IN THE MATTER OF THE SECURITIES ACT
R.S.O. 1990, c. S.5, AS AMENDED

- and –

IN THE MATTER OF
CERTAIN DIRECTORS, OFFICERS AND INSIDERS OF
HOLLINGER INC.

- and –

IN THE MATTER OF
CERTAIN DIRECTORS, OFFICERS AND INSIDERS OF
HOLLINGER INTERNATIONAL INC.

(Application to vary under section 144 of the Act)

Hearing

March 21, 23, and 24, 2005

Panel

Susan Wolburgh Jenah	-	Vice-Chair (Chair of the Panel)
Robert W. Davis	-	Commissioner
Suresh Thakrar	-	Commissioner

Counsel

Leah Price Dale Denis Avi Greenspoon Elliot Vardin Stephen Infuso Norman May	-	For the Applicant Hollinger Inc.
Alan Mark Steve Tenai Ava Yaskiel	-	For the Applicants 1269940 Ontario Limited 2753421 Canada Limited, Conrad Black Capital Corporation, Conrad M. (Lord) Black, The Ravelston Corporation
Harry Burkman	-	For the Applicants 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509466 N.B. Inc., 509647 N.B. Inc., Argus Corporation Limited
Stephen Halperin Jessica Kimmel	-	For the Independent Committee of the Board of Directors of Hollinger Inc.
Robert Staley Julia E. Schatz	-	For Hollinger International Inc. and the Special Committee for Hollinger International Inc.

Peter Howard Brian Pukier	-	For Lawrence & Company Inc.
Chris Paliare Gordon Capern Jeffrey Larry	-	For Kenneth McLaren and other minority shareholders
David C. Moore Ken Jones	-	For Catalyst Fund General Partner I Inc.
Johanna Superina Naizam Kanji Paul Hayward	-	For Staff of the Ontario Securities Commission

DECISION AND REASONS

[1] The Applications, as described and defined below, are made pursuant to section 144 of the *Securities Act* (the "Act"). Section 144 provides that the Commission may make an order varying an order of the Commission if, in the Commission's opinion, to do so would not be prejudicial to the public interest. The Commission has been unable to form the opinion that it would not be prejudicial to the public interest to grant the requested relief.

BACKGROUND

[2] This matter relates to two applications dated March 15, 2005 ("the Applications") pursuant to section 144 of Act to vary the following Orders (the "MCTOs"):

(a) the Order of the Commission dated June 1, 2004, as varied by the Order of the Commission dated March 8, 2005 (the "Hollinger MCTO"), relating to certain directors, officers, and insiders of Hollinger Inc.; and

(b) the Order of the Commission dated June 1, 2004, as varied by the Order of the Commission dated March 8, 2005 (the "International MCTO"), relating to certain directors, officers, and insiders of Hollinger International Inc. ("International").

[3] The applicants in the matter (collectively, the "Applicants") are Hollinger Inc.; 1269940 Ontario Limited, 2753421 Canada Limited, Conrad Black Capital Corporation, Conrad M. (Lord) Black ("Black"), and The Ravelston Corporation Limited ("Ravelston"); and 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509646 N.B. Inc., 509647 N.B. Inc., and Argus Corporation.

[4] Following preliminary motions on standing on March 21, 2005, the Panel granted standing to all parties who sought intervenor standing at the hearing. The Panel granted full standing to adduce evidence and make submissions at the hearing to: the Independent Committee of the Board Directors of Hollinger Inc. (the "IDC"); Lawrence & Company Inc. ("Lawrence"), which is a minority common shareholder of Hollinger Inc.; and Kenneth McLaren and other minority common shareholders of Hollinger Inc. (collectively, "McLaren"). The Panel granted modified *Torstar* standing to International and the Special Committee of International (the "Special Committee"), and to Catalyst Fund General Partner I Inc. ("Catalyst"). The Commission's reasons for its decision on intervenor standing will be issued in due course.

[5] Hollinger Inc. is in default of filing:

(a) its interim financial statements (and related interim MD&A) for the three-month period ended March 31, 2004, the six-month period ended June 30, 2004, and the nine-month period ended September 30, 2004;

(b) its annual audited financial statements (and related annual MD&A) for the year ended December 31, 2003; and

(c) its Annual Information Form for the year ended December 31, 2003.

[6] In June 2004, at the time of the issuance of the International MCTO, International was in default of filing:

(a) its interim financial statements (and related interim MD&A) for the three-month period ended March 31, 2004;

(b) its annual audited financial statements (and related annual MD&A) for the year ended December 31, 2003; and

(c) its Annual Information Form for the year ended December 31, 2003.

[7] International has partially satisfied its default by filing its 2003 Form 10-K with the United States Securities and Exchange Commission (the "SEC"), which form includes its audited financial statements for the fiscal year ended December 31, 2003 and related MD&A and will constitute International's 2003 Annual Information Form for the purposes of Ontario securities law. On January 21, 2005, International filed its audited financial statements for the fiscal year ended December 31, 2003 and related MD&A on the System for Electronic Document Analysis and Retrieval.

