

Court File No. CV-11-9159-00CL

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST,
PRISZM INC. AND KIT FINANCE INC.

(the "Applicants")

FACTUM OF THE APPLICANTS
(Returnable March 31, 2011)

Dated: March 31, 2011

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PART I - INTRODUCTION

1. Prizm Income Fund ("**Prizm Fund**"), Prizm Canadian Operating Trust ("**Prizm Trust**"), Prizm Inc. ("**Prizm GP**"), and KIT Finance Inc. ("**KIT Finance**") (collectively, the "**Applicants**") seek relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**"). The Applicants are also seeking to have the stay of proceedings and other benefits of an Initial Order under the CCAA extended to Prizm Limited Partnership ("**Prizm LP**"). Prizm Fund, Prizm Trust, Prizm GP, Prizm LP and Kit Finance will be referred to collectively herein as the "**Prizm Entities**". Any reference in this affidavit to "**Prizm**" shall be a reference to one or more of the Prizm Entities as the context dictates.

2. The Prizm Entities own and operate 428 KFC, Taco Bell and Pizza Hut restaurants in seven provinces across Canada. As described in greater detail below,

as a result of declining sales and the inability to secure additional or alternate financing, the Prizm Entities cannot meet their liabilities as they come due and are therefore insolvent.

3. The Prizm Entities seek a stay of proceedings under the CCAA to allow them to secure a going concern solution for the business including approximately 6,500 employees and numerous suppliers, landlords and other creditors and maximize recovery for the Prizm Entities' stakeholders.

PART II - THE FACTS

4. The facts with respect to this Application are more fully set out in the Affidavit of Deborah J. Papernick, sworn March 31, 2011 (the "**Papernick Affidavit**"). All capitalized terms used but not defined herein have the meaning ascribed to them in the Papernick Affidavit.

Papernick Affidavit, Application Record, Tab 2

Overview of the Prizm Entities' Business and Operations

5. Prizm LP is a franchisee of Yum! Restaurants International (Canada) LP (the "**Franchisor**") and is Canada's largest independent quick service restaurant operator. Prizm LP is the largest operator of the KFC concept in Canada, accounting for approximately 60% of all KFC product sales in Canada. In addition, Prizm LP operates a number of multi-branded restaurants that combine a KFC restaurant with either a Taco Bell or a Pizza Hut restaurant.

Papernick Affidavit at para. 6, Application Record, Tab 2.

6. KFC is Prizm LP's largest brand. Prizm LP's sales are dominantly from the KFC brand, with the balance from Taco Bell and a minor Pizza Hut presence.

Papernick Affidavit at para. 7, Application Record, Tab 2.

7. As of March 25, 2011, the Prizm Entities had approximately 6,500 employees and operated 428 restaurants in seven provinces: British Columbia, Alberta, Manitoba, Ontario, Quebec, Nova Scotia and New Brunswick. 97 restaurants were locations where a host KFC restaurant is combined with either a Taco Bell concept or a Pizza Hut concept. Prizm LP's restaurants serve over one million customers each week.

Papernick Affidavit at para. 8, Application Record, Tab 2.

Corporate Structure

8. Prizm LP (formerly KIT Limited Partnership) is a limited partnership formed under the laws of Manitoba. The business of Prizm LP is to develop, acquire, make investments in and conduct the business and ownership, operation and lease of assets and property in connection with the quick service restaurant business in Canada, together with all activities ancillary or incidental thereto.

Papernick Affidavit at para. 15, Application Record, Tab 2.

9. Prizm Fund is an income trust indirectly holding approximately 60% of Prizm LP's trust units.

Papernick Affidavit at paras. 9 and 10, Application Record, Tab 2.

10. Prizm Trust is an unincorporated, limited purpose trust wholly-owned by Prizm Fund and was created to acquire and hold 60% of the outstanding partnership units of Prizm LP, as well as approximately 60% of Prizm GP's units, for Prizm Fund.

Papernick Affidavit at para. 14, Application Record, Tab 2.

11. Prizm GP is a corporation which acts the general partner of Prizm LP.

Papernick Affidavit at para. 19, Application Record, Tab 2.

12. KIT Finance is a corporation created to act as borrower for the Prudential Loan, described in detail below.

Papernick Affidavit at para. 22, Application Record, Tab 2

13. The principal and head offices of Prizm Fund, Prizm LP, and Prizm GP are located at 101 Exchange Avenue, Vaughan, Ontario L4K 5R6.

Papernick Affidavit at paras. 13, 18 and 20, Application Record, Tab 2.

Franchise Agreement

14. Prizm LP entered into a Master Franchise Agreement with the Franchisor effective November 10, 2003 and was deemed to have executed a separate and individual franchise agreement for each restaurant in the form of the International Franchise Agreement attached to the Master Franchise Agreement (collectively, the "**Franchise Agreement**").

Papernick Affidavit at para. 41, Application Record, Tab 2.

15. Prizm LP is a franchisee and does not control the brands associated with the restaurants which it operates. All aspects of product offering, marketing, restaurant design, and advertising are significantly influenced by the Franchisor, or other groups (such as advertising cooperatives), which directly impacts both sales and profitability of the Prizm Entities.

Papernick Affidavit at para. 42, Application Record, Tab 2.

