Ontario Securities Commission
Commission des valeurs mobilières de l'Ontario
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**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, AS AMENDED**

AND

**IN THE MATTER OF
INTERRENT REAL ESTATE INVESTMENT TRUST**

AND

**IN THE MATTER OF
A DECISION OF THE TORONTO STOCK EXCHANGE**

**REASONS FOR DECISION
(Sections 8 and 21.7 of the Act)**

Hearing:	August 17, 2009	
Decision:	October 15, 2009	
Panel:	James E. A. Turner	- Vice-Chair and Chair of the Panel
	David L. Knight, F.C.A.	- Commissioner
Counsel:	David Hausman Scott Rollwagen Shelley Babin	- For NorthWest Value Partners Inc.
	Robert Cohen Ted Frankel	- For InterRent Real Estate Investment Trust
	Linda Plumpton Andrew Gray	- For the Toronto Stock Exchange
	Kelley McKinnon Tina Woodside	- For CLV Group Inc.
	Usman Sheikh Naizam Kanji Michael Tang	- For the Ontario Securities Commission

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REASONS FOR DECISION

I. Background

A. Introduction

[1] These are the reasons of the Ontario Securities Commission (the "**Commission**") on the preliminary motions described below brought in connection with an application, the Fresh as Amended Request for Hearing and Review, dated August 11, 2009 (the "**Application**"), by NorthWest Value Partners Inc. ("**NorthWest**") pursuant to sections 8 and 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") to review two decisions of the Toronto Stock Exchange (the "**TSX**").

[2] The first decision under review pursuant to the Application is the decision by the Listings Committee of the TSX (the "**Listings Committee**") dated August 5, 2009, to accept notice of a private placement (the "**Private Placement**") of up to 9,333,333 units of InterRent Real Estate Investment Trust ("**InterRent**"), representing approximately 49% of the outstanding units, without requiring unitholder approval. That decision is referred to as the "**Listings Committee Decision**".

[3] The second decision under review pursuant to the Application is the decision by the TSX dated June 19, 2009 that the TSX did not object to InterRent delaying its annual and special meeting of unitholders, scheduled to take place on June 26, 2009, such delayed meeting to be held on or before September 30, 2009. That decision is referred to as the "**Meeting Date Decision**".

B. The Application and the Motions

[4] In the Application, NorthWest submits that the TSX should not have accepted notice of the Private Placement without requiring unitholder approval and that the TSX should not have granted InterRent's request to postpone its annual and special meeting of unitholders. NorthWest requests the following relief from the Commission:

(i) an order under sections 8(3) and 21.7 of the Act setting aside the Listings Committee Decision to accept the Private Placement without the requirement for a unitholder vote;

(ii) an order under sections 8(3) and 21.7 of the Act setting aside the Meeting Date Decision;

(iii) an order under sections 8(4) and 21.7 of the Act staying the decisions of the TSX pending the disposition of the balance of the Application; and

(iv) such further and other orders as counsel may advise and the Commission may permit.

[5] A hearing was held on August 17, 2009 to address preliminary motions in connection with the Application. We received materials and heard submissions on the motions from NorthWest, InterRent, the TSX, CLV Group Inc. ("**CLV**") and Staff of the Commission ("**Staff**"). At that hearing, the following preliminary motions were before us:

(i) CLV and Mike McGahan ("**McGahan**") brought a motion seeking full intervenor status for each of them; and

(ii) NorthWest brought a motion raising the following questions for determination:

(1) What is the appropriate standard of review of the Listings Committee Decision and the Meeting Date Decision?

(2) With respect to the standard of review, and given the TSX record that has been provided to the parties, should the Commission defer to the decisions of the TSX, and does the Commission need additional information beyond the TSX record?

(3) If the Commission should not defer to the Listings Committee Decision, is NorthWest entitled to particulars of (i) the names of the subscribers to the Private Placement (the "**Subscribers**"); and (ii) any transcripts of the evidence of the InterRent trustees and the Subscribers?

(4) If the Commission should defer to the Listings Committee Decision, is NorthWest entitled to particulars of (i) the names of the Subscribers; and (ii) any transcripts of the evidence of the InterRent trustees and the Subscribers?

(5) If NorthWest is entitled to particulars, what is the schedule for providing those particulars?

(6) Was the request for a hearing and review of the Meeting Date Decision filed in time?

C. The Commission's Decision

[6] Our decision dated August 26, 2009 addressed the issues raised by the motions as follows:

(i) CLV was granted full intervenor status and McGahan was denied intervenor status;

(ii) with respect to the issues raised in NorthWest's motion:

(1) we did not order disclosure of the names of the Subscribers, and as a result, it was unnecessary for us to address NorthWest's request to examine the Subscribers and to fix a schedule for doing so;

(2) we found that NorthWest had not met the onus of establishing any of the grounds upon which we are entitled to intervene in a TSX decision. We also found that we had a sufficient basis to defer to the Listings Committee Decision. Accordingly, we dismissed the Application as it related to the Listings Committee Decision; and

(3) we found that the request for a hearing and review of the Meeting Date Decision was filed more than 30 days after the date of that decision and, as a result, we dismissed the motion for a hearing and review of the Meeting Date Decision on the basis that the request for that hearing and review was filed out of time.

[7] On August 26, 2009, we issued our decision in this matter on an expedited basis. We did so because we were advised that the subscriptions for the Private Placement were being held in trust, but that the Private Placement could not be completed until the Commission made a decision with respect to the Application.

[8] On request, we agreed to give the parties advance notice of the time at which we would release our decision so that, if necessary, NorthWest could make arrangements to move before a court to stay our decision or to enjoin completion of the Private Placement, if NorthWest considered it desirable to do so.

[9] These are the full reasons for our decision in this matter.

D. The Parties

1. NorthWest

[10] NorthWest is a private real estate firm based in Toronto that owns, develops and manages real estate in Canada. NorthWest owns 3,495,194 units of InterRent, representing 18.4% of InterRent's currently outstanding units.

