, in the *Sears Canada* case and previous decisions, indicated that value can be inferred from the fact that a securityholder has entered into a collateral agreement and that the securityholder would only do so if it saw some value in doing so. Although Avion

has chosen not to disclose in the Avion Circular any information regarding KingStreet's business, KingStreet's website (see "www.kingstreetpartners.com") indicates that "KingStreet Capital Partners is a Private Equity real estate investment business seeking opportunities where active management can create value for its investors". The website goes on to state the following:

"Our second fund, KingStreet Real Estate Growth LP No. 2, closed in February 2005 with \$350 million of equity from KingStreet's institutional investors, for a \$1.2 billion investment program. Investment objectives focus on office, retail and industrial properties and portfolios in central and suburban business districts of Canada's major markets. These investments will centre on investments and assets where there can be a value creation plan through creative portfolio realignment, development or redevelopment, new financing and proactive leasing programs. KingStreet's role is to source, capitalize and asset manage investment opportunities and seek 'best of class' providers for property management and leasing services."

We would submit that, given KingStreet's stated business and investment objectives as an acquirer and operator of real estate, it is reasonable to conclude that, in fact, KingStreet attaches value to whatever arrangement it has made with Avion with respect to the acquisition by KingStreet of Atlas' properties and that KingStreet would not have agreed to tender its Atlas' units at \$7 per unit and advanced significant amounts of money and other resources in the Avion Offer without that arrangement.

- (iii) In paragraph 7e, Avion states that KingStreet is acting "solely in a lending relationship". This is contrary to the statements that Avion and/or its counsel have made in the Avion Circular and in its correspondence with Staff, which detail the integral role that KingStreet has played in the Avion Offer. If KingStreet is acting solely as a lender to the Offeror, then one wonders why KingStreet has gone to such lengths (and contrary to customary practise of a lender to a person making a take-over bid) to participate in the Offer as a joint offeror, including entering into of the July 21, 2006 Letter of Understanding with Avion, assuming 30% of the costs of the Avion Offer if it is not successful, agreeing to exclusivity arrangements with Avion with respect to the acquisition of Atlas, granting indemnities in favour of Avion in respect of that Letter of Understanding, and signing the certificate page in the Avion Circular and assuming the related statutory liability.

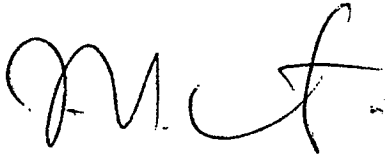
October 2, 2006

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Ontario Securities Commission

We understand that Avion may seek a decision of the Commission pursuant to Section 104(2)(a) of the Act seeking relief from the application of Section 97(2) in respect of the various arrangements between KingStreet, Avion and the Offeror. In the event that an application for such relief is filed with the Commission, we hereby request an opportunity to make submissions with respect to that relief prior to any decision being made by the Commission.

Yours very truly,

A handwritten signature in black ink, appearing to read 'J. Grant', written in a cursive style.

Jonathan Grant

JG/aw

cc: Garth Girvan
Blair Cowper-Smith