Ontario Securities Commission | Commission des valeurs mobilières de l'Ontario | P.O. Box 55, 19th Floor 20 Queen Street West Toronto ON M5H 3S8 | CP 55, 19e étage 20, rue queen ouest Toronto ON M5H 3S8

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

- AND -

IN THE MATTER OF CI FINANCIAL CORP.

- AND -

IN THE MATTER OF DECISIONS OF THE TORONTO STOCK EXCHANGE

REASONS FOR DECISION
(Section 21.7 and Subsection 8(3) of the Act)

Hearing:	May 26, 2011	
Decision:	October 25, 2011	
Panel:	Mary G. Condon	- Commissioner and Chair of the Panel
	Sinan O. Akdeniz	- Commissioner
Appearances:	Paul Le Vay Johanna Braden Owen Rees	- For CI Financial Corp.
	Michael E. Barrack Deborah E. Palter	- For the Toronto Stock Exchange
	James Sasha Angus Erin O'Donovan Naizam Kanji	- For Staff of the Commission

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REASONS FOR DECISION

I. OVERVIEW

A. Background

[1] On May 26, 2011, a hearing (the "**Hearing**") in this matter was held before the Ontario Securities Commission (the "**Commission**") to consider CI Financial Corp. ("**CI**")'s May 9, 2011 Request for Hearing and Review (the "**Application**") of two decisions of the Listings Committee of the Toronto Stock Exchange (the "**TSX**") (collectively, the "**Decisions**"), pursuant to section 21.7 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**").

[2] The Decisions require CI to submit a resolution ratifying the continuation of CI's Shareholder Rights Plan Agreement (the "**Plan**") to a two-tiered vote that would include all shareholders rather than a vote of only the Independent Shareholders (those shareholders who hold less than 20% of CI's issued and outstanding shares, as defined in the Plan) (the "**Independent Shareholders**"). A two-tiered vote refers to a requirement that both of (i) all CI shareholders and (ii) CI's Independent shareholders vote in favour of continuing the Plan.

[3] Following the Hearing on May 26, 2011, we issued an order setting aside the Decisions pursuant to subsection 8(3) and section 21.7 of the Act (the "**May 26, 2011 Order**"). The May 26, 2011 Order further required that only the Independent Shareholders of CI were entitled to vote on the resolution ratifying the continued existence of the Plan at CI's 2011 annual meeting of shareholders (the "**2011 Annual Meeting**").

[4] These are the Reasons for our Decision to grant CI's request to overturn the Decisions of the TSX.

B. The Parties

(a) CI

[5] CI is a wealth management firm and one of Canada's largest investment fund companies. It has been a listed issuer since June 1994 and is listed on the TSX under the symbol CIX.

[6] As of the date of the Hearing, the rights conferred by CI's Plan were listed by the TSX. On December 19, 2008, CI's shareholders voted in favour of the Plan. According to its preamble, the Plan is meant to:

> … ensure, to the extent possible, that all shareholders of [CI] are treated fairly in connection with any take-over offer or bid for the Common Shares …, and to ensure that the board of directors of [CI] from time to time is provided with sufficient time to evaluate unsolicited take-over bids and to explore and develop alternatives to maximize shareholder value; …

[7] Under the terms of the Plan, CI's board was to submit a resolution ratifying the continued existence of the Plan for consideration and approval at the 2011 Annual Meeting.

[8] CI's largest shareholder is the Bank of Nova Scotia ("**BNS**"), which holds approximately 36.3% of CI's issued and outstanding shares as of December 31, 2010. As of the date of the Hearing and at the time of ratifying the adoption of the Plan on December 19, 2008, BNS was the only non-Independent Shareholder in CI.

(b) The TSX

[9] The TSX is a stock exchange recognized by the Commission under subsection 21(1) of the Act and pursuant to a recognition order. The TSX regulates the operations and the standards of practice and business conduct of TSX-listed issuers in accordance with subsection 21(4) of the Act and in accordance with the by-laws, rules, regulations, policies, procedures, interpretations and practices of the TSX.

[10] The Commission's recognition order with respect to the TSX requires the TSX to "establish such rules, policies and other similar instruments that are necessary or appropriate to govern and regulate all aspects of its business and affairs". The rules established by the TSX which are relevant to this proceedings are contained in the TSX Company Manual (the "**TSX Manual**").

(c) Commission Staff

[11] Staff of the Commission ("**Staff**") is also a party to proceedings brought pursuant to subsection 8(3) and section 21.7 of the Act.

C. The Application

[12] In its Application, CI argues that the TSX erred in purporting to require CI to submit a resolution ratifying the continuation of the Plan to a vote of all shareholders rather than a vote of just the Independent Shareholders.

[13] According to CI's Application, the TSX lacked the jurisdiction to make the Decisions. CI argues that the TSX Manual contains rules regarding the adoption of a shareholders rights plan, but there are no TSX rules or regulations regarding shareholder approval of the continued existence of a previously adopted shareholder rights plan.

[14] Further, CI submits that the TSX made the Decisions without due consideration for the plain language of the Plan, and without consideration for the purpose and intent of the Plan.

[15] CI requests that the Decisions be set aside because:

(a) the TSX lacked jurisdiction to make the Decisions;

(b) even if it did have jurisdiction, the TSX proceeded on an incorrect principle;

(c) the TSX made an error in law;

(d) the TSX overlooked material evidence;

(e) there is new and compelling evidence before the Commission; and

(f) the public interest requires that the Plan and agreements like it are respected.