[8] International is currently in default of filing its interim financial statements (and related interim MD&A) for the three-month period ended March 31, 2004, the six-month period ended June 30, 2004 and the nine-month period ended September 30, 2004.

[9] International has publicly disclosed that it does not expect to file its 2004 Form 10-K prior to March 31, 2005.

[10] The MCTOs were imposed because Hollinger Inc. and International failed to comply with their obligations under Ontario securities law to file interim and annual audited financial statements, related Management's Discussion and Analysis, and Annual Information Forms (the "Required Disclosures"). The terms of the MCTOs provide that the MCTOs will remain in effect until two business days after all necessary filings have been made with the Commission.

[11] The effect of the MCTOs is to prohibit trading in the securities of Hollinger Inc. and International by those officers, directors, and insiders of the subject companies who are listed in Schedules to the MCTOs.

[12] Ravelston owns, directly or indirectly 78.3% of Hollinger Inc.'s common shares (the "Common Shares") and 3.9% of Hollinger Inc.'s Exchangeable Non-Voting Preference Shares Series II (the "Series II Preference Shares"). Ravelston itself is indirectly controlled by Black, an Applicant in this matter.

[13] Hollinger Inc. and International remain in default of filing the Required Disclosures, although International has filed its audited financial statements and related disclosures for 2003.

[14] Hollinger Inc. has proposed a going private transaction (the "GPT" or the "Transaction"), initiated by Ravelston and Black, by way of consolidation. Pursuant to the GPT, the outstanding Common Shares and the Series II Preference Shares will be consolidated (the "Consolidations") at a ratio which will result in: (a) Ravelston being the sole holder of the Common Shares; and (b) the exchange of all Series II Preference Shares for Class A common stock of International.

[15] The GPT requires the approval of the holders of the Common Shares (the "Common Shareholders") and the Series II Preference Shares. A special meeting of Hollinger Inc.'s shareholders has been scheduled for March 31, 2005 for the purpose of putting the GPT to a vote of the shareholders (the "Vote").

[16] The GPT is described in the "Notice of Special Meeting and Management Proxy Circular in Connection with the Special Meeting of the Holders of Retractable Common Shares and Series II Preference Shares to be Held on Thursday, March 31, 2005 to Consider a Proposed Going Private Transaction by Way of a Consolidation" dated March 4, 2005 (the "Circular").

[17] In order for the Consolidation to proceed, it was necessary to obtain the consent of the holders of the Senior Secured Notes to amend the terms and conditions of the Indentures. The holders of the Senior Secured Notes provided the necessary consent in order to allow the Transaction to be presented to the Shareholders provided that a definitive date of March 31, 2005 was set for the Vote. Failing this, the Consolidations could not be implemented.

[18] The Common Shareholders are presented with three choices pursuant to the GPT: to submit their Common Shares for retraction and receive the current retraction price of $4.65 a share; dissent and be paid the fair value for their Common Shares, in accordance with the provisions of the *Canada Business Corporations Act*; or vote for the Transaction and receive $7.60 for each Common Share held. Page 29 of the Circular states that retractions of Common Shares submitted after May 31, 2004 are suspended at this time, due, apparently, to liquidity concerns. As of March 4, 2005, an aggregate of 395,665 Common Shares (approximately 1.1% of the Common Shares) had been submitted for retraction (and not processed), all with a retraction price of $9.00 per share. The current retraction price per Common Shares is fixed at $4.65.

[19] At the Effective Time of the Transaction, the Common Shareholders (but not those that exercise their right to dissent) will receive the Common Share Consideration, consisting of $7.60 and the Additional Amount per Share, if any, to be determined by the Updated Valuation, and the CCPR. Common Shareholders that exercise their right to dissent will only be paid the fair value of the Common Shares, and are excluded from receiving both the Additional Amount per Share, as determined by the Updated Valuation, and the CCPR. Those Common Shareholders who have previously submitted their Common Shares for retraction, at a retraction price of $9.00 per share, are able to obtain the Common Share Consideration and the CCPR provided they make arrangements to withdraw their retraction request prior to the Meeting. In other words, by

withdrawing their retraction request, those Common Shareholders will be giving up a known additional $1.40 in exchange for an unknown Additional Amount per Share and CCPR.

[20] The Applicants are named as respondents in the Hollinger MCTO and the International MCTO and are therefore prohibited from trading in securities of Hollinger and International, except as permitted by the MCTOs. The Applicants are seeking to vary the MCTOs to permit any direct or indirect trades in the securities of Hollinger Inc. and International, including acts in furtherance of such trades that may occur in connection with the Consolidations under the GPT.

[21] The requested relief is required as the Consolidations under the GPT will involve, among other things, certain dispositions of securities held by certain of the Hollinger Respondents and International Respondents.

