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.

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

(Applications for standing in the hearing on the merits of the Applications to vary under section 144 of the Act)

Hearing	-	March 21, 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 Hollinger Inc.
Alan Mark Steve Tenai Ava Yaskiel	-	For 1269940 Ontario Limited, 2753421 Canada Limited, Conrad Black Capital Corporation, Conrad M. (Lord) Black, The Ravelston Corporation Limited

Harry Burkman	-	For 509643 N.B. Inc., 509644 N.B. Inc., 509645 N.B. Inc., 509466 N.B. Inc., 509647 N.B. Inc., and 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	-	For Catalyst Fund General Partner I Inc.
Johanna Superina Naizam Kanji Paul Hayward	-	For Staff of the Ontario Securities Commission

DECISION AND REASONS

BACKGROUND

[1] Two applications, dated March 15, 2005 ("the Applications") pursuant to section 144 of the *Securities Act* (the "Act") were made 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. ("Hollinger"); 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.

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

[3] The hearing on the merits of the Applications was held on March 23 and 24, 2005. On March 28, 2005, the Commission released its decision refusing to grant the Applications as requested.

[4] In our decision, we noted that prior to the hearing on the merits, we heard submissions on standing on March 21, 2005. Certain parties requested and were granted

standing. We indicated that our reasons for the decision relating to standing would follow.

[5] We granted modified "Torstar" standing to International and Catalyst and full standing to the McLaren, Lawrence, and the IDC (all defined below). These are the reasons for that decision.

APPLICATIONS FOR STANDING

[6] Following the issuance of the Notice of Hearing on March 15, 2005, a number of parties requested standing in the Applications. Those who asked for standing were:

a. Hollinger International Inc. ("Hollinger International") and the Special Committee of Hollinger International Inc. (collectively "International"). Hollinger's principal asset was its holdings in Hollinger International;

b. Kenneth McLaren, Stephen Jarislowsky, David Wilkes and Andrew Wilkes (collectively "McLaren"). This was a group of minority shareholders of the common shares of Hollinger (the "Common Shares"), who, at the time of the hearing, held in the aggregate approximately 1,000,000 Common Shares, approximately 13% of the Common Shares held by minority shareholders. McLaren was opposed to the Going Private Transaction (the "GPT" or the "Transaction") proposed by Hollinger, and initiated by Ravelston and Black. The GPT would be put to the common shareholders for a vote in the event that the Commission decided to grant the relief sought in the Applications;

c. Catalyst Fund General Partner I Inc. ("Catalyst"). Catalyst was the largest holder of the Series II Preference Shares of Hollinger ("Preferred Shares"). Catalyst was also opposed to the GPT;

d. Lawrence & Company Inc. ("Lawrence"). Lawrence was also a minority common shareholder of Hollinger, holding 493,300 of the Common Shares, approximately 6.5% of the Common Shares held by the minority shareholders. Lawrence was in favour of the GPT; and

e. The Independent Directors Committee of Hollinger (the "IDC"). The IDC appeared on behalf of the minority common shareholders of Hollinger collectively.

ARGUMENTS FOR STANDING

International

[7] International sought full standing and argued that granting it such standing would fully and adequately serve the public interest.

[8] As one of the MCTOs sought to be varied related to the securities of Hollinger International, International maintained that it should be a party to that Application. As there would be no reason to separate the two hearings for the Applications to vary the MCTOs, International argued it should therefore be a party to the Application to vary the Hollinger MCTO as well.

[9] International argued that it was directly affected by the outcome of the proceeding because Hollinger International was the true target of the GPT. The GPT would directly affect and threaten to harm the economic interests of Hollinger International and its shareholders inasmuch as it would allow Hollinger to reassert its position in Hollinger International and gain the control that had been lost.

[10] International maintained that it could make a useful contribution to the proceedings as it was "uniquely positioned to provide highly relevant and probative evidence that relates to the public interest issues raised by the hearing." This would consist of new facts and evidence that would contradict information included in the Circular relating to the GPT (defined below) and in the Applications that International maintained was untrue or incorrect.

[11] This new evidence included an affidavit of Hollinger International's General Counsel, James Van Horn. This affidavit referred to Hollinger International's offer to provide assistance in connection with Hollinger's 2003 annual financial statement audit, and to provide Hollinger with access to documents, information and personnel needed to complete the audit. The affidavit further stated that no one from the Privatization Committee of Hollinger had asked for assistance from Hollinger International, contrary to what was stated in the Notice of Special Meeting and the 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").