[16] We address below the detailed submissions of CI and the opposing submissions of the TSX and Staff.

D. The Plan

[17] An earlier version of the Plan (the "**Predecessor Plan**") was approved by the trustees of CI's predecessor entity, CI Financial Income Fund, on October 21, 2008, and was posted on SEDAR on October 31, 2008.

[18] The Predecessor Plan was identical to the current version in all material respects. We therefore do not distinguish between the Predecessor Plan, approved on October 21, 2008, and the current version of the Plan, dated January 1, 2009 and filed on SEDAR the following day. Similarly, for the sake of simplicity, although the original vote to adopt the plan was made by CI Financial Income Fund's unitholders, we do not distinguish between these securityholders and the current CI shareholders in this decision.

[19] The Plan was provided to the TSX by letter dated October 22, 2008. On October 27, 2008, the TSX confirmed that it accepted notice for filing of the Plan subject to the ratification of the Plan by CI's unitholders:

> We hereby confirm that [TSX] has accepted notice for filing of the Plan, subject to the following conditions:
>
> 1. the Plan must be ratified by unitholders of the Fund at a meeting to be held on or before the day that is six months from the date the plan was adopted by the Fund which ratification must evidence both:
>
>   (a) a majority of votes cast in favour of the Plan at such meeting; and
>
>   (b) a majority of votes cast in favour of the Plan at such meeting, without giving effect to any votes cast (i) by any unitholder that, directly or indirectly, on its own or in concert with others, holds or exercises control over more than 20% of the outstanding voting units of the Fund, if any; and (ii) by the associates, affiliates and insiders of any referred to in (i) above;
>
> 2. if the Plan is not ratified in condition (1) above, it must be rescinded or otherwise cancelled and be of no further effect immediately after the above-mentioned unitholders' meeting; and
>
> 3. within five business days following approval of the Plan by the directors of the Fund, receipt of two copies of the executed version of the Plan.

[20] On December 19, 2008, an overwhelming majority of CI's outstanding voting securities were voted on the question of whether to ratify the Plan at a special meeting of securityholders. Of those securities, 97% were voted in favour of the Plan, and the Plan was ratified.

[21] At the same December 19, 2008 special meeting, securityholders also voted in favour of converting CI Financial Income Fund to a corporation, along with the automatic implementation of the Plan.

[22] According to the terms of the Plan, the latest the Plan could expire would be the date of the 2014 annual meeting of CI shareholders:

> **1.1 Definitions**
>
> …
>
> (v) "**Expiration Time**" shall mean the earlier of:
>
> (i) the Termination Time [the time at which the right to exercise Rights shall terminate]; and
>
> (ii) the termination of the annual meeting of the shareholders of the Corporation in the year 2011;
>
> provided, however, that if the resolution referred to in Section 5.19 is approved in accordance with Section 5.19 at or prior to such annual meeting, "**Expiration Time**" means the earlier of (i) the Termination Time and (ii) the termination of the annual meeting of the shareholders of the Corporation in the year that is three years after the year in which such approval occurs.

[23] Thus, the Plan requires further ratification by CI shareholders at the 2011 Annual Meeting, without which the Plan will expire on the date of the 2011 Annual Meeting. This requirement is contemplated in the definition of "Expiration Time", above, and is set out in section 5.19 of the Plan:

> **5.19 Shareholder Review**
>
> If required by the rules and regulations of any stock exchange on which the Common Shares are then listed, at or prior to the annual meeting of the shareholders of the Corporation in 2011, provided that a Flip-in Event has not occurred prior to such time, the Board shall submit a resolution ratifying the continued existence of this Agreement to all holders of Common Shares for their consideration and, if thought advisable, approval. If such approval is not required by the rules and regulations of any stock exchange on which the Common Shares are then listed, at or prior to the annual meeting of the shareholders of the Corporation in 2011, provided that a Flip-in Event has not occurred prior to such time, the Board shall submit a resolution ratifying the continued existence of this Agreement to the Independent Shareholders for their consideration and, if thought advisable, approval. Unless the majority of the votes cast by all holders of Common Shares or the Independent Shareholders, as applicable, who vote in respect of such resolution are voted in favour of the continued existence of this Agreement, the Board shall, immediately upon the confirmation by the Chairman

> of such shareholders' meeting of the results of the votes on such resolution and without further formality, be deemed to elect to redeem the Rights at the Redemption Price.

[24] The question of whether section 5.19 of the Plan requires a two-tiered vote of (i) all CI shareholders and (ii) CI's Independent Shareholders, or whether it requires one vote of only CI's Independent Shareholders is the subject of the two TSX Decisions under review.

E. The TSX Decisions

i. The April 20, 2011 Listings Committee Summary Decision

[25] On April 1, 2011, BNS wrote to the TSX, requesting that the TSX require CI to permit BNS to vote on the continued ratification of the Plan for a further three-year term. BNS took the position that subsection 636(b) of the TSX Manual, which states that the TSX will normally require a two-tiered vote for the adoption of plans that treat one shareholder differently from others, applied to the shareholder vote for the continuation of the Plan at the 2011 Annual Meeting. Subsection 636(b) of the TSX Manual states:

> 636. (b) In cases where a particular security holder may be exempted from the operation of a plan even though the security holder's percentage holding exceeds the plan's triggering ownership threshold, TSX will normally require that the plan be ratified by a vote of security holders that excludes the votes of the exempted security holder and its insiders as well as by a vote that does not exclude such security holder.