[22] The Circular describes the formal valuation of the Common Shares (the "GMP Valuation") prepared by GMP Securities Limited ("GMP") and the provision for a second formal valuation (the "Updated Valuation") of the Common Shares to be conducted after the release of International's 2004 audited financial statements, following which, if there is an increase in the valuation of the Common Shares, there will be an additional amount paid to Common Shareholders (the "Additional Amount Per Share").

[23] The Circular also describes a litigation trust (the "CCPR Trust") intended to address concerns about an ongoing Court-ordered inspection into Hollinger Inc.'s related party transactions (the "E&Y Inspection") and the value of potential claims that Hollinger Inc. and its shareholders may have against Hollinger Inc.'s related parties, including the related parties that initiated the GPT, Ravelston and Black (the "Additional Litigation Claims"). Under the terms of the GPT, any related party claims other than those included in the GMP Valuation will be

pursued by the CCPR Trust and the Common Shareholders will have a proportionate interest in the proceeds of the litigation as described in the Circular and deposited in the CCPR Trust.

[24] A Statement of Allegations dated March 18, 2005 was issued by staff of the Enforcement Branch against Hollinger Inc., Black, F. David Radler, John A. Boultbee, and Peter Y. Atkinson alleging conduct contrary to the public interest in relation to the affairs of Hollinger Inc.

Timing of the Applications

[25] It appears from the record before us and the submissions we heard from all of the parties that discussions and negotiations with regard to the GPT have been ongoing since approximately October, 2004 as between Hollinger Inc., Ravelston, Black, the Independent Privatization Committee of Hollinger Inc. (as defined in the Circular), the IDC and their respective counsel and other advisors. Discussions with Staff of the Commission ("Staff") appear to have begun sometime shortly thereafter. Formal applications to lift the MCTOs were filed with the Secretary's Office of the Commission on March 11, 2005 in the case of the International MCTO and on March 14, 2005 in the case of the Hollinger MCTO. A Notice of Hearing was immediately issued upon receipt of the Applications.

[26] The submissions on standing were heard on March 21, 2005 and the Hearing on the Merits took place on March 23 and 24, 2005. In view of the March 31, 2005 deadline for the Vote to proceed in the event the MCTOs are lifted, we are issuing our Decision and Reasons.

[27] The oral and written submissions of the Applicants underscore their view that the relief they are requesting is "technical" in nature and that the nature of the Commission's inquiry should be limited in determining whether to exercise its discretion under section 144 of the Act to lift the MCTOs. In our opinion, there has been a failure to appreciate the scope and nature of

the Commission's public interest jurisdiction under section 144 of the Act and the relevant considerations which should inform the exercise of that jurisdiction in, to borrow the words contained in Hollinger Inc.'s Proxy Circular, the "unique and unusual circumstances" of the GPT.

Positions of the Intervenors

[28] The IDC consists of five members of the six member Board of Hollinger Inc.. The five members are Paul A. Carroll, Q.C., Robert J. Metcalfe, Donald M.J. Vale, Allan Wakefield and Gordon W. Walker, Q.C. The members of the IDC are independent of and unrelated to the Applicants, except in respect of their positions with Hollinger Inc.. None of the members of the IDC owns any shares of Hollinger Inc. or has any interest in the outcome of the Transaction that differs from the interests of Hollinger's minority shareholders. The IDC believes that it is in the best interest of Hollinger and the minority shareholders for the Transaction to be considered by shareholders and, accordingly, supports the applications made and the relief sought. In oral submissions before us, Counsel for the IDC made it clear that the position of the IDC should not be equated with support for either Black or the Transaction.

[29] Lawrence holds approximately 6.5 percent of the shares held by the minority holders of the Common Shares. Lawrence would like to vote on the Transaction and, accordingly, supports the Applications and the relief sought.

[30] McLaren holds approximately 13 percent of the shares held by the minority holders of the Common Shares. McLaren takes the position that it would be contrary to the public interest for the Transaction to proceed and, accordingly, opposes the Applications and the relief sought.

[31] International is a Delaware corporation, a subsidiary of Hollinger Inc. and a public company in the United States. International is also a reporting issuer in Ontario and elsewhere in

Canada, with public shareholders across Canada. The Special Committee was established by International's board of directors to investigate allegations of wrongdoing directed at Black and others made by shareholder Tweedy Browne Co., LLC. International and the Special Committee take the position that it would be contrary to the public interest for the Transaction to proceed mainly because of the impact it would have on International and its shareholders. Accordingly, they oppose the Applications and the relief sought.

[32] Catalyst is the majority shareholder of the Series II Preferred shares of Hollinger Inc. Catalyst takes the position that it would be contrary to the public interest for the Transaction to proceed and, accordingly, opposes the Applications and the relief sought.

[33] Staff strongly favour allowing the minority shareholders to vote on the Transaction and, accordingly, supports the Applications and the relief sought.

ANALYSIS

[34] In order to vary the MCTOs as requested, the Commission must be satisfied that it would not be prejudicial to the public interest to do so. This is the applicable test under section 144 of the Act pursuant to which these Applications have been brought.