[11] NorthWest participated in InterRent's process to maximize unitholder value referred to in paragraph 20 below. NorthWest submitted seven proposals to InterRent between February 27, 2009 and July 22, 2009. Those proposals included transactions under which NorthWest would subscribe for units of InterRent, either for cash or as part of a property vend-in, and under which NorthWest would be entitled to appoint a majority of the board of trustees of InterRent.

[12] NorthWest was unable to agree with InterRent as to the terms of any transaction.

[13] NorthWest decided that it would take steps to replace the members of the board of trustees of InterRent at the annual and special meeting of unitholders originally scheduled to take place on June 26, 2009. At that time, NorthWest held approximately 19.85% of the outstanding units of InterRent.

[14] On June 24, 2009, NorthWest entered into a put/call arrangement with a fund managed by Phillips, Hager & North Investment Management Ltd. (the "**PH&N Agreement**"). This agreement provides NorthWest the right to appoint a proxy holder at the annual and special meeting of InterRent unitholders in respect of an additional 3,003,000 units, representing an additional 15.8% of the outstanding units of InterRent.

[15] As a consequence of its own holding of units, its rights under the PH&N Agreement and support NorthWest has received from two other institutional unitholders, NorthWest asserts that it would be able to carry any vote on the Private Placement and it would be able to replace the board of trustees of InterRent.

2. InterRent

[16] InterRent is an unincorporated, open-ended real estate investment trust based in Toronto. It was formed pursuant to a Declaration of Trust on October 10, 2006. InterRent units and 7.0% Series A subordinated convertible debentures are listed on the TSX. There are currently 19,041,141 outstanding InterRent units, including 381,184 special voting units.

[17] InterRent was created to acquire, own and operate income producing multi-family residential properties in Canada. It currently owns approximately 4,000 apartment suites.

[18] InterRent's principal objectives are to provide unitholders with stable and growing monthly cash distributions, primarily on a Canadian income tax-deferred basis, and to increase the value of the units through the effective management of its revenue producing properties and the acquisition of additional properties.

[19] Accordingly, property management is a core component of InterRent's business. InterRent employees are currently responsible for the management of approximately 83% of InterRent's 81 properties.

[20] On March 11, 2009, InterRent publicly announced that it had established a special committee of independent trustees with a mandate to examine alternatives to maximize value for unitholders. Subsequently, InterRent postponed its annual and special meeting of unitholders to allow the special committee of InterRent trustees to complete its review of potential strategic transactions.

[21] As a result of its strategic review, InterRent proposes to carry out the Private Placement. Under the Private Placement, 5,333,333 to 9,333,333 units are to be issued to institutional and high net worth investors. The initial closing date of the Private Placement was proposed as July 30, 2009. In its news release dated July 28, 2009, InterRent announced that concurrent with the

initial closing of the Private Placement, InterRent also intends to enter into a property management agreement with CLV. InterRent stated in this news release that the Private Placement was the product of InterRent's process to maximize unitholder value announced on March 11, 2009. The Private Placement is described more fully below.

[22] Under the proposed property management agreement with CLV, all of InterRent's property management functions would be transferred or "externalized" to CLV. The entering into of the property management agreement was originally a condition of the Private Placement but this condition had been removed by the time of the Listings Committee Decision. The TSX has required that the property management agreement be submitted to disinterested unitholders of InterRent for approval (by a majority of votes) and the TSX agreed with InterRent that vote may include unitholders who acquire units under the Private Placement.

3. CLV

[23] CLV is a private property management firm based in Ottawa. It manages residential real estate properties in Ottawa and surrounding areas, and a commercial property portfolio that includes strip malls and industrial, retail and office buildings. CLV is at arm's length to InterRent.

[24] CLV has managed a portion of InterRent's properties for approximately seven years and currently manages all of InterRent's 14 properties in the Ottawa region (representing approximately 17% of InterRent's 81 properties).

[25] McGahan is CLV's Chief Executive Officer, sole director and shareholder and he is one of the Subscribers.

[26] CLV assisted in arranging for the group of investors who will subscribe for units under the Private Placement. It is also proposed that CLV provide all of InterRent's property management functions under the proposed property management agreement.

4. The TSX

[27] The TSX is a stock exchange recognized by the Commission under subsection 21(1) of the Act. The TSX regulates certain conduct of listed issuers through its applicable by-laws, rules, policies, interpretations and practices. The provisions of the TSX Company Manual (the "**TSX Manual**") relevant to this Application are set forth in Schedule A.

5. Commission Staff

[28] Commission Staff is a party to proceedings brought pursuant to sections 8 and 21.7 of the Act.

E. The Private Placement

[29] On July 28, 2009, InterRent issued a news release announcing the proposed Private Placement, the proposed property management agreement with CLV and proposed changes to the board of trustees of InterRent. The news release stated that the Private Placement would be a best-efforts non-brokered private placement of a minimum of 5,333,333 units (representing approximately 28% dilution) and a maximum of 9,333,333 units (representing approximately 49% dilution) at a price of $1.50 per unit. The Private Placement had an initial closing date of July 30, 2009 for the issuance of at least the minimum number of units, with one or more additional tranches to be completed on or prior to September 4, 2009.

[30] There are approximately forty Subscribers who will purchase units under the Private Placement, and approximately 52% of the units to be issued (under the maximum offering) will be held by four pension funds. CLV assisted in arranging for the group of investors who will subscribe for units under the Private Placement. The Subscribers are institutional and high net worth investors who are expected to vote in favour of the approval of the property management agreement proposed to be entered into between InterRent and CLV.

[31] Upon closing of the Private Placement, NorthWest's voting rights in InterRent will be diluted from approximately 34% to 23% (those voting rights include NorthWest's voting rights under the PH&N Agreement).

F. The TSX Decisions

1. The Meeting Date Decision

[32] On June 18, 2009, InterRent issued a news release announcing the postponement of its annual and special meeting of unitholders scheduled for June 26, 2009. InterRent requested the consent of the TSX for the postponement of that meeting to a date on or before September 30, 2009. InterRent's stated reason for this request was to allow more time for its special committee to evaluate proposals to maximize unitholder value.

[33] The TSX confirmed on June 19, 2009 that it did not object to InterRent delaying its annual and special meeting to a date on or before September 30, 2009.