[26] BNS argued that under subsection 636(b), the continuation of the Plan requires the same shareholder approvals as required to implement the Plan, being a vote of all shareholders as well as a vote that excludes BNS and its insiders. BNS disagreed with CI's position that the continuation of the Plan only required a vote of the Independent Shareholders.

[27] On April 5, 2011, CI wrote to the TSX in response to BNS's letter. CI claimed in this letter that the TSX rules do not address this situation and that there is no principled reason to impose the TSX rules applicable to the initial adoption of the Plan on the vote at the 2011 Annual Meeting.

[28] The TSX received further correspondence from BNS and CI on April 7, 2011 and April 8, 2011, respectively.

[29] Following this correspondence, the TSX decided to consider the question of whether it should require that CI hold a two-tiered vote on the ratification of the continued existence of the Plan, as requested by BNS: "In light of the extensive submissions received from the Bank [BNS] and CI, TSX determined to consider this matter at Listings Committee notwithstanding the absence of an application from CI" (April 20 Decision at p. 2)). On April 18, 2011 a Listings Committee Memo was provided by TSX staff to the Listings Committee, which recommended that the Listings Committee require the Plan to be ratified by a two-tiered vote, comprised of a vote of all CI shareholders and a vote of only the Independent Shareholders.

[30] The Listings Committee met on April 20, 2011 and determined that CI was required to seek a two-tiered vote to ratify the Plan's continued existence at the 2011 Annual Meeting (the "**April 20 Decision**"). The Listings Committee communicated the April 20 Decision to CI by telephone on April 20, 2011 and sent a letter restating the requirement for a two-tiered vote the following day. The Listings Committee's reasons for the April 20 Decision are set out in a Listings Committee Summary, which was subsequently provided to CI (the "**April 20 Listings Committee Summary**").

[31] In reaching its April 20 Decision, the Listings Committee considered the application of subsection 636(b) of the TSX Manual, and concluded that the TSX Manual is silent on requirements for renewal or interim votes on shareholder rights plans. However, the Listings Committee decided to use its discretion to require a two-tiered vote on the ratification of the continued existence of the Plan, which it determined was a renewal in substance:

> The Plan provides that it will terminate if it is not ratified, in a manner similar to a security holder rights plan submitted for a renewal vote. Committee acknowledged that unlike traditional renewals, an amendment to the expiry date was not required. However, the requirement for an Independent Shareholder approval for the continued existence can be viewed in substance as a renewal. TSX practice has been to treat renewals in the same manner as a plan adoption, which requires a two-tiered vote.
>
> (April 20 Decision at p. 2)

[32] In making the April 20 Decision, the Listings Committee also considered disclosure contained in the circular distributed by CI to seek shareholder approval for the Plan in 2008 (the "**2008 Circular**"). The 2008 Circular does not indicate that only Independent Shareholder approval would be required to ratify the continued existence of the Plan at the 2011 Annual Meeting. Although the complete Plan was available on SEDAR, the Listings Committee determined that "all security holders should be entitled to rely on the summary in particular with respect to important aspects such as limitations on voting rights and should not have to interpret the plan directly" (April 20 Decision at p. 4).

[33] The Listings Committee applied its discretion under section 603 of the TSX Manual. Section 603 states:

> 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.

Section 603 also includes a list of factors that the TSX should consider in exercising this discretion. The Listings Committee considered these factors in the August 20 Decision.

[34] In the April 20 Listings Committee Summary, the Listings Committee gave two main reasons for its decision to require a two-tiered vote:

(a) The requirement for shareholder ratification for the continued existence of the Plan is unclear. The Listings Committee found that the disclosure provided in the 2008

Circular was not detailed, the termination time was unclear and the 2008 Circular did not stipulate that only Independent Shareholders would be able to vote on the ratification of the continued existence of the Plan in 2011.

(b) The ratification by shareholders in 2011 was, in essence, akin to a renewal approval, given that the Plan would terminate failing ratification.

[35] The Listing Committee summarized its reasons for the April 20 Decision in the April 20 Listings Committee Summary:

> Overall, the Committee agreed the quality of the marketplace could be negatively impacted if the general two-tiered vote is not imposed. Based on the Plan and the disclosure in the 2008 Circular, a CI shareholder could reasonably expect that all the shareholders would have an opportunity to vote for the continued existence of the Plan in 2011. Committee also considered that there could be a negative impact on the quality of the marketplace to have different voting standards on plan adoption, renewal and ratification, when in substance there are no differences since in each case the plan will terminate failing security holder approval while the Plan continues to treat shareholders differently.
>
> (April 20 Decision at p. 6)

ii. The April 29, 2011 Listings Committee Summary Decision

[36] Following the April 20 Decision, CI requested that the Listings Committee, with the additional participation of the Senior Vice President of the TSX, reconsider its decision to require CI to submit a resolution ratifying the Plan to a vote of all shareholders rather than a vote of just the Independent Shareholders. CI made this request prior to the issuance of the April 20 Listings Committee Summary.

[37] On April 27, 2011, TSX staff provided the Listings Committee with an updated memo, which recommended that the Listings Committee maintain its decision to require a two-tiered vote on the ratification of the continued existence of the Plan.