[35] The right of the shareholder to vote is a fundamental right. The Commission must not interfere with it lightly. The Applicants, the IDC, Lawrence, and Staff support the right of the shareholders to vote on the GPT. They submit that the question before the Commission is a narrow one: should the shareholders have the right to vote on the GPT?

[36] McLaren, Catalyst and the Special Committee submit that the question before the Commission is a broader one: would it be fair to allow the GPT to proceed to a Vote in these circumstances?

[37] Not surprisingly, those who support the Applications to vary the MCTOs favour the narrower formulation while those who oppose the Applications to vary the MCTOs favour the broader formulation. The manner in which the question is framed bears directly on the onus which rests with the Applicants who seek the necessary discretionary relief.

[38] This case requires the Commission to consider both questions. The Commission is cognizant of the importance of shareholder choice and the right to vote. We must also be satisfied, in these circumstances, that it would be reasonable to expect the shareholders to be in a position to make an informed decision. We emphasize the phrase "in these circumstances" because, as has been acknowledged by all parties, they are, indeed, unique and unusual.

[39] For the reasons discussed below, we are unable to conclude that it would be fair, in these circumstances, to put the GPT to a vote of the shareholders. Considered individually, none of the concerns outlined below would be determinative. When considered cumulatively, however, their impact is material.

OSC Policy 57-603

[40] The MCTOs do not, and are not intended to, restrain trading by shareholders of Hollinger Inc. and International generally. Pursuant to OSC Policy 57-605, the Commission will generally, where a company defaults in filing the Required Disclosure, impose an MCTO to prevent trades by those who may have material, undisclosed information. In other words, the Policy seeks to prevent trades by officers, directors and other insiders who may have an informational advantage.

[41] The Applicants submit that the Commission must find that the related parties who are proposing the GPT and who are subject to the MCTOs *in fact* have an informational advantage in

the form of material, undisclosed information as a pre-condition to a refusal to vary the MCTOs. This attempt to shift the burden onto the Commission must fail.

[42] The MCTOs are prophylactic in nature. As noted above, they are generally imposed as a matter of course, not because the Commission has made a finding that the relevant subjects of the MCTOs have an informational advantage *in fact*, rather, because they *may* have such an advantage. To accept the Applicants' submissions in this regard would not only serve to shift the burden of proof onto the Commission, but would inappropriately fetter the Commission's discretion by creating a condition precedent to its exercise. These are applications to vary MCTOs under section 144 of the Act. The onus rests with the Applicants to demonstrate that the discretionary relief they seek would not be prejudicial to the public interest.

Lack of Audited and Interim Financial Statements

[43] Current audited and interim financial statements and related disclosures are unavailable with regard to Hollinger Inc., and current interim financial statements are unavailable with regard to International. It is expected that International's 2004 audited financial statements will be filed in the near future. One would normally expect such financial disclosures to be available to shareholders before asking them to consider a transaction such as the GPT. The provision of Default Status Reports cannot overcome this deficiency.

The Valuation

[44] A number of issues and concerns were raised by McLaren, Catalyst and the Special Committee with regard to the adequacy of the Valuation and the independence of GMP. We focus here only on those we found to be most significant.

[45] The GMP Valuation was prepared without the benefit of the required audited and interim financial statements for Hollinger Inc., and without the benefit of 2004 audited financial statements or the required interim financial statements for International. In this regard, the testimony of Gordon Walker, Chairman of the Board of Hollinger Inc., in cross examination in another proceeding on March 2, 2005 was tendered into evidence at the Hearing before us and is worth reproducing:

> Q: All right. I take it you would agree with me that that information would be important information to a shareholder considering any potential bid or offer for his or her or its shares, is that fair?
>
> A: Yes. In my opinion that is fair. I think that is the basis of any form of takeover privatization or otherwise to know what the company is worth. And it follows from that that having proper financials, audited financials is absolutely an essential ingredient.

[46] Mr. Paul Pew of GMP was a witness at the hearing. In response to a question from the Panel as to whether it was unusual to prepare a valuation without the benefit of current financial statements, Mr. Pew responded that he could not recall any other instance in which GMP was required to do so.

[47] While fairness and solvency opinions were requested in GMP's original retainer by Hollinger Inc., GMP subsequently advised Hollinger Inc. that it would be unable to provide such opinions in light of the circumstances surrounding Hollinger Inc. The GMP Valuation does not contain either a fairness or solvency opinion. GMP's inability to provide such opinions, although requested in the original retainer, raises questions as to the adequacy and reliability of the Valuation overall.

[48] In its Valuation, GMP noted various unique and unusual circumstances surrounding the GPT which are described at page 38 of the Circular. For example, at page C-5 of the Circular, GMP states as follows:

6. *GMP has had no access to the operational and executive management of International*

> GMP requested the IPC to arrange to provide GMP with access to the operational and executive management of International and its subsidiaries in order to evaluate and project the future consolidated financial performance of International. In the normal course of preparing a Valuation, GMP would expect such access since International represents the most significant asset held by Hollinger. Access to books, records and management of International was not made available to GMP. GMP's inability to receive such access to management has made it extremely difficult to accurately project the future financial performance of International.