2. The Listings Committee Decision

[34] On July 24, 2009, InterRent gave notice to the TSX pursuant to section 602 of the TSX Manual of the proposed Private Placement. The Private Placement was announced publicly in InterRent's news release of July 28, 2009.

[35] On July 30, 2009, NorthWest sent a letter to the TSX requesting that the TSX exercise its discretion under section 603 of the TSX Manual to require unitholder approval of the Private Placement.

[36] On August 4, 2009, TSX staff distributed a recommendation memorandum to the Listings Committee. TSX staff recommended that the Listings Committee exercise its discretion under section 603 of the TSX Manual to require that the Private Placement be submitted to disinterested unitholders for approval.

[37] The TSX staff recommendation was based on concerns with respect to InterRent's governance and disclosure practices and the size of the transaction relative to InterRent's liquidity. The externalization of InterRent's property management functions, which at that time was a condition to closing the Private Placement, was stated to be arguably "transformational".

[38] With respect to InterRent's governance practices, the following matters were identified in the TSX staff recommendation memorandum:

(i) the proposed new slate of trustees and the relationships between certain nominees and CLV;

(ii) the voting support agreements and the right of first refusal agreements to be entered into between current trustees and officers of InterRent and CLV;

(iii) the externalization of InterRent's property management functions without unitholder approval;

(iv) the proposed setting of a new record date for the unitholders' meeting to approve the proposed property management agreement that would allow the Subscribers to vote at the meeting; and

(v) the haste with which InterRent wished to close the Private Placement.

[39] The Listings Committee met on August 5, 2009 to consider the TSX staff recommendation. The Listings Committee did not accept TSX staff's recommendation to require unitholder approval of the Private Placement. The Listings Committee did conclude that "the property management agreement must be submitted to unitholders of [InterRent] for approval (which vote may include unitholders under the private placement) and that CLV, Mike McGahan and their related parties may not vote in respect of such approval".

[40] The Listings Committee found that the Private Placement was negotiated at arm's length and would not result in units being issued to insiders. Therefore, unitholder approval was not expressly required under subsections 604(a)(ii) or 607(g)(ii) of the TSX Manual. None of the Subscribers to the Private Placement would become a holder of 10% or more of the units (and therefore an insider) following completion of the Private Placement.

[41] The Listings Committee considered the dilution resulting from the Private Placement and concluded that, although the size of the Private Placement was large relative to InterRent's liquidity, the units would be issued at a premium to the current market price. The Listings Committee noted that the market price of the units on the TSX had not dropped significantly

since InterRent's announcement of the Private Placement. As a result, unitholder approval was not expressly required under subsection 607(g)(i) of the TSX Manual.

[42] The Listings Committee also addressed whether the Private Placement would "materially affect control" of InterRent (under subsection 604(a)(i) of the TSX Manual). The Listings Committee noted that each of the Subscribers had represented and warranted in the subscription agreement that they did "not have any agreement or undertaking with any other subscriber under the [Private Placement] such that the subscriber could be considered to be acting jointly or in concert with any other subscriber". Relying in part on those representations, the Listings Committee concluded that the Private Placement would not materially affect control of InterRent because it would not result in a new holding of more than 20% of the units by any unitholder or combination of unitholders acting together. As a result, the Listings Committee concluded that unitholder approval was not required under subsection 604 of the TSX Manual.

[43] The Listings Committee went on to consider whether it should exercise its discretion under section 603 of the TSX Manual to require unitholder approval of the Private Placement. It considered the effect of the Private Placement on the "quality of the marketplace" and reviewed the factors listed in section 603 including the involvement of insiders in the Private Placement, the material effect on control of InterRent, InterRent's corporate governance practices, InterRent's disclosure practices, the size of the transaction relative to the liquidity of InterRent and the existence of any orders issued by a court or regulatory body that had considered unitholders' interests. While a large number of units would be issued, the Listings Committee concluded that "there would be no economic dilution to unitholders, and the proposed changes to the board of trustees and the proposed externalization of property management services would be submitted to unitholders for approval".

[44] The Listings Committee concluded that it would not exercise its discretion under section 603 of the TSX Manual to require unitholder approval of the Private Placement.

II. The Issues

[45] The intervenor motion requires us to address whether to grant standing to CLV and/or McGahan and on what terms.

[46] NorthWest's preliminary motion sets out six questions for our determination (see paragraph 5 of these reasons). Before we address those questions, we must first determine whether it is appropriate to deal with them on a preliminary motion. If we conclude that we will hear NorthWest's motion, in our view, we must then address the following questions:

(i) Is NorthWest entitled to particulars of the names of the Subscribers and any transcripts of evidence, and if so, what is the schedule for providing the particulars and transcripts?

(ii) What is the appropriate standard of review of the Listings Committee Decision?

(iii) Should we defer to the Listings Committee Decision?

(iv) Was the request for a hearing and review of the Meeting Date Decision filed in time?

(v) If so, should we defer to the Meeting Date Decision?

III. Analysis

A. The Intervenor Motion

1. Positions of the Parties

CLV

[47] Each of CLV and McGahan requested an order granting them full intervenor status, or in the alternative, intervenor status to make submissions only.

[48] CLV and McGahan submit that they are proper intervenors and would be able to assist the Commission in determining the matters at issue. They both seek full intervenor status on the grounds that they have been active participants in arranging the Private Placement and have knowledge of the facts and issues. They submit that they should have full standing because their conduct was raised in the allegations made by NorthWest as a relevant factor and because they will be affected by the outcome of the Application. CLV is also the proposed property manager under the proposed property management agreement to be entered into with InterRent.

NorthWest, InterRent, the TSX and Staff

[49] NorthWest, InterRent, the TSX and Staff consented to an order granting full intervenor status to CLV and McGahan.

2. The Commission's Rules of Procedure

[50] Subrule 1.8.1(4) of the Commission's *Rules of Procedure* (2009), 32 O.S.C.B. 1991 (the "**Rules of Procedure**") sets out factors a Commission Panel may consider when determining whether to grant intervenor status. That subrule provides as follows:

> **1.8.1 (4) Factors --** In considering a motion for leave to intervene, a Panel may consider factors such as:
>
> (a) the nature of the matter;
>
> (b) the issues;

(c) whether the person or company is directly affected;

(d) the likelihood that the person or company will be able to make a useful and unique contribution to the Panel's understanding of the issues;

(e) any delay or prejudice to the parties; and

(f) any other factor the Panel considers relevant.