[38] The Listings Committee, now with the participation of the TSX Senior Vice President, reconsidered the matter on April 29, 2011, and decided to uphold its decision to require a two-tiered vote on the continued existence of the Plan (the "**April 29 Decision**"). The Listings Committee's reasons for the April 29 Decision are set out in a Listings Committee Summary, which was provided to CI following the April 29 Decision (the "**April 29 Listings Committee Summary**").

[39] The April 29 Decision noted that there is no requirement in the sections of the TSX Manual governing shareholder rights plans that issuers file an application with the TSX for the continuation of a plan. However, the Listings Committee determined that it had discretion under section 603 of the TSX Manual to place conditions on the mid-term vote on the Plan's continuance. The Listings Committee rejected CI's submission that it lacked jurisdiction under section 603 of the TSX Manual to impose requirements on the Plan ratification vote at the 2011

Annual Meeting. In making the April 29 Decision, the Listings Committee once again considered the applicable factors noted in section 603 of the TSX Manual.

[40] CI referred the TSX Listings Committee to a number of other shareholder rights plans which contain a clause similar to section 5.19 of the Plan. The Listings Committee distinguished these plans from the Plan in finding:

- none of those plans had grandfathered persons and therefore the two-tiered vote would have been irrelevant. This was not the case with CI's Plan, under which BNS is a grandfathered person as the beneficial owner of 20% or more of CI shares at the date the Plan was adopted;

- in the majority of cases, issuers made applications to the TSX for ratification, even though no amendments were being made to the plans;

- for those plans where issuers did not file an application with the TSX for ratification, the outcome was the same as it would have been had they filed an application;

- TSX required a two-tiered vote in cases where amendments were being made to the plans;

- disclosure for most of the other plans made it clear that only independent shareholder approval would be required for ratification, and in any case, the TSX does not review disclosure in circulars at the time shareholder rights plans are approved;

- CI's Plan specifically contemplates that the TSX could require approval by all shareholders; and

- these plans should not be determinative because none present substantially the same fact scenario as in this case.

(April 29 Listings Committee Summary at p. 3-4)

[41] The Listings Committee stated in the April 29 Listings Committee Summary that:

> … the overall quality of the marketplace could be negatively impacted by permitting CI to seek only a vote of independent shareholders to ratify the Continuation of the Plan, particularly in light of the disclosure in the Circular at the time of Plan adoption.
>
> (April 29 Listings Committee Summary at p. 5)

Specifically, the Listings Committee noted that it "agreed that the restricted vote for the Continuation was not properly disclosed. It seems reasonable that a reader could interpret the plan as having two three year periods, subject to shareholder approval" (April 29 Listings Committee Summary at p. 4).

[42] Further, the Listings Committee determined that there was no substantive policy reason to distinguish between an adoption, renewal or ratification of shareholder rights plans with respect to the shareholder approval requirements.

II. THE ISSUES

[43] The issues before us at this hearing and review were twofold:

1. Did the TSX Listings Committee have jurisdiction to make the Decisions?
    (a) Is the ratification of the continued existence of the Plan a "transaction"?
    (b) Does the TSX have jurisdiction over the continued existence of the Plan as a redemption?
    (c) Does the TSX have jurisdiction to make the Decisions because there are "special circumstances"?
2. If it is determined that the TSX has jurisdiction, is there any reason why the Commission should overturn the Decisions? Specifically,
    (a) Did the TSX err in law?
    (b) Did the TSX overlook material evidence?
    (c) Is there evidence before the Commission that was not before the TSX that would give us reason to overturn the Decisions?
    (d) Does the Commission's interpretation of the public interest conflict with the TSX's interpretation?

[44] Having concluded that the TSX lacked the jurisdiction to make the Decisions that the continued existence of the Plan be submitted to a two-tiered vote, it is not necessary for us to make a determination on any of the other grounds for review raised by CI in its Application.

III. THE LAW: THE COMMISSION'S JURISDICTION ON A HEARING AND REVIEW

[45] The Commission's jurisdiction to intervene in a decision of an SRO or exchange is set out in subsection 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 exchange, recognized self-regulatory organization, recognized quotation and trade reporting system, recognized clearing agency or designated trade repository 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.

[46] Subsection 8(3) of the Act provides the Commission's powers upon a hearing and review:

> 8(3) Power on review – Upon a hearing and review, the Commission may by order confirm the decision under review or make such other decision as the Commission considers proper.

[47] In a hearing and review held pursuant to section 21.7 of the Act, the Commission exercises jurisdiction akin to a trial de novo, rather than a more limited appellate function. (*Investment Dealers Assn. of Canada v. Boulieris* (2004) 27 O.S.C.B. 1597 (aff'd [2005] O.J. No. 1984 (Div. Ct.)) at paras. 29-30).

[48] Although a hearing and review is broader in scope than an appeal, there are limited grounds upon which the Commission will intervene in a decision of the TSX. In its decision in *Re Canada Malting Co.* (1986), 9 O.S.C.B. 3587 ("***Canada Malting***"), the Commission set out the grounds upon which it may intervene, which have continued to be applied in subsequent Commission decisions. The Commission may intervene in a decision under section 21.7 if:

> (a) the TSX proceeded on an incorrect principle;
>
> (b) the TSX erred in law;
>
> (c) the TSX overlooked material evidence;
>
> (d) new and compelling evidence is presented to the Commission which was not presented to the TSX; or
>
> (e) the TSX's perception of the public interest conflicts with that of the Commission
>
> (*Canada Malting, supra* at 3587)

[49] Generally, the Commission will take a restrained approach and will show deference to decisions of the TSX, particularly where those decisions fall within areas of the TSX's expertise.