This qualification is indeed material given that International is the principal asset of Hollinger Inc.

[49] The Independent Privatization Committee listed, on page 34 of the Circular, the absence of a fairness opinion from GMP and the unique and unusual circumstances set out in the Valuation, among the factors that caused it to conclude that the Board would not make any recommendation with respect to how the shareholders should vote with regard to the GPT.

[50] There were legitimate questions raised as to why there was no disclosure in the Circular and/or the Valuation with respect to prior valuations. In this regard, we were referred to the following extract from the decision of Vice-Chancellor Strine in *Hollinger Inc. v. Hollinger International Inc.*, 858 A.2d 342 (Del. Ch. 2004) at 370, 379-380 and 382 in which he stated as follows:

> Black's proposals included one to Cerberus… Notably, Black viewed this proposal as having a large economic payoff because of the value of the remaining assets – i.e., the core of the Chicago Group. In the same proposal, Black opined that the Chicago Group would generate annual EBITDA of $130 to $150 million within four years and be worth $1.5 billion [page 370]
>
> …
>
> When the bidding on the Chicago Group was halted, the highest bid received was $950 million. I consider these numbers good ones to use, even considering the circulation problems that later emerged at the *Sun-Times*. I do so because it is probable that the $950 million bid was not a final stretch bid as it was not a last

> round bid, but the ability to extract more from a final bidding round would, in light of circulation problems that arose, have been doubtful. [pages 379-380]
>
> ...
>
> Importantly, the record evidence regarding the future of both Groups also suggests that their cash flow-generating potential and sale value are not greatly disparate. To wit,
>
> > ...
> >
> > ▪ Lazard's DCF valuations of the Telegraph Group and the Chicago Group show a modestly higher value range for the Telegraph Group than the Chicago Group. [page 382]
>
> …
>
> As has been mentioned, [Hollinger] Inc. tried to sell itself to the Barclays earlier this year. In approving the agreement to sell itself to the Barclays, the Inc. board received advice from two different investment banking firms, Blair Franklin Capital Partners and Westwind. Both Walker and Rohmer were on the Inc. board by that time (albeit only for days) and both voted to approve the sale. The separate valuation analyses that Blair Franklin and Westwind presented to the Inc. board both showed the Chicago Group as being more valuable than the *Telegraph* Group. [page 382]

[51] We further noted that Staff's submission indicates only that the GMP Valuation "appears" to comply with the requirement of OSC Rule 61-501.

[52] Finally, the Companion Policy to Rule 61-501 ("CP 61-501") states that scope limitations in a Valuation should be limited to circumstances beyond the issuer's control that arise solely as a result of unusual circumstances. McLaren noted in his affidavit as follows:

> [37] While there are clearly unusual circumstances in this matter, certain of these circumstances are not beyond Hollinger's control but are, in fact, created by Hollinger's own actions and those of its insiders and related parties.
>
> [38] In my view, it cannot be the intent of the Rule that an issuer be entitled to create unusual circumstances through its own allegedly improper conduct and that of its insiders and then rely on such circumstances as the justification for the failure to provide the type of valuation ordinarily required under the Rule.

CCPR Trust

[53] The Applicants emphasize that the CCPR was negotiated as a "protective measure" for the minority shareholders in the unique circumstances of the GPT.

[54] The Circular discloses, at page 13, that: "The CCPR Declaration of Trust will declare that one CCPR will be created for each Common Share outstanding immediately prior to the Effective Time (including, for avoidance of doubt, directly and indirectly, RCL)". "RCL" is defined to mean Ravelston. Several of the parties, including McLaren and Catalyst, submitted that the CCPR will be fraught with potential conflicts of interest for a variety of reasons, including: Ravelston, and indirectly, Black, will be the largest beneficiary of the Trust, that they and affiliated entities may be defendants in litigation relevant to the CCPR Trust, including actions arising out of the E&Y Inspection, that they may be in a position to pursue strategies as defendants designed to frustrate the CCPR Trust to their own advantage, and that they may have a significant degree of control over the ultimate disposition of any claims in which they are defendants.

[55] We were advised that there is only one precedent for the use of such a litigation trust, the Cinar Litigation Trust. Unlike the present situation, Cinar was acquired by an arms-length third party that had not, allegedly, engaged in the conduct that the Cinar Litigation Committee was established to investigate and pursue. The Management Proxy Circular of Cinar dated January 14, 2004 (the "Cinar Circular") discloses the risk factors relating to the contingent cash entitlements. The Cinar Circular also describes in some detail the outstanding litigation in which Cinar is involved, including who the parties are, amounts claimed, nature and status of the litigation and an assessment of the likelihood of success.