[51] Based on these factors, the Commission may decide to grant or deny intervenor status, and the Commission has the discretion to limit the scope of intervention and to impose any terms and conditions that are appropriate in the circumstances (Subrule 1.8.1(3) of the Rules of Procedure).

3. CLV is Granted Full Intervenor Status

[52] We granted full intervenor status to CLV. In our view, CLV is directly affected by the Listings Committee Decision and may be directly affected by the Commission's decision on the Application. It is also likely that CLV will be able to make a useful and unique contribution to our understanding of the issues. We also note that all of the parties consented to CLV participating in the hearing with full standing, and there were no concerns raised that CLV's participation would delay or prejudice any of the other parties.

[53] We denied intervenor status to McGahan. McGahan is CLV's Chief Executive Officer and sole director and shareholder. Given our decision to grant full intervenor status to CLV, we concluded that McGahan would not bring a different or unique perspective to the Application. He will be able to participate in the hearing through CLV and we do not believe that he has a separate or different perspective from that of CLV.

B. Is it Appropriate to Hear the Preliminary Motion Brought by NorthWest?

[54] In our view, certain of the issues raised in the preliminary motion brought by NorthWest have the potential to inappropriately bifurcate this proceeding. They are brought on the basis that we should decide in the first instance, on a preliminary motion, whether we will defer to the decisions of the TSX in this matter. If we decide not to defer, we would then hold a separate hearing *de novo* based on the evidence then presented to us.

[55] It is useful in considering this issue, to refer to the grounds upon which we may appropriately intervene in a decision of the TSX. The grounds upon which we may do so are set out in paragraphs 98 and 100 of these reasons. In our view, in order to assess those grounds, we must have a full record before us from the TSX as well as any additional evidence that is relevant to making those determinations. For example, we must be able to assess, in the circumstances, whether our perception of the public interest conflicts with that of the TSX. In our view, we cannot decide the question of whether we will defer to the decision of the TSX without essentially the same evidence that would be before us on a hearing *de novo*. In our view, if we conclude that we will not defer to the TSX, we should then decide the matter based on the

evidence then before us. Accordingly, we should not be asked on a preliminary motion whether we will defer to the decisions of the TSX.

[56] In its motion, NorthWest has also requested that the Commission determine the appropriate standard of review of a TSX decision and whether we need additional information beyond the TSX record that is before us. In our view, it is also not appropriate on a preliminary motion for us to be asked to decide a legal question, such as what the standard of review should be. Nor is it for the Commission to decide whether we may need additional information in order to make a decision. It is up to the parties before us to make submissions on the appropriate standard of review and to determine what evidence they wish to introduce. It is for the Commission, as adjudicator, to decide what evidence may be admitted and the appropriate weight to be given to it, and to make decisions based on the evidence before us and the submissions made. It is not appropriate for us to suggest whether or not we think additional information may be necessary.

[57] Notwithstanding these concerns, we decided as a practical matter to proceed to hear the NorthWest motion with respect to those issues we considered appropriate. We did so on the basis that our objective was to make a decision on the Application and that we would not hold another separate hearing *de novo* in the event that we concluded that we could not defer to the decisions of the TSX in this matter. Proceeding on this basis seemed the best approach given that the parties were prepared to address all of the issues and that, in our view, a full record was before us. We recognized that being able to proceed on this basis could be affected by the question whether we would order particulars of the names of the Subscribers and their possible examination. As a result, we first addressed the issue of particulars.

C. Disclosure of the Names of the Subscribers

1. Positions of the Parties

NorthWest

[58] NorthWest requests disclosure of the names of the Subscribers (that were redacted from the TSX record) and particulars of the number of units for which each subscriber has subscribed. NorthWest makes this request, regardless of our determination of whether we will defer to the Listings Committee Decision.

[59] NorthWest submits that it is requesting the names of the Subscribers for the purpose of examining the Subscribers, either prior to the hearing of the Application or during the hearing of the Application by way of a summons. NorthWest submits that knowledge of the identity of the Subscribers and the nature of their relationships with CLV is essential for determining whether the Private Placement will materially affect control of InterRent.

[60] NorthWest submits that the fact that the Listings Committee was aware of the names of the Subscribers at the time of the Listings Committee Decision, but redacted those names at the request of InterRent, is sufficient reason to require disclosure of the names of the Subscribers.

InterRent

[61] InterRent submits that the names of the Subscribers are irrelevant for purposes of this proceeding and the Commission's decision on the Application. It submits that the TSX was alive to NorthWest's concern over the relationships between the Subscribers and CLV and that the TSX undertook a full investigation and was satisfied on the issue of control. InterRent submits that the Listings Committee has already dealt with this issue and came to the conclusion that no insiders or other related parties of InterRent are involved in the Private Placement.

[62] InterRent submits that NorthWest's request for disclosure of the names of the Subscribers is an abuse of process. It is concerned that NorthWest's intention may be to undermine the Private Placement through other means.

[63] InterRent submits that NorthWest's request is an attempt to turn the TSX into a trier of fact that is required to conduct extensive inquiries. In InterRent's view, this should not be permitted as a matter of policy.

[64] Although InterRent does not believe that the identities of the Subscribers are relevant, it has no reservation about providing the information to the Commission on terms that respond to InterRent's concerns about the possible misuse of the information by NorthWest.

The TSX

[65] The TSX submits that NorthWest has been provided with all information relevant to this proceeding and that it does not need the identities of the Subscribers. The TSX also adopts the submissions of InterRent.

[66] The TSX submits that the standard of disclosure required of the Listings Committee does not require that the identity of all the Subscribers be set out in its reasons. It also submits that the Listings Committee satisfied itself on the question of whether the Private Placement would materially affect control, based on representations and warranties given by each Subscriber with respect to its relationship with the others.