McLaren

[12] McLaren sought full standing on the basis that they could make a useful contribution to the proceedings without unfairly prejudicing the interests of the parties.

[13] In its submissions, Counsel for McLaren pointed out that McLaren, as a group of minority common shareholders opposed to the GPT, was uniquely positioned to advance arguments and evidence as to why the GPT was contrary to their interests as minority shareholders.

[14] McLaren stated that they would call evidence and make submissions on a number of matters including whether the Circular and the valuation conducted by GMP Securities Ltd. (the "GMP Valuation") provided sufficient, appropriate and accurate information to allow the minority shareholders to make an informed decision.

[15] McLaren would also argue that minority shareholders would benefit from receiving the report of the inspector appointed by Justice Campbell to investigate related-party transactions involving Hollinger. Moreover, McLaren would call evidence and make submissions about whether the minority shareholders would benefit from further disclosure, including additional information about Hollinger International that was not reflected in the GMP Valuation.

[16] If the Commission were to vary the MCTOs, a vote on the GPT would be allowed to proceed. This would have a direct financial impact on the minority common shareholders, in the event of a favourable vote. McLaren argued that it would be wrong to allow a vote in these circumstances without the benefit of a proper and complete

valuation based on current financial statements or a recommendation of the Board of Directors as to the fairness of the subject transaction.

[17] In short, as in *Re Canadian Tire Corp.* (1987), 10 O.S.C.B. 857 ("*Canadian Tire*") and *Re Canada Malting Co.* (1986), 9 O.S.C.B. 3565, the financial interests of McLaren would be directly affected by the Commission's decision.

Catalyst

[18] Catalyst also sought full standing. As owner of 1,398,000 Preferred Shares of Hollinger, approximately 80% of the Preferred Shares, Catalyst argued that the GPT would have a significant impact on its economic interest.

[19] Catalyst maintained that it would be directly affected by a decision to grant the Applications as Catalyst could then be forced to vote on the PS Consolidation Resolution, as defined in the Circular.

[20] As a security holder, Catalyst was entitled to expect that, in connection with the GPT, appropriate disclosure and a proper valuation would be provided in accordance with applicable requirements.

[21] Catalyst had been a party to related court proceedings under the *Canada Business Corporations Act* involving Hollinger. Catalyst generated materials which the Commission would have access to and which were, according to Catalyst, "highly material to the public interest considerations." Catalyst had also obtained a letter from BMO Nesbitt Burns that raised issues with respect to the GMP Valuation. Catalyst also proposed to file an affidavit of Wesley Voorheis, whose previous experience with a

litigation trust would be useful in an analysis of the litigation trust described in the Circular.

[22] In summary, Counsel for Catalyst stated that his client had particular insight into relevant matters such as the GMP Valuation, the litigation trust and the *CBCA* proceedings relating to Hollinger, and could therefore make a unique and useful contribution to the proceedings.

Lawrence

[23] Lawrence originally applied for modified Torstar standing, a restricted type of standing described below, in order to make submissions in respect of the Applications. Upon learning that McLaren sought full standing, Lawrence sought the same standing as that afforded to McLaren.

[24] Lawrence was said to have a direct interest because the minority shareholders would be asked to vote on the GPT if the Commission were to vary the MCTOs as requested.

[25] As a minority shareholder, Lawrence's economic interests would be directly affected if it were to be deprived of the opportunity to vote on the GPT and the protections being offered as part of the GPT.

[26] Lawrence stated that it could "provide a useful contribution from a different perspective" inasmuch as it was a minority shareholder openly in favour of the GPT.

IDC

[27] The IDC maintained that it was the only representative of the minority shareholders as a collective group.

[28] Counsel for the IDC argued that the public minority shareholders of Hollinger should be given the opportunity to exit the company.

[29] Although the IDC had been involved in discussions relating to the GPT from the beginning, the IDC took no position on the fairness of the GPT and was not prepared to make a recommendation to shareholders with respect to how they should vote in relation to the GPT. Notwithstanding, the IDC had determined that the GPT ought to be put to the shareholders for a vote.

[30] The IDC stated that it was uniquely positioned to provide a useful perspective on the relevant matters before us.

Ravelston

[31] As a party to the Applications, Ravelston opposed International's and Catalyst's applications for standing. Counsel for Ravelston maintained that International and Catalyst were attempting to turn the Applications hearing into a sanctions hearing against Black.

[32] Counsel for Ravelston argued that the only direct interest engaged by the Applications is whether it would be in the interests of the minority public shareholders to

consider and vote on the GPT, and that neither Catalyst nor International have any direct interest in the Applications given they were not minority common shareholders.