[56] By contrast, the Circular devotes numerous pages to a complex description of the terms of the CCPR Trust. It does not describe in detail the relevant outstanding litigation. The

Circular also fails to disclose the risks that may be associated with the CCPR Trust. For example, the Circular does not disclose that the proceeds from Specified Litigation will remain the property of Hollinger Inc. and cannot be transferred to the CCPR Trust until the consent of the holders of senior notes of Hollinger Inc. is obtained, and that the funding arrangements for the CCPR Trust, as set out in the Circular, may prove to be inadequate. In view of the importance Hollinger Inc. attaches to the CCPR Trust as a "protective measure" as evidenced by the emphasis it receives in the Circular, we believe that shareholders are entitled to a clear and balanced presentation so that they can make an informed assessment of the value they wish to place on the CCPR Trust.

[57] Pages 13 and 23 of the Circular state as follows:

> The Independent Committee will, pursuant to a court order, cause the CCPR to be formed. In the event that such court order is not obtained, the Independent Committee and the Corporation will explore mutually acceptable alternatives pursuant to which the CCPR Trust can be formed.

[58] During the Hearing, when we attempted to explore what the nature of the "mutually acceptable alternatives" might be, we received conflicting responses from Counsel for Ravelston and Counsel for the IDC. Counsel for Ravelston indicated that other arrangements might be possible while Counsel for the IDC indicated that a court order establishing the CCPR Trust was, in fact, a condition of the GPT.

[59] The Applicants have filed a motion returnable before Justice Campbell on Tuesday, March 29, 2005 for an order establishing the CCPR Trust. While it is unclear from the materials, it appears, based on oral submissions before us by counsel for the IDC, that the Court will not be asked to approve the merits of the CCPR Trust.

The Updated Valuation

[60] The Circular describes the mechanism of an Updated Valuation and an Additional Amount per Share, as those terms are defined in the Circular. These mechanisms are intended to address the lack of current financial disclosure with respect to Hollinger Inc. and International, its main asset. The definition of "updated Valuation" at page 11 of the Circular makes it clear that the GMP Valuation will be updated solely to reflect, to the extent necessary, new information set out in International's Form 10-K to be filed with the SEC.

[61] The very existence of the Updated Valuation mechanism is an implicit acknowledgement by Hollinger and the IDC, who negotiated for its inclusion in the GPT package, that updated financial information about International, its largest asset, is vital for shareholders to make an informed decision about the GPT. Despite the importance of this information, it is proposed that shareholders be asked to vote on the GPT before knowing the content of the Updated Valuation, the methodology to be applied or even who will conduct the Updated Valuation.

Recommendation by the Independent Privatization Committee or the Board

[62] In the ordinary course, both 61-501 and CP 61-501 contemplate that directors of the issuer should disclose their reasonable beliefs as to the desirability or fairness of the proposed transaction and should make useful recommendations regarding the transaction.

[63] In this case, the Independent Privatization Committee and the Board of Hollinger Inc. (the "Board") have not made any recommendation to the shareholders as to how they should vote in respect of the GPT, having determined only that the shareholders should be given the opportunity to vote. In so doing, it is noted in the Circular that, in the absence of a fairness opinion from GMP and having regard to the unique and unusual circumstances set out in the Valuation, they were unable to reach a conclusion or make a recommendation as to whether the Common Share consideration is fair, from a financial point of view, to the minority shareholders.

[64] We appreciate the difficulty faced by the Independent Privatization Committee and the Board. However, we find it difficult to understand how it is that shareholders can be expected to make an informed decision on how to vote when faced with the same limited Valuation and unique and unusual circumstances which caused the directors, with their knowledge of the affairs of Hollinger Inc. and their detailed understanding of the Transaction, to be unable to formulate a recommendation to the shareholders.

[65] While we were referred to the Commission's decision in *Re Canadian Jorex Limited* (1992), 15 OSCB 257 at 266-67 in support of the principle of shareholder choice and the right of the shareholders to decide whether to dispose of their shares, this decision also underscores the importance of the advice a shareholder can expect to receive from the board of directors and other advisors:

> For us, the public interest lies in allowing shareholders of a target company to exercise one of the fundamental rights of share ownership – the ability to dispose of shares as one wishes – without undue hindrance from, among other things, defensive tactics that may have been adopted by the target board with the best of intentions, but that are either misguided from the outset or, as here, have outlived their usefulness.
>
> In Mr. Ward's view, therefore, the ultimate decision as to the value and appropriateness of a given bid, and thus as to whether or not it should be considered to be acceptable, should be left in the hands of the target board or its independent committee, and their professional advisers. Clearly, this is not the view that we take (nor does National Policy 38 [predecessor to NP 62-202 – *Defensive Tactics*], for that matter), since we have every confidence that the shareholders of a target company will ultimately be quite able to decide for themselves, *with benefit of the advice they receive from the target board* and others, including their own advisers, whether or not to dispose of their shares and, if so, at what price and on what terms. And to us the public interest lies in allowing them to do just that. (Emphasis Added)

[66] In the unique and unusual circumstances of this Transaction, legitimate concerns are raised as to how the shareholders of Hollinger Inc. will be in any better a position to make an informed decision on the merits of the GPT than were the directors of Hollinger Inc.