[67] The TSX also submits that the Commission should not permit NorthWest to examine the Subscribers because that would essentially be permitting a full-scale cross-examination to determine whether or not the TSX was entitled to rely on the representations made to it in response to the questions it asked. The TSX emphasizes that "it does not generally have an obligation to conduct an investigation or to carry out due diligence when considering the exercise of its discretion under a provision of the TSX Manual".

CLV

[68] CLV supports the submissions of InterRent and the TSX. CLV submits that the names of the Subscribers are irrelevant given the officer's certificate delivered by CLV. The officer's certificate states, among other things, that CLV is not acting in trust for any of the Subscribers

and does not have an agreement with any of the Subscribers with respect to the ownership or voting of the InterRent units to be issued pursuant to the Private Placement. In addition, there were representations and warranties given by the Subscribers that they are not acting jointly or in concert with each other. CLV is also concerned with the potential for intimidation of investors and delay of this proceeding that could result from NorthWest's requests.

[69] CLV submits that disclosing the names of the Subscribers and requiring examination of them in circumstances such as this, where the record before the TSX was comprehensive and its analysis and reasons were thorough, gives rise to the following policy concerns:

> (i) it would establish a low threshold for admitting new or fresh evidence, particularly from third parties not otherwise involved in the proceeding;
>
> (ii) it would create the prospect for abuse, intimidation and tactical delay in the regulatory approval process;
>
> (iii) it would permit cross-examination of third parties when there is no evidence suggesting any wrong-doing by them; and
>
> (iv) it would encourage speculative fishing expeditions and loss of privacy of such third parties.

Staff

[70] Staff submits that NorthWest's request for particulars of the names of the Subscribers is a classic example of a fishing expedition and asks the Commission to dismiss the request.

[71] In Staff's view, the identities of the Subscribers are not required to be disclosed in order for the Commission to make a decision in this matter. Staff submits that the TSX took the proper approach to the question of whether the Private Placement would materially affect control of InterRent by relying on the officer's certificate from CLV, the representations and warranties of the Subscribers, and the submissions of counsel for CLV and InterRent.

2. Conclusion on Disclosure of the Subscribers' Names

[72] The Commission has the authority to make orders requiring parties to a proceeding before it to provide particulars and/or disclosure (pursuant to section 5.4 of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 and Rules 4.2 and 4.3 of the Commission's Rules of Procedure).

[73] While the Panel is entitled to see the full record that was before the TSX, we also have discretion to direct that documents and/or information be omitted from the public record (as permitted under subrule 14.3(3) of the Rules of Procedure).

[74] We decided at the hearing not to order disclosure of the names of the Subscribers.

[75] In our view, disclosure of the names of the Subscribers is not necessary in these circumstances in order for NorthWest to make its case on the Application or for us to make a decision. That is because (i) we know that the names of the Subscribers were before the TSX when it made its decision; (ii) we know that 52% of the units to be issued pursuant to the Private Placement will be held by four pension funds; (iii) representations and warranties were made by each of the Subscribers that they did not have any agreement or undertaking with any other Subscriber such that they could be considered to be acting jointly or in concert with other Subscribers; (iv) none of the Subscribers will become the holder of 10% or more of the units as a result of the Private Placement and none are currently insiders of InterRent, and (v) NorthWest will continue to control the largest number of units following the Private Placement.

[76] We were concerned that the request for the names of the Subscribers was a fishing expedition by NorthWest that included a request to examine the Subscribers. We did not consider that necessary in the circumstances.

[77] We would add that a proceeding such as this is not an appropriate forum for providing the kind of extensive discovery and examinations one might be entitled to in a court proceeding. While it is important for the Commission to have before it all of the information necessary to make a decision, the kind of discovery we are prepared to require in a matter such as this will be more limited than what may be available before the courts. The parties are aware of that in bringing an application before us.

[78] We also considered it important to protect the privacy of the Subscribers. We were concerned with revealing their names and in embroiling them in this proceeding. In another proceeding before the Commission, the disclosure of the identity of third party investors may be necessary; in this proceeding, it is not.

[79] Since we did not require disclosure of the names of the Subscribers, it is unnecessary for us to consider NorthWest's request to examine the Subscribers or whether we have authority to require such examinations outside the hearing on the merits.

D. Should the Commission Defer to the Listings Committee Decision?

1. Positions of the Parties

NorthWest

[80] NorthWest submits that the Commission should intervene in the Listings Committee Decision based on any of the five grounds set out in *Re Canada Malting Co.* (1986), 9 O.S.C.B. 3566 ("*Canada Malting*") and reaffirmed in *Re Hudbay Minerals Inc.* (2009), 32 O.S.C.B. 3733 ("*HudBay*") (see paragraph 98 of these reasons for a list of those grounds).

[81] NorthWest submits that the Listings Committee erred in not recognizing that the outcome of the vote of unitholders on the property management agreement would be a foregone conclusion, and that the Listings Committee ought to have had regard to the definition of

"materially affect control" in the TSX Manual. NorthWest submits that the Subscribers' representations and warranties that they are not acting jointly or in concert are not sufficient evidence that there would be no material effect on control. NorthWest argues that there need not be an agreement between parties to act together for a transaction to materially affect control of an issuer.

[82] NorthWest also submits that the terms of the subscription agreements entered into by the Subscribers are material evidence not referred to in the Listings Committee Decision, and that new and compelling evidence, not before the TSX, exists by reason of the consents from unitholders holding more than 50% of the outstanding units for the removal of all InterRent trustees.

[83] NorthWest submits that the public interest requires unitholder approval of the Private Placement because it amounts to a business combination of InterRent and CLV, pursuant to which unitholders will receive no control premium or liquidity.

InterRent

[84] InterRent submits that the Commission ought to accord significant deference to the expertise of self-regulatory organizations and recognized stock exchanges such as the TSX, and that there is sufficient information in the TSX record to conclude that none of the *Canada Malting* factors upon which the Commission may intervene apply.

[85] InterRent submits that each of NorthWest's substantive concerns have been addressed by the Listings Committee in its review of the matter. InterRent submits that the TSX record is thorough in its disclosure of (i) the facts and circumstances before the Listings Committee, (ii) the factors and considerations weighed by the Listings Committee, and (iii) the reasoning that the Listings Committee applied in making its decision, including specific reference to applicable sections of the TSX Manual.