[50] In this case, CI framed the preliminary issue as one of whether the TSX had jurisdiction to make the Decisions. The question of whether the TSX had jurisdiction can also be addressed within the scope of a *Canada Malting* analysis. The parties do not dispute that it is appropriate in this case for the Commission to consider the jurisdiction of the TSX as a preliminary issue.

[51] In our view, the analysis is the same whether the issue is addressed as a preliminary question of jurisdiction or assessed as an error in law under the *Canada Malting* analysis. The issue before us is whether the TSX erred in finding that it had jurisdiction to make the Decisions.

[52] The question we must answer in our analysis is therefore: Did the TSX have the jurisdiction to make the Decisions and require a two-tiered vote on the ratification of the continued existence of the Plan by CI's shareholders?

IV. RELEVANT SECTIONS OF THE TSX MANUAL

[53] Section 602 of the TSX Manual gives the TSX jurisdiction over "transactions". In 2008, section 602 stated[1]:

> 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, nonparticipating 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).

[54] Under section 634 of the TSX Manual, shareholder rights plans qualify as "transactions":

> Sec. 634. General
>
> (a) Security holder rights plans (commonly referred to as "poison pills") fall under TSX jurisdiction by virtue of Section 602 which requires listed issuers to pre-clear with TSX any potential issuance of equity securities.
>
> …

[55] The TSX's general approach to approval requirements for shareholder rights plans is set out in Section 636 of the TSX Manual. Subsection 636(b) provides that the TSX will generally require a two-tiered vote for approval of a shareholder rights plan:

> Sec. 636. TSX Approach
>
> …
>
> (b) In cases where a particular security holder may be exempted from the operation of a plan even though the security holder's percentage holding exceeds the plan's triggering ownership threshold, TSX will normally require that the plan be ratified by a vote of security holders that excludes the votes of the exempted security holder and its insiders as well as by a vote that does not exclude such security holder.
>
> …

[1] Section 602 was changed as of February 4, 2011. We agree with CI's submission that these language changes do not affect the issues to be decided in this hearing.

[56] Section 603 of the TSX Manual provides the TSX with the general discretion to impose conditions on any transaction in its jurisdiction. It states as follows:

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

V. SUBMISSIONS OF THE PARTIES

A. CI Financial

[57] As noted above, section 634 of the TSX Manual provides that security holder rights plans "fall under TSX jurisdiction by virtue of Section 602 which requires listed issuers to pre-clear with TSX any potential issuance of equity securities". CI is required to notify the TSX in writing of any transactions relating to the issuance or potential issuance of its securities, including rights issued pursuant to shareholder rights plans. CI submits that it did this in 2008 when the Plan was initially adopted, and that the TSX accepted the Plan when it issued its acceptance letter on October 27, 2008. Following shareholder approval by a two-tiered vote, as required by the TSX, the TSX listed the rights conferred by the Plan. Having done so, according to CI, the TSX exhausted its jurisdiction over the Plan.

[58] According to CI's submissions, the TSX, having approved the Plan, has no further authority to intervene in the Plan, unless CI sought to amend the plan or enter into a new shareholder rights plan upon the Plan's expiry.

[59] CI submits that the TSX does not have a broad authority to intervene in a shareholder rights plan which it has already approved. Section 603, which confers discretion on the TSX to

accept notice of transactions and impose conditions on transactions, does not provide the TSX with jurisdiction to impose conditions on the continued existence of the Plan. CI submits that it is an abuse of process for the TSX to purport to re-exercise its discretion under Section 603 years after approving the Plan in 2008, after CI and its Independent Shareholders have relied on the TSX's initial exercise of its discretion.

[60] CI submits that the TSX Listings Committee erred in its interpretation of the Plan. According to CI's submissions, section 5.19 of the Plan provides for a vote of only the Independent Shareholders, unless there is a rule or regulation of the TSX, or another exchange, which requires a vote of all shareholders. CI submits that the language of section 5.19 of the Plan does not invite the TSX to interfere in the 2011 shareholder review of the Plan in the absence of a rule or regulation that expressly permits the TSX to do so. Section 5.19 of the Plan states that:

> If required by the rules and regulations of any stock exchange on which the Common Shares are then listed, at or prior to the annual meeting of the shareholders of the Corporation in 2011, … the Board shall submit a resolution ratifying the continued existence of this Agreement to all holders of Common Shares for their consideration and, if thought advisable, approval. …

CI submits that this statement does not grant the TSX the ability to require a two-tiered vote absent a rule providing it with this jurisdiction. CI further submits that the TSX rules currently do not provide the TSX such jurisdiction.

[61] CI submits that the TSX erred in finding that the shareholder review of the Plan scheduled for June 2011 is not substantially different from an initial adoption of a plan, an amendment to a plan or the renewal of a plan. Although the adoption of shareholder rights plans requires a vote of all shareholders and a two-tiered vote when one shareholder is treated differently than others by the plan, once a plan has been validly adopted, there is no rationale for varying the terms of the plan and requiring a vote that differs from that to which the shareholders originally agreed.