E&Y Inspection

[67] A Court-ordered inspection into Hollinger Inc.'s related party transactions with Ravelston, Black and others is ongoing. In his Endorsement relating to a motion heard on October 27, 2004, Justice Colin Campbell observed at paragraph 14, in respect of the investigation ordered into Hollinger Inc.'s going private transactions:

> …the investigation underway by the Inspector will continue. Since there are not and have not been any financial statements of Inc. available for shareholders for over a year, it may be that the valuation process anticipated in the privatization transaction may take some time. *At the very least it would seem that shareholders should be entitled to receive the information from the Inspector's report and how it may affect the value of their shares before any transaction is put to them for approval.* (Emphasis Added)

[68] This Endorsement prompted the IDC to bring a motion before Justice Campbell with regard to whether they ought to put the GPT before the shareholders for a vote. In his Endorsement dated March 7, 2005, Justice Campbell declined to provide such direction, stating that:

> ... in the circumstances it is not appropriate for the Court at this stage to make any other order than it appreciates the information provided by the Independent Directors and adjourns its motion for direction pending any further steps taken by any party based on the decisions that will be made by the Directors.

[69] The ultimate findings from the E&Y Inspection Report bear directly on the CCPR Trust mechanism. Staff take some comfort from the fact that the Circular states that the E&Y Inspection will continue. However, it was clear from the record before us that Justice Campbell has had to deal with the delays and difficulties that E&Y are encountering in completing its Inspection, including Black's refusal to answer the Inspector's questions. It would not be unreasonable to consider the past behaviour of those whose non-cooperation has apparently frustrated the Inspection to date in assessing the reliability of any undertaking they have given to cooperate in future. We further note that the issue in the context of a Court-ordered inspection

should not be whether those who are the subject of the inspection "will allow it to continue" but, rather, can they be relied upon to co-operate in future so that the Inspection can be completed in a timely and effective fashion.

Re Cinar

[70] The Applicants and Staff rely upon the decision of the Commission in *Re Cinar Corporation* (2004), 27 O.S.C.B. 1191 ("Cinar") in support of the relief sought. We find that Cinar is distinguishable from the present situation for the following reasons:

- Cinar was not a going private transaction within the meaning of Rule 61-501;
- Cinar involved the acquisition of Cinar by an arm's length party where the controlling shareholders were selling on the same basis as the minority shareholders;
- Cinar was an acquisition by way of arrangement pursuant to the provisions of the *Canada Business Corporations Act* where the court was required to address the "fairness and reasonableness" of the transaction;
- the board of Cinar received a fairness opinion; and
- the Board of Cinar made a recommendation to shareholders in support of the transaction.

OSC Rule 61-501 and Companion Policy 61-501

[71] The safeguards built into OSC Rule 61-501 (the "Rule") lie at the heart of the protections which the Rule affords security holders in the context of related party transactions. When a related party transaction, such as the GPT, is initiated, the safeguards of an independent valuation and a review of the proposed transaction by an independent committee of the board to

assess the "desirability and fairness of the proposed transaction and to make useful recommendations regarding the transaction" (section 6.1(2) of CP 61-501) are triggered. The fundamental purpose of the Rule is to ensure that in connection with the disclosure, valuation, review and approval processes, "all security holders are treated in a manner that is fair *and that is perceived to be fair*" (section 1.1 of CP 61-501, emphasis added).

[72] In *Re CDC Life Sciences Inc.* (1988), 11 OSCB 2541 at 2557 the Commission discussed OSC Policy 9.1, the predecessor to the Rule, and commented on the rationale underlying the independent valuation requirements in going private transactions:

> Policy 9.1 recognizes that the controllers of an issuer, in their management or direction of the management of its affairs, necessarily know more about that issuer's business and its prospects than is known to passive investors. The policy seeks to redress that imbalance by requiring an independent valuation when the controllers initiate financial transactions between themselves directly, or indirectly by the issuer, and the public shareholders.

[73] We also have regard to the guidance concerning formal valuations in section 5.1(4) of the Rule, which includes the statement: "*In addition, it is inappropriate for any interested party to exercise or attempt to exercise any influence over a valuator"* (Emphasis Added).

[74] Having regard to the fundamental importance attached to the actual and perceived independence of the valuator, we reproduce the following exchange of emails dated February 13, 2005 which was introduced as evidence in these proceedings. First, Eugene McBurney, a principal of GMP sent Black a detailed email emphasizing the need for GMP to be allowed to maintain its independence in the valuation process:

> Conrad:
>
> …We are not taking sides not are we worried about any ulterior motives of the various parties. More importantly, we are not hoping or expecting to receive any future benefits or favours from anyone, including (without limitation) Catalyst, Ravelston, Hollinger or any other interested party. This is not "motherhood". We take pride in our independence and our professionalism. We have conducted an

> open process by speaking with any interested party; we expect to hear a certain amount of advocacy. If we determine that we can proceed, we will come to our own independent views exercising the highest standards of professional judgement and responsibility. This is a standard which everyone expects of us.