[86] InterRent submits that the Listings Committee was alert to the opposition to the Private Placement from unitholders, and was alive to NorthWest's concerns, including those regarding the impact of the Private Placement on dilution and control, at the time the Listings Committee made its decision.

The TSX

[87] The TSX submits that none of the grounds for intervention set out in *Canada Malting* exist, and that there is no basis to interfere with the Listings Committee Decision. The TSX submits that the Listings Committee went beyond the standard that is required for deference by the Commission to TSX decisions articulated in *HudBay.*

[88] In response to NorthWest's submissions on whether the Private Placement would materially affect control of InterRent, the TSX submits that the Listings Committee applied the correct test from the TSX Manual, and made specific reference to the relevant definition. The TSX submits

that NorthWest's distinction between whether Subscribers are "acting jointly or in concert" or are "acting together" in order for there to be a material effect on control is not important, since both concepts require an agreement. The TSX submits that in the circumstances, there is no evidence of any agreement that the Subscribers will act together in the future. The TSX emphasizes that evidence in the record shows only that the Subscribers were identified by CLV and that NorthWest's assertions that the Subscribers will act together in the future is speculation.

[89] The TSX submits that the Listings Committee Decision was reasonable in all of the circumstances and is amply supported by reasons, and that the process leading up to that decision was fair and appropriate.

CLV

[90] CLV agrees with the submissions of InterRent and the TSX about the adequacy and completeness of the TSX record supporting the Listings Committee Decision.

[91] CLV submits that the Subscribers are participating in the Private Placement because of their knowledge of CLV's property management track record, and that the only common interest of CLV and the Subscribers is the improvement of the financial condition of InterRent.

Staff

[92] Staff submits that considerable deference should be given to decisions in the TSX's area of expertise. Staff submits that the TSX reasonably considered the relevant facts and circumstances and has weighed the relevant considerations in concluding that unitholder approval is not required, or would not be imposed, for the Private Placement under sections 603, 604(a) and 607(g) of the TSX Manual. Accordingly, Staff submits that the Commission should defer to the Listings Committee Decision.

[93] On the issue of whether the Private Placement would materially affect control, Staff refers to the Commission's decision in *HudBay*, where the Commission states that "Certainly, there is no evidence before us of any agreement, arrangement or understanding among those shareholders to vote together in the future" (*HudBay*, *supra* at para. 177). Staff submits that there is no evidence suggesting future joint action by the Subscribers that would support a conclusion that the Private Placement will materially affect control of InterRent.

2. The Law

a. Jurisdiction to Review

[94] The Commission has jurisdiction to review a decision of the TSX under section 21.7 of the Act, which states:

> **21.7(1) Review of decisions** – The Executive Director or a person or company directly affected by, or by the administration of, a direction, decision, order or

> ruling made under a by-law, rule, regulation, policy, procedure, interpretation, or practice of a recognized stock exchange, recognized self-regulatory organization, recognized quotation and trade reporting system or recognized clearing agency may apply to the Commission for a hearing and review of the direction, decision, order or ruling.
>
> **(2) Procedure** – Section 8 applies to the hearing and review of the direction, decision, order or ruling in the same manner as it applies to a hearing and review of a decision of the Director.

[95] Subsection 8(3) of the Act provides that on a review "the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper".

b. Standard of Review

[96] Notwithstanding the broad power of review under sections 21.7 and 8 of the Act, the Commission has generally taken a restrained approach and has given considerable leeway to the TSX in determining the proper purposes and relevant considerations in making a decision (*HudBay*, *supra* at para. 104). Particular deference will be given to factual conclusions made in areas where the TSX has specialized expertise:

> Where the basis of the application is a decision of a recognized stock exchange, recognized self-regulatory organization or similar body pursuant to s. 21.7, the Commission will accord deference to factual determinations central to its specialized competence.
>
> (*Re Boulieris* (2004), 27 O.S.C.B. 1957 at para. 26)

[97] This principle was affirmed in *HudBay*, where the Commission stated that:

> The Commission generally shows deference to the decisions of the TSX, particularly in the areas of the TSX's expertise. We recognize the important role that the TSX plays within our regulatory framework. The Commission's authority under section 21.7 of the Act should not be used as a means to second-guess reasonable decisions made by the TSX. The Commission will not substitute its own view for that of the TSX simply because the Commission might have reached a different conclusion in the circumstances.
>
> (*HudBay*, *supra* at para. 103)

c. Grounds for Intervention

[98] *Canada Malting* sets out five grounds upon which the Commission may intervene in a decision of the TSX. Those grounds are whether:

1. the TSX has proceeded on an incorrect principle;

2. the TSX has erred in law;

3. the TSX has overlooked material evidence;

4. new and compelling evidence is presented to the Commission that was not presented to the TSX; or

5. the Commission's perception of the public interest conflicts with that of the TSX.

(*Canada Malting, supra* at para. 59)

[99] There is a substantial onus upon an applicant to establish that one or more of these grounds exists. The Commission has stated that:

> Only in very rare circumstances should the Commission substitute its decision for that of the TSX. Subject to the discussion below, before the Commission intervenes in a decision of the TSX pursuant to section 21.7 of the Act, it should ensure that the applicant has met the heavy burden of demonstrating that its case fits squarely within at least one of the five grounds for intervention identified in *Canada Malting*.
>
> (*HudBay, supra* at para. 114)

[100] The Commission has also recognized that it may intervene in circumstances where it determines that the TSX did not exercise its discretion fairly, or where the standards of the TSX were inconsistent with the Commission's perception of the public interest (*Williams v. Toronto Stock Exchange* (1972), 7 O.S.C.B. 87 at 88 and 89).

[101] In *HudBay*, the Commission recognized the potential harm to the capital markets if the Commission is too interventionist in reviewing decisions of the TSX *(HudBay, supra* at para. 114). Market participants have a legitimate interest in transaction and regulatory certainty in relying on TSX decisions. Accordingly, the Commission should defer to decisions of the TSX where there is a reasonable basis to do so.

3. Deference to the Listings Committee Decision

a. Application of the *Canada Malting* Factors

[102] We find that NorthWest has not met the heavy onus of establishing any of the grounds set out in *Canada Malting* upon which we should intervene in the Listings Committee Decision.