[33] Counsel for Ravelston also pointed out that in those cases where Torstar standing was granted, the applicants have typically been shareholders or other persons with a direct financial interest in the subject company.

[34] Ravelston's Counsel argued that Catalyst's economic interest was not affected by the GPT and further noted that Catalyst had stated its intention to vote against the consolidation, whatever the outcome of the hearing to determine whether or not to grant the Applications.

[35] Finally, Ravelston's Counsel maintained that to allow Catalyst and International to participate in the hearing would cause injustice to the immediate parties.

Hollinger

[36] Hollinger opposed International's request for standing in the Application to vary the Hollinger MCTO because International was not directly or indirectly affected by any decision in relation to the Hollinger MCTO, and International would not be able to make a useful contribution without injustice to the parties.

[37] Hollinger also argued that neither International nor Catalyst had any financial or economic interest in the outcome of the Applications. Rather, their concerns were indirect and speculative, and therefore insufficient to justify standing of any kind.

[38] Hollinger disputed the assertion by International and Catalyst that they could make a useful contribution to the proceedings and argued that International's submissions and their proposed evidence was unrelated to the issues raised in the Application to vary the Hollinger MCTO.

[39] Hollinger agreed that the common shareholders that applied for standing should be granted Torstar standing because their financial interests would be impacted by the decision to proceed with the GPT in the event of a favourable vote.

Staff

[40] Staff recommended that the Commission grant modified Torstar standing or enhanced standing to all of the parties that applied for intervenor status, with the exception of the IDC who should be given full standing.

[41] Staff's position was that the proposed intervenors would be able to offer a different and useful perspective on the issues to be determined by the Commission.

REASONS

[42] In previous Commission decisions, the Commission has granted two types of standing to those seeking intervenor status:

a. Full standing, including the opportunity to adduce evidence and make submissions; and

b. Torstar standing, a restricted form of standing.

[43] "Torstar" standing derives its name from *Re Torstar Corp.* (1985), 8 O.S.C.B. 5068 ("*Torstar*"), and refers to a restricted type of standing which entitles a party to make submissions before the Commission but not to tender evidence in the proceeding.

THE TEST

[44] In *Re Albino* (1991), 14 O.S.C.B. 365 ("*Albino*"), the Commission set out a test that has been adopted in a number of subsequent Commission decisions [at pp. 425 – 426]:

> ...on requests for standing the Commission must first and foremost consider the nature of the issue and the likelihood that the intervenors will be able to make a useful contribution without injustice to the immediate parties (the *MacMillan Bloedel* test, adopted in *Torstar*). Where a would-be intervenor has a direct financial interest, in that the person may acquire a benefit or incur a loss as an immediate result of a Commission decision, full standing is appropriate. The clearest application of that principle is to security holders and to those who have announced an intention (i.e. offerors in take-over bids) to acquire securities. Where the intending intervenor has a clear financial interest – most obviously, as a holder of securities of the subject issuer – but that interest will not be immediately affected by the decision the Commission may make, then only restricted (i.e. *Torstar*) standing is to be granted.

[45] *Albino* suggests that the following factors should be considered in an application for standing:

a. The nature of the proceeding;

b. Whether the proposed intervenor will make a useful contribution to the proceeding;

c. Whether the proposed intervention would unfairly prejudice the interests of the existing parties; and

d. The effect, if any, of the proceeding's potential outcomes on the economic interests of the proposed intervenor.

[46] Hearings before the Commission may relate to a variety of matters, including: discipline for breaches of the *Securities Act* and/or conduct contrary to the public interest; consideration of contested take-over bids; reviews of decisions of self-regulatory organizations; or reviews of decisions of a Director.

[47] In previous cases, the Commission has noted that issues of standing should be viewed differently in hearings involving contested take-over bids, for example, versus disciplinary proceedings. The Commission has granted broader intervention rights in bid-related and similar types of proceedings than in disciplinary hearings. These principles are laid out by the Commission in *Re Instinet Corp.* (1995), 18 O.S.C.B. 5439 at p. 5446 and in *Canadian Tire*.

[48] When deciding if a proposed intervenor will make a useful contribution to the proceedings, the Commission will consider whether the proposed intervenor will advance arguments or evidence that would not otherwise be presented. In *MacMillan Bloedel* v. *Mullin* [1985] B.C.J. No. 2076 (C.A.) ("*MacMillan Bloedel*") at paragraph 9, the British Columbia Court of Appeal said that a successful intervenor should "bring a different perspective to the issue before the Court". This Commission held in *Albino* that where an existing party can adequately advance a position, then interventions may be neither helpful nor necessary.