[62] CI submits that by ordering a two-tiered vote, the TSX granted a remedy that undermines the purpose of the shareholder review, to the detriment of the Independent Shareholders, even as the TSX purports to be acting in the interest of those shareholders. CI submits that the TSX compromised the contractual rights of CI's shareholders and the interests of CI's Independent Shareholders.

B. The TSX

[63] The TSX submits that the continuance of a shareholder rights plan subject to shareholder ratification is a transaction, regardless of whether characterized as a "mid-term check", a "continuation" or any other name. It is in substance and consequence a transaction – the Plan ceases to exist unless the shareholders vote in favour of it.

[64] The TSX submits that the renewal of an existing plan is effectively a re-adoption of the same plan and is a transaction. The consequences are the same in the cases of a vote against adoption or renewal – the plan ends without further steps being taken. According to the TSX, the continued existence of the Plan, subject to shareholder ratification, is no different.

[65] The TSX advocates a purposeful approach to defining a "transaction". It argues that the Plan qualifies as a transaction under section 602 because it involves the potential redemption of securities. An issuer must notify the TSX of its intention to redeem or partially redeem its securities.

[66] The TSX contends that section 603 of the TSX Manual confers a broad discretionary power on the TSX to accept notice of a transaction, impose conditions on a transaction and allow exemptions from the requirements in Parts V or VI of the TSX Manual. The TSX submits that it is within its jurisdiction "to apply its discretion not only to transactions, but also more broadly when events falling under Parts V and VI of the TSX Manual may impact the quality of the marketplace". While there is no specific rule providing the TSX with jurisdiction over "renewals" of plans, the TSX has general jurisdiction over shareholder rights plans under sections 634 to 637 of the TSX Manual, particularly with respect to shareholder votes on plans.

[67] The TSX has jurisdiction over shareholder rights plans under section 634 of the TSX Manual, and it has the discretion to accept notice of a plan and impose conditions on it under section 603. The TSX submits that there is no requirement that the transaction be a "new transaction", and further, that it is of no consequence whether a determination about the existence of a plan is made at the beginning, middle or end of its life.

[68] The TSX submits that further support for a purposeful approach to defining a "transaction" to include the mid-term vote is found in the introduction to the TSX Manual, under the heading "Special Circumstances". The TSX argues that the special circumstances section requires issuers to comply with the spirit of the TSX's listing requirements in situations where there is no specific guidance in the TSX Manual's rules. The TSX submits that this section also provides it with jurisdiction to place conditions on the mid-term vote, which it exercised because of its concerns about the opaqueness of the disclosure regarding the vote's structure in the 2008 Circular.

[69] The TSX argues that a vote on the continued existence of the Plan is subject to TSX jurisdiction. The TSX submits that this is consistent with the discretion granted to the TSX in the TSX Manual and the provisions of section 5.19 of the Plan.

C. Staff of the Commission

[70] Staff submits that the TSX's argument requires us to accept that the "transaction" referenced in section 603 of the TSX Manual is not restricted to a "transaction involving the issuance or potential issuance" of securities. Staff submits that a plain reading of sections 602 and 603 of the TSX Manual does not support the TSX's position. Since there is no requirement under TSX rules for CI to provide notice to the TSX of a continuation of the Plan, the TSX's discretion under section 603 is not engaged.

[71] Staff further submits that interpreting the TSX's discretion under section 603 as providing the TSX with ongoing jurisdiction over transactions will create market uncertainty. Staff takes the position that this interpretation should be rejected, otherwise issuers will not know when the TSX is going to take jurisdiction over a transaction, or what precisely is characterized as a transaction.

[72] Staff submits that the TSX's exercise of its discretion under section 603 to maintain the quality of the marketplace is only engaged when the TSX is accepting a transaction, imposing conditions on a transaction or allowing exemptions from requirements under Parts V or VI of the TSX Manual. Staff's position is that the TSX's jurisdiction under section 603 is limited to proposed transactions that involve the issuance or potential issuance of securities.

VI. ANALYSIS: THE TSX'S JURISDICTION

A. Jurisdiction over "transactions" in sections 602 and 603 of the TSX Manual

[73] We agree with CI and Staff that the mid-term ratification of the continuation of the Plan is not a transaction.

[74] The TSX's jurisdiction over transactions is set out in sections 602 and 603 of the TSX Manual. Section 602 provides that: "Every listed issuer shall immediately notify TSX in writing of any transaction involving the issuance or potential issuance of any of its securities" (TSX Manual, s. 602).

[75] Section 603 sets out the TSX's discretion with respect to transactions:

> 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 …

[76] The TSX's jurisdiction to exercise its discretion under section 603 is qualified by the requirement that it be exercised with respect to transactions. Section 602 applies not to all transactions, but to transactions "involving the issuance or potential issuance of securities". The TSX Rules allow for the exercise of its discretion to consider the effect on the quality of the marketplace only with respect to transactions that involve the issuance or potential issuance of securities.

[77] The rights conferred by the Plan were listed by the TSX upon its initial approval of the Plan in 2008. Section 634 of the TSX Manual confirms that shareholder rights plans fall under the TSX's jurisdiction by virtue of section 602. The TSX had jurisdiction over the Plan in 2008, and it exercised that jurisdiction. The TSX approved the Plan, subject to conditions that included a two-tiered vote on the initial ratification of the Plan by CI shareholders.