[103] The Listings Committee considered whether the Private Placement would materially affect control of InterRent and, in doing so, considered the relevant definition and the factors to

be considered as part of that definition. We do not find that the TSX proceeded on any incorrect principle or erred in law. The Listings Committee considered the following facts to be relevant to its analysis:

(i) NorthWest will continue to control the largest number of votes attached to the outstanding units following the completion of the Private Placement;

(ii) no Subscriber will own 20% or more of the units following completion of the Private Placement;

(iii) CLV has certified that it is not acting in trust for any of the Subscribers and there is no agreement between CLV and the Subscribers with respect to the ownership or voting of units to be issued under the Private Placement;

(iv) there are approximately forty Subscribers and approximately 52% of the privately placed units will be held by four pension funds;

(v) each Subscriber has provided a representation and warranty in its subscription agreement that it "does not have any agreement or undertaking with any other subscriber under the private placement such that the subscriber could be considered to be acting jointly or in concert with any other subscriber"; and

(vi) following the Private Placement, the Subscribers will have no different economic interest than the other unitholders of InterRent.

[104] There was no evidence before the TSX to suggest that any of the Subscribers intend to act together as a voting block or group in the future.

[105] In considering whether or not the Private Placement would materially affect control of InterRent, we recognize that it is not necessary for there to be an agreement among the Subscribers as to how they will vote. It is possible, as submitted by NorthWest, that an agreement or understanding by each Subscriber with CLV as to how they will vote (as opposed to an agreement or understanding among the Subscribers themselves) could give rise to a material effect on control. We also agree with NorthWest that there can be a material effect on control of InterRent even if CLV and the Subscribers are not parties to a voting agreement or are not "acting jointly or in concert". However, we believe that the TSX was alive to these issues when it made the Listings Committee Decision.

[106] We also acknowledge that the Subscribers are likely to vote in favour of the property management agreement. We understand that the reason why many of the Subscribers are participating in the Private Placement is their knowledge of CLV's business track record. In our view, the fact that they are likely to vote in favour of the property management agreement does not necessarily suggest that control of InterRent has been materially affected by the Private Placement (within the meaning of the TSX Manual). It simply indicates how Subscribers intend to vote on a particular matter.

[107] In our view, there were a number of additional considerations that may have influenced the TSX to come to the decision it did on whether to require approval by unitholders of the Private Placement under section 603 of the TSX Manual. Those considerations include that:

(i) the Private Placement and the entering into of the property management agreement are the result of a strategic review by the board of trustees of InterRent that was supported and approved by a special committee of independent trustees;

(ii) NorthWest participated in that process but ultimately was not able to reach agreement with InterRent as to the terms of a transaction; and

(iii) the Private Placement is being carried out at a premium to the market price of the units at the time it was agreed to and will not result in economic dilution to existing unitholders.

[108] We also note that no unitholder approval of the Private Placement is required under section 607(g)(i) of the TSX Manual because it is not being carried out at a price less than the market price of the units.

[109] It is clear that in considering the circumstances, the TSX focused on the key regulatory issues. We note in this respect that the TSX required public disclosure by InterRent of the Listings Committee Decision and clarification of the maximum dilution that would result from the Private Placement. The TSX required that public disclosure of the Private Placement be made at least 48 hours prior to the closing of the Private Placement. The TSX also confirmed with InterRent that there should be no change in trustees of InterRent without a unitholder vote, and it required unitholder approval of the proposed property management agreement and excluded CLV, McGahan and their related parties from the vote on that agreement. The TSX was clearly alive to the relevant regulatory issues and considerations.

[110] We have reviewed the record and in our view there is no basis for us to conclude that the TSX overlooked any material information when it came to its decision to accept notice of the Private Placement without requiring unitholder approval. We were not provided with any new and compelling evidence that was not presented to the TSX.

[111] We note that NorthWest submits that it now holds consents representing more than 50% of the outstanding units in favour of the removal of all of the InterRent trustees. That circumstance does not, in our view, constitute new or compelling evidence for purposes of the Application. If NorthWest holds or controls 50% or more of the votes, it is entitled to exercise those votes and its rights as a unitholder as it sees fit. That is not, however, a reason for the Commission to now intervene in the Listings Committee Decision.

[112] The TSX could have exercised its discretion in the circumstances to require unitholder approval of the Private Placement. The TSX did not do so and that seems to us to be a decision

that the TSX could reasonably make in the circumstances. That is not to say that we would have made the same decision; only that it was the TSX's decision to make.

[113] In conclusion, in making the Listings Committee Decision, the TSX considered the relevant facts and information and assessed the relevant regulatory issues and considerations. The process it followed was appropriate and its reasons articulated its rationale for the decisions it made. In our view, there is a reasonable basis for us to defer to the Listings Committee Decision, and we do so.

[114] We therefore dismissed the Application as it relates to the Listings Committee Decision.

E. Request for a Hearing and Review of the Meeting Date Decision

1. Positions of the Parties

NorthWest

[115] NorthWest also requested that the Commission review the Meeting Date Decision. NorthWest submits that the delay of the annual and special meeting of unitholders continued to be a live issue at the time of the Listings Committee Decision. In support of this argument, NorthWest refers to the TSX Staff Recommendation Memorandum and the Listings Committee Decision, which both make reference to the postponement of the meeting.

InterRent

[116] InterRent submits that NorthWest's request for a hearing and review of the Meeting Date Decision was commenced outside of the 30-day period permitted under the Act, since the Meeting Date Decision was made on June 19, 2009 and the original Application was filed on August 4, 2009.

The TSX

[117] The TSX agrees with the submission of InterRent. The TSX also submits that the reference to the delay of the Meeting Date Decision in the Listings Committee Decision was simply a consideration of the effect of that decision on InterRent's corporate governance practices and it was not a live issue under consideration at the time.

[118] The TSX further submits that the basis for agreeing to a postponement of a meeting is that it be justifiable in the circumstances. If the Meeting Date Decision was justifiable, it should be shown deference by the Commission.

CLV

[119] CLV did not make submissions on this issue.