[49] The Commission must always be mindful of the need to deal fairly with the existing parties to the proceeding in considering applications for intervenor status. Excessive interventions may unduly protract the proceedings and thus unfairly prejudice existing parties, as noted in *Albino* at page 426. The Commission has the statutory authority to determine its own procedures and practices and can make orders to apply in any particular proceeding, as provided under paragraph 25.0.1(a) of the *Statutory Powers Procedure Act*, R.S.O. 1990. This power is analogous to a court's ability to control its own process at trial or on a motion to avoid an unfair outcome to the immediate parties, as per *Re Ontario Securities Commission and Electra Investments (Canada) Ltd.* (1983), 44 O.R. (2d) 61 (Div. Ct.).

[50] Previous Commission decisions relating to standing have focused on the impact the Commission's decision would have on the economic interests of a proposed intervenor.

[51] The nature of the relief sought in this case and the surrounding circumstances were such that we allowed all of the proposed intervenors to participate in the hearing on the merits of the Applications. We concluded, based on oral and written submissions, that we would benefit from hearing the various perspectives of the intervenors on the issues before us and that they could all make a useful contribution to the proceedings.

[52] The Commission has the ability to control its own process and can exercise its discretion to grant intervenor standing in a manner that does not cause prejudice to the immediate parties.

[53] Having considered the arguments and written submissions of the proposed intervenors, the Applicants, and Staff, we granted standing to all of the applicants for intervenor status while imposing limits on the time available for submissions and in some cases setting parameters around the issues on which we were prepared to hear evidence.

[54] International was granted modified Torstar standing with respect to the Application to vary the International MCTO.

[55] We concluded that International would be able to make a useful contribution to our consideration of the Application to vary the International MCTO and, in particular, on issues relating to: access to, and cooperation between, Hollinger and Hollinger International with regard to the provision of financial disclosure to Hollinger and with regard to the GMP Valuation.

[56] We concluded that granting International modified Torstar standing to make submissions and adduce limited evidence on the issues identified above would not unfairly prejudice the interests of the immediate parties.

[57] Similarly, we afforded modified Torstar standing to Catalyst, allowing Catalyst to adduce evidence relating to the adequacy of the GMP Valuation and the information underlying such valuation, and of the viability of the CCPR and the CCPR Trust mechanism, as defined in the Circular.

[58] Catalyst's role in pending court proceedings involving Hollinger and the evidence it proposed to introduce from BMO Nesbitt Burns relating to the GMP Valuation made

Catalyst uniquely positioned to provide a perspective on this important issue without causing prejudice to the immediate parties.

[59] Although Catalyst and International arguably did not have a direct economic interest in the outcome of the Applications, we concluded that our consideration of the Applications would benefit from the targeted evidence they would lead. More importantly, we determined that such evidence would not otherwise be presented without their participation.

[60] We granted full standing to each of McLaren, Lawrence, and the IDC. Each of these parties was, or represented, minority common shareholders of Hollinger.

[61] We afforded full standing to McLaren who would clearly be directly affected by a decision to allow or deny the requested relief. McLaren opposed the relief sought. We believed that McLaren could provide useful input with regard to the relevant issues at the hearing including the adequacy and accuracy of the disclosure provided in the Circular and the appropriateness of asking the minority shareholders to vote on the GPT in the absence of updated financial statements upon which to base the valuation.

[62] We also granted full standing to Lawrence, the only other minority shareholder seeking intervenor status. As a minority shareholder in favour of the relief requested and with a direct financial interest in the matter at issue in the hearing, it was clear that Lawrence could make a useful contribution to the proceedings, from a perspective that would be different than that of either McLaren or the IDC.

[63] We determined that the IDC could make an important contribution to our consideration of the Applications. In addition to purporting to represent the collective interests of the minority shareholders, the IDC had been involved in discussions relating to the GPT. We were of the view that the IDC would provide a unique and useful perspective, without prejudice to the immediate parties.

[64] In summary, and for the reasons discussed above, the Commission granted modified Torstar standing on the basis discussed above to International and to Catalyst, and full standing to the McLaren, Lawrence, and the IDC.

Dated at Toronto this 18th day of August, 2005.

"Susan Wolburgh Jenah"
Susan Wolburgh Jenah

"Robert W. Davis"
Robert W. Davis

"Suresh Thakrar"
Suresh Thakrar