[78] The Plan, as approved by the TSX, contemplated that there would be a mid-term vote by the Independent Shareholders at the 2011 Annual Meeting:

> … at or prior to the annual meeting of the shareholders of the Corporation in 2011, … the Board shall submit a resolution ratifying the continued existence of this Agreement to the Independent Shareholders for their consideration and, if thought advisable, approval. …
>
> (Plan, section 5.19)

Having exercised its section 603 jurisdiction in 2008, it was not open to the TSX to revisit its decision to approve the Plan and its terms.

[79] We do not agree that the TSX's acknowledged discretion over the initial approval of transactions continues for the entire life of a transaction. The TSX Manual explicitly grants the TSX jurisdiction over the initial adoption of plans and amendments to existing plans. There is no similar grant of jurisdiction over the continuation of plans mid-stream. This was noted by the Listings Committee in the April 29 Decision: "The Committee acknowledged that there was no requirement within these sections which directly governs the Continuation or explicitly requires the filing of an application with TSX for the continuation of a Plan" (April 29 Listings Committee Summary at p. 2). Absent such a rule, the TSX's jurisdiction under sections 602 and 603 is limited to transactions involving the issuance or potential issuance of securities.

[80] The TSX submits that the definition of "transaction" should capture those circumstances in which it would be appropriate for the TSX to exercise supervisory authority to guarantee the quality of the marketplace, and that the whole area of poison pills is in the "wheelhouse" of the TSX.

[81] Shareholder rights plans fall under the jurisdiction of the TSX under Part VI of the TSX Manual. This jurisdiction, however, is limited by the terms of the TSX Manual. Section 634(a) of the Manual states that: "Security holder rights plans (commonly referred to as "poison pills") fall under TSX jurisdiction by virtue of Section 602 which requires listed issuers to pre-clear with TSX any potential issuance of equity securities". The circumstances at issue here are not a situation where the TSX may exercise its discretion to approve or impose conditions on a transaction or "allow exemptions from any of the requirements contained in Parts V or VI of this Manual" (TSX Manual, s. 603).

[82] The TSX's jurisdiction to consider the effect on the quality of the marketplace under section 603 can be exercised with respect to transactions involving the issuance or potential issuance of securities. This included the initial listing of the rights of the Plan, but does not permit the TSX to impose conditions on the mid-term vote.

[83] The TSX argues that the terms of the Plan itself contemplate that the TSX may require a two-tiered vote at the 2011 Annual Meeting. Section 5.19 of the Plan states, in part:

> If required by the rules and regulations of any stock exchange on which the Common Shares are then listed, at or prior to the annual meeting of the shareholders of the Corporation in 2011, provided that a Flip-in Event has not occurred prior to such time, the Board shall submit a resolution ratifying the continued existence of this Agreement to all holders of Common Shares for their consideration and, if thought advisable, approval. …

[84] We agree with CI's submission that the language of section 5.19 does not confer on the TSX the authority to place conditions on the mid-term vote, nor does it acknowledge the existence of rules providing the TSX with discretion to require a two-tiered vote. On its terms, section 5.19 contemplates the possibility that the TSX or another stock exchange on which CI is listed may, at the time of the 2011 vote, have rules governing votes such as this one on the

ratification of the continuation of the Plan. Section 5.19 continues to describe the voting process at the 2011 Annual Meeting in the case where the TSX or another exchange implements rules requiring a two-tiered vote.

[85] As a final matter, we note that the TSX described its limited jurisdiction over shareholder rights plans in its response to a request for comments regarding proposed amendments to Parts V, VI and VII of the TSX Manual:

> … The securities commissions in Canada are responsible for reviewing the propriety or operation of plans, not TSX. TSX simply accepts notice of the plan and consents to the listing of the rights on TSX which are issuable pursuant to the plan. Therefore, it is not within TSX's jurisdiction to "allow the plan to be operative" …
>
> (*TSX Request for Comments – Amendments to Parts V, VI and VII of the Toronto Stock Exchange Company Manual in Respect of Non-Exempt Issuers, Changes in Structure of Issuers' Capital and Delisting Procedures* (2004), 27 O.S.C.B. 249)

B. Jurisdiction over redemptions

[86] The TSX submits that the mid-term vote on the continuation of the Plan is a transaction because it involves the potential redemption of listed rights. The TSX contends that a purposeful and contextual reading of section 602 of the TSX Manual results in a finding that transactions are those events for which notice to the TSX is required. Under section 625 of the TSX Manual, issuers proposing to redeem, or partially redeem, securities must give notice to the TSX:

> I. Redemption of Listed Securities
>
> Sec. 625
>
> (a) Where a listed issuer proposes to redeem, or partially redeem, listed securities, one copy of the notice of redemption must be filed with TSX concurrently with the sending of the notices to the security holders, but in any event no later than seven trading days prior to the redemption date. For a full redemption of a listed class of securities, such securities will normally be delisted from TSX at the close of business on the redemption date. For a partial redemption, listed securities must be redeemed on a pro rata basis, TSX will not accept notice of a partial redemption of listed securities by lot.
>
> (b) Where a listed issuer redeems or partially redeems securities which were convertible into listed securities, the listed issuer must advise TSX, as soon as possible after the redemption date, of the number of securities which were authorized for issuance for potential conversion of the redeemed securities but were not in fact issued. TSX will adjust its listing records accordingly.