[75] Black replied:

> Dear Gene,
>
> Thanks for your message, which conforms entirely with my understanding. Of course your valuation must be independent in every respect and that is all I ever sought, as I trust I made clear on the three occasions on which we spoke…

[76] In a subsequent email sent the same day, from Black to Robert Metcalfe, a member of the Independent Privatization Committee, Black forwarded his exchange with Eugene McBurney and stated:

> I assume it will be made clear to Gene that he won't get his million dollars unless he produces something that works for the Company.

[77] With regard to communications from Black to the independent directors of Hollinger Inc., an affidavit of Gordon Walker, Chairman of the Board of Hollinger Inc. was adduced into evidence at the Hearing. This affidavit was filed in connection with a Court application that the IDC made to Justice Campbell to seek the Court's direction on whether or not the GPT should be put to the shareholders for a Vote without the benefit of the E&Y Inspector's Report. Mr. Walker's affidavit sworn February 23, 2005 refers to threats made by shareholders related to Ravelston, as set out in paragraphs 11, 13 and 19 below:

> 11. Apart from potential actions by Independent securities holders, the Independent Directors have been directly threatened with litigation by shareholders who are related to Ravelston Corporation Ltd. ("Ravelston")… Much if not all of these threats have occurred in the context of the proposed going private transaction in respect of Hollinger.
>
> 13. The earliest of these threats was made by Lord Black in an e-mail to Mr. Paul Carroll, dated November 2, 2004 the day he resigned from the Board, wherein he made a number of allegations, and concluded, **"You should be in no doubt that if the directors botch privatization, the Common shareholders will**

> **finally rise from their torpor and hold those directors personally financially responsible for the severe and totally unnecessary erosion of their interest that will result".** [emphasis in the original]
>
> 19. Against the backdrop of these comments, we are very concerned about how our conduct in respect of the privatization proposal will be regarded. The Independent Directors will have to decide in early March whether they support the proposal and consider its terms fair. We are concerned that if for some reason we decline to support the proposal we will be sued by Black, Ravelston and potentially others, as Black has already accused us of "perpetuating our sinecures" at his expense. Conversely, if we do support the proposal, then we may be regarded as having simply "knuckled under" to pressure and threats.

[78] Evidence was introduced which purports to be a record, maintained by the Independent Privatization Committee on the advice of their Counsel, of all of the communications between the Independent Privatization Committee and Black and other non-independent parties to the GPT. (the "Contact Log"). The record of emails contained in the Contact Log raises questions with regard to the intended purpose and effect of such communications on the members of the Independent Privatization Committee. .

[79] These communications from Black to the members of the Independent Privatization Committee apparently prompted the Committee's Counsel to send a letter to Black's Counsel on December 21, 2004, indicating that all communications between Black and the Independent Privatization Committee relating to the proposed GPT and the business of Hollinger generally should only be initiated by the Independent Privatization Committee. The importance of maintaining the independence of the Independent Privatization Committee was also emphasized in this letter. The Independent Privatization Committee continued to receive emails from Black with regard to the GPT.

[80] The degree of reliance which minority shareholders are entitled to place upon the safeguards inherent in Rule 61-501 goes beyond bare compliance with their form. They are entitled to be satisfied, in all of the circumstances of a particular transaction, that there has been

compliance with the spirit of the applicable requirements as well. GMP, the independent valuator, the Independent Privatization Committee of Hollinger Inc. and the IDC should have been permitted to carry out their responsibilities with the assistance of the related party at whose instance the related party transaction has been initiated, as needed, but free from undue influence, coercion or threats, whether express or implied.

[81] The minority shareholders are entitled to be certain that the safeguards which are so central to Rule 61-501 are permitted to work effectively. When a related party attempts to exert undue influence, examples of which are set out above, and regardless of whether such apparent attempts are successful, shareholders' confidence in the integrity of the safeguards may, justifiably, be undermined. On a macro level, such conduct, if tolerated or condoned through an exercise of discretion in favour of the responsible party, serves to undermine confidence in the fairness and integrity of the capital markets overall.

CONCLUSION

[82] The purposes of the Act are to provide protection to investors from unfair, improper, or fraudulent practices and to foster fair and efficient capital markets and confidence in those capital markets (section 1.1).

[83] In pursuing the purposes of the Act, the Commission is directed to have regard to, and balance in specific cases, the fundamental principles which are set out in section 2.1 of the Act. The fundamental principles of the Act include: requirements for timely, accurate and efficient disclosure of information; restrictions on fraudulent and unfair market practices and procedures; and requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[84] The Commission is guided by these purposes and principles in its administration of the Act.

[85] In the circumstances of this case, and for the reasons discussed above, the Commission has been unable to form the opinion that it would not be prejudicial to the public interest to grant the relief requested. Accordingly, the Applications to vary the MCTOs are denied.

Dated at Toronto this 27th day of March, 2005.

"Susan Wolburgh Jenah"
Susan Wolburgh Jenah

"Robert W. Davis"
Robert W. Davis

"Suresh Thakrar"
Suresh Thakrar