Staff

[120] Staff agrees and adopts the position of the TSX on the timeliness of NorthWest's request to review the Meeting Date Decision.

2. The Applicable Legislation

[121] Subsection 8(2) of the Act applies, with necessary changes, to an application for a hearing and review under section 21.7 of the Act (by reason of subsection 21.7(2)). Subsection 8(2) of the Act provides as follows:

> **8(2) Review of Director's decisions –** Any person or company directly affected by a decision of the Director may, by notice in writing sent by registered mail to the Commission within thirty days after the mailing of the notice of the decision, request and be entitled to a hearing and review thereof by the Commission.

[122] Therefore, a request for a hearing and review of a decision of a recognized stock exchange must be made within the 30-day period provided for in subsection 8(2) of the Act.

3. NorthWest's Application for Review is out of Time

[123] The Meeting Date Decision was confirmed by a letter from the TSX to InterRent on June 19, 2009. The correspondence shows that NorthWest was aware of that decision by June 24, 2009. The request for a hearing and review of that decision is dated August 4, 2009. Accordingly, NorthWest's request for a hearing and review of the Meeting Date Decision was made more than 30 days after the date of that decision and is out of time. Accordingly, we dismiss the Application as it relates to the Meeting Date Decision.

IV. Conclusions

[124] Although we are entitled to see the full record that was before the TSX in connection with the Listings Committee Decision, including the names of the Subscribers, we concluded that such disclosure was not necessary in this case.

[125] The TSX record demonstrates that the TSX considered the concerns expressed by NorthWest and that the TSX was alive to the relevant regulatory issues and considerations when it decided not to require unitholder approval of the Private Placement.

[126] In the circumstances, NorthWest has not met the heavy onus of demonstrating grounds upon which we should intervene in the Listings Committee Decision.

[127] Accordingly, we deferred to the Listings Committee Decision and dismissed the Application as it relates to that decision.

[128] We also dismissed the Application as it relates to the Meeting Date Decision because that application was filed out of time.

DATED at Toronto on the 15th day of October 2009.

"James E. A. Turner"	*"David L. Knight"*
James E. A. Turner	David L. Knight, F.C.A.

SCHEDULE A – RELEVANT PROVISIONS OF THE TSX COMPANY MANUAL

Part I - Introduction

Interpretation

In this Manual,

…

"**materially affect control**" means the ability of any security holder or combination of security holders acting together to influence the outcome of a vote of security holders, including the ability to block significant transactions. Such an ability will be affected by the circumstances of a particular case, including the presence or absence of other large security holdings, the pattern of voting behaviour by other holders at previous security holder meetings and the distribution of the voting securities. A transaction that results, or could result, in a new holding of more than 20% of the voting securities by one security holder or combination of security holders acting together will be considered to materially affect control, unless the circumstances indicate otherwise. Transactions resulting in a new holding of less than 20% of the voting securities may also materially affect control, depending on the circumstances outlined above;

…

Part VI - Changes in Capital Structure of Listed Issuers

Sec. 602. General

(a) Every listed issuer shall immediately notify TSX in writing of any transaction involving the issuance or potential issuance of any of its securities other than unlisted, non-voting, non-participating securities.

(b) A listed issuer may not proceed with a Subsection 602(a) transaction unless accepted by TSX. Failure to comply with this provision may result in the suspension and delisting of the listed issuer's listed securities (see Part VII of this Manual).

…

Sec. 603. Discretion

TSX has the discretion: (i) to accept notice of a transaction; (ii) to impose conditions on a transaction; and (iii) to allow exemptions from any of the requirements contained in Parts V or VI of this Manual.

In exercising this discretion, TSX will consider the effect that the transaction may have on the quality of the marketplace provided by TSX, based on factors including the following:

(i) the involvement of insiders or other related parties of the listed issuer in the transaction;

(ii) the material effect on control of the listed issuer;

(iii) the listed issuer's corporate governance practices;

(iv) the listed issuer's disclosure practices;

(v) the size of the transaction relative to the liquidity of the issuer; and

(vi) the existence of an order issued by a court or administrative regulatory body that has considered the security holders' interests.

Sec. 604. Security Holder Approval

(a) In addition to any specific requirement for security holder approval, TSX will generally require security holder approval as a condition of acceptance of a notice under Section 602 if, in the opinion of TSX, the transaction:

(i) materially affects control of the listed issuer; or

(ii) provides consideration to insiders in aggregate of 10% or greater of the market capitalization of the listed issuer and has not been negotiated at arm's length.

If any insider of the listed issuer has a beneficial interest, direct or indirect, in the proposed transaction which differs from other security holders of the same class TSX will regard such a transaction as not having been negotiated at arm's length.

(b) For other transactions, TSX's decision as to whether to require security holder approval will depend on the particular fact situation having specific regard to those items listed in Subsection 604(a). For the purposes of Subsection 604(a)(ii), the insiders participating in the transaction are not eligible to vote their securities in respect of such approval.

…

Sec. 607. Private Placements

(a) TSX defines the term "private placement" as an issuance of treasury securities for cash consideration or in payment of an outstanding debt of the listed issuer without prospectus disclosure, in reliance on an exemption from the prospectus requirements under applicable securities laws.

…

(c) Private placements not subject to Sections 604 and 717 and that are:

(i) offered at a price per security at or above market price, regardless of the number of listed securities issuable, or

(ii) for an aggregate number of listed securities issuable equal to or less than 25% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis, prior to the date of closing of the transaction where the price per security is less than the market price but within the applicable discounts set out in Subsection 607(e),

will be accepted by TSX generally within three (3) business days of TSX receiving notice thereof. Notice to TSX of this type of private placement is effected by submitting Form 11 "Private Placement—Expedited Filing" found in Appendix H.

…

(g) TSX will require that security holder approval be obtained for private placements:

(i) for an aggregate number of listed securities issuable greater than 25% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis, prior to the date of closing of the transaction if the price per security is less than the market price; or

(ii) that during any six month period are to insiders for listed securities or options, rights or other entitlements to listed securities greater than 10% of the number of securities of the listed issuer which are outstanding, on a non-diluted basis, prior to the date of closing of the first private placement to an insider during the six month period.

…