[87] The TSX argues that the requirement for notice for a redemption of securities triggers the TSX's jurisdiction to impose conditions on transactions under section 603. We note that this issue was not addressed in the Decisions. The TSX Decisions do not consider whether

redemptions are "transactions" under section 602 of the TSX Manual. On the contrary, the Listings Committee stated the following in its Decisions: "TSX rules are silent on the requirements relating to renewal or interim votes on security holder rights plans" (April 20 Listings Committee Summary at p. 2), and,

> The Committee acknowledged that there was no requirement within [sections 634 to 637 of the TSX Manual] which directly governs the Continuation or explicitly requires the filing of an application with TSX for the continuation of a plan.
>
> (April 29 Listings Committee Summary at p. 2)

[88] A plain reading of section 625 of the TSX Manual suggests that it requires that notice be given to the TSX once an issuer proposes to redeem or partially redeem its securities. This section is therefore only engaged once a determination to redeem the securities is made.

[89] The mid-term vote on the Plan's continuation could result in the delisting of the rights associated with the Plan. However, the TSX's jurisdiction over the redemption of the listed rights is not engaged until CI makes a request to redeem those securities. Although there is the potential for redemption of securities in the vote on the mid-term ratification of the Plan, CI would not be required to provide the TSX with notice of an intention to redeem securities prior to the mid-term vote. Indeed, it could not do so.

[90] Further, as discussed above, the TSX's discretion under section 603 is limited to transactions involving the issuance or potential issuance of securities. Redemption of securities is not contemplated in the definition of a transaction in section 602 of the TSX Manual. The mid-term vote does not involve an issuance or potential issuance of securities as is required in the definition of a transaction under section 602.

C. Jurisdiction in "special circumstances"

[91] The TSX submits that, in the absence of specific rules governing its jurisdiction over the mid-term ratification of the continuance of the Plan, the Listings Committee still had jurisdiction to require a two-tiered vote because there were "special circumstances". The TSX referred us to the "Special Circumstances" section of the TSX Manual's Introduction, which states:

> Special Circumstances
>
> The listing requirements of the Exchange are comprehensive, and relevant to most situations. Yet, because of rapid structural changes in business and the breadth and complexity of the activities of listed companies, circumstance could arise where explicit guidance may not be found in the Manual. In those instances where a particular corporate situation is unique, and where no specific rules relating to such a situation can be found, companies are expected to adhere to the spirit of the Exchange's listing requirements.

[92] The TSX argues that the disclosure in the 2008 Circular was misleading because it did not state that the mid-term ratification of the Plan's continuance would be subject to a vote of only the Independent Shareholders. As a result of these special circumstances, the TSX claims it

had the discretion to intervene and require a two-tiered vote on the 2011 ratification of the continued existence of the Plan.

[93] We note that both the 2008 Circular and the full text of the Plan were available to all CI shareholders in 2008. However, the 2008 Circular was not included in the materials that TSX initially considered when it approved the Plan in 2008. This was presumably because, as noted by the Listings Committee in the April 29 Decision, "… TSX does not review disclosure in circulars at the time of shareholder approval of shareholder rights plans".

[94] We did not have enough evidence before us to make our own assessment of the adequacy or materiality of the disclosure in the 2008 Circular. We do note that Appendix "I" of the 2008 Circular, where the Plan is referenced, makes it clear that it is only a summary of the full Plan:

> The following is a summary of the features of the Rights Plan as it applies to the Fund. The summary is qualified in its entirety by the full text of the Rights Plan, a copy of which is available on request from the Secretary of the Fund as described in the Information Circular and is also available on SEDAR at www.sedar.com.
> …

[95] The listed issuer's disclosure practices is a factor that the TSX may consider in its section 603 analysis when deciding whether to approve a shareholder rights plan. However, in order for the TSX's powers under section 603 to be engaged, the TSX must first have jurisdiction. We have concluded that in this case, it did not. The time for the TSX to apply an analysis under section 603 was in 2008 when the Plan was initially approved. It was not open to the TSX to reconsider the impact of the Plan on the quality of the marketplace, having previously approved it in 2008.

[96] We agree with CI's submission that the "Special Circumstances" section of the TSX Manual should not apply in this case. This is not a circumstance where "explicit guidance may not be found in the Manual". The TSX Manual has rules relating to shareholder rights plans, and CI complied with those rules when it provided the Plan to the TSX in 2008. The TSX had the opportunity to opine on the process to be used for mid-term ratification when it reviewed the Plan in 2008.

VII. CONCLUSION

[97] We find that the TSX did not have jurisdiction to make the Decisions requiring that the mid-term vote on the ratification of the continuance of CI's shareholder rights plan be subject to a two-tiered vote. The vote on the continuation of the Plan at the 2011 Annual meeting does not involve the issuance or potential issuance of securities, and is therefore not a transaction that engages the TSX's jurisdiction under sections 602 and 603 of the TSX Manual. The TSX erred in law in finding that it had jurisdiction in 2011 to impose conditions on the mid-term vote on the continuation of the Plan.

[98] Given our finding that the TSX erred in assuming jurisdiction to impose conditions on the 2011 mid-term vote, it is not necessary for us to consider the other grounds for review alleged by CI.

[99] The TSX Decisions were therefore set aside, as provided in our May 26, 2011 Order. Only the Independent Shareholders of CI were entitled to vote on the resolution ratifying the continued existence of the Plan at the 2011 Annual Meeting.

Dated at Toronto this 25th day of October, 2011.

"Mary G. Condon"	*"Sinan O. Akdeniz"*
Mary G. Condon	Sinan O. Akdeniz