16. The majority of Prizm LP's Franchise Agreements, which cover the use of the KFC, Taco Bell and Pizza Hut trademarks, expire over a period of five years, commencing in November 2009. Under the terms of the Franchise Agreement, Prizm LP is able to extend its rights for an additional ten years upon payment of a renewal fee and the making of required capital investments in order to upgrade the renewed restaurants to the standards currently specified by the Franchisor.

Papernick Affidavit at para. 43, Application Record, Tab 2.

17. As described in greater detail in the Papernick Affidavit, the term of 70 of the restaurants operated by the Prizm Entities expired on February 28, 2011. The Prizm Entities have continued to operate all restaurants in the ordinary course.

Papernick Affidavit at para. 46, Application Record, Tab 2.

Outstanding Indebtedness

18. As at March 30, 2011, the Prizm Entities had short-term and long-term indebtedness totalling \$98.8 million pursuant to the following instruments (all of which are described in greater detail in the Papernick Affidavit):

- (a) Note purchase and private shelf agreement dated January 12, 2006, as amended, ("**Note Purchase Agreement**") between, *inter alia*, KIT Finance, Prizm GP and Prudential Investment Management ("**Prudential**") - \$67.3 million
- (b) Subordinated Debentures issued by Prizm Fund due June 30, 2012 - \$30 million - \$31.5 million

Papernick Affidavit at paras. 55 and 62, Application Record, Tab 2.

19. The indebtedness under the Note Purchase Agreement (the "**Prudential Loan**") is guaranteed by and secured by substantially all of the assets of Prizm GP,

Kit Finance, and Prizm LP and by limited recourse guarantees and pledge agreements granted by Prizm Fund and Prizm Trust.

Papernick Affidavit at para. 58, Application Record, Tab 2.

20. In addition to the foregoing, as at March 30, 2011, the Prizm Entities had approximately \$39.1 million of accrued and unpaid liabilities.

Papernick Affidavit at para. 64, Application Record, Tab 2.

Financial Difficulties

21. Prizm LP operates its restaurants as franchisee and is highly dependent on the Franchisor for numerous aspects of its business.

Papernick Affidavit at para. 65, Application Record, Tab 2.

22. The KFC and Taco Bell brands experienced significant same store sales declines in 2009, 2010 and the first quarter of 2011 which resulted in a significant same store sales declines for the Prizm Entities.

Papernick Affidavit at para. 66, Application Record, Tab 2.

23. As a result of same store sales declines for the KFC and Taco Bell brands, the Prizm Entities experienced financial performance in FY2009 and FY2010 that was below both prior years' performance and budgeted expectations (as described in greater detail in the Papernick Affidavit).

Papernick Affidavit at para. 67, Application Record, Tab 2.

24. While sales have declined, operating costs have increased on a dollar basis as a result of lower store count and declining sales.

Papernick Affidavit at para. 70, Application Record, Tab 2.

25. Seasonality of business results in revenues in the first two quarters of the fiscal year being slightly lower than in the latter two. Therefore, the Prizm Entities do not expect an improvement in their sales or cash position in the first half of 2011.

Papernick Affidavit at para. 71, Application Record, Tab 2.

Defaults Under Various Credit Facilities and Critical Business Agreements

26. As a result of slower than forecast sales during the third quarter, on September 5, 2010, Prizm Fund breached the Prudential Financial Covenant (as defined in the Papernick Affidavit) and remains in non-compliance today. As a result of the non-compliance, both tranches of the Prudential Loan became callable by Prudential.

Papernick Affidavit at para. 73, Application Record, Tab 2.

27. Prizm Fund has also failed to make an interest payment of \$0.975 million due on December 31, 2010 in respect to the Subordinated Debentures and remains in default of its interest payment obligation.

Papernick Affidavit at para. 85, Application Record, Tab 2.

28. The Prizm Entities have also ceased paying certain obligations to the Franchisor as they come due. Among other things, Prizm LP has failed to pay the franchise renewal fee due on August 10, 2010 and its continuing fee payable pursuant to the Franchise Agreement since December 2010. Prizm LP has also defaulted in its obligation to complete upgrades to a number restaurants as required under the Franchise Agreement.

Papernick Affidavit at paras. 78, 79 and 81, Application Record, Tab 2.

Efforts to Restructure and Current Status

29. The Prizm Entities undertook extensive measures in 2010 to increase their profitability. In response to declining profitability, the Prizm Entities, among other things, closed nine underperforming restaurants in 2010, reduced food waste and took steps to increase labour productivity at the store level.

Papernick Affidavit at paras. 87 and 88, Application Record, Tab 2.

30. In early 2010, the Prizm Entities also engaged investment banker Canaccord Genuity to assist in their restructuring and efforts to restructure their long term loan facilities and investment obligations. Working in conjunction with the Prizm Entities' existing lender, Prudential, Canaccord Genuity contacted a total of 74 parties with respect to a potential financing. Some of the potential lenders expressed an interest in taking part in one or more refinancing alternatives. However, the

challenging credit markets and a lack of agreement on certain business issues with the Franchisor resulted in the discontinuation of refinancing efforts.

Papernick Affidavit at paras. 89 and 90, Application Record, Tab 2.

31. During December 2010, the Board of Trustees and Boards of Directors of the Prizm Entities determined that additional financing was required if the Prizm Entities were to continue operating in the short to medium term. Pursuant to an amendment to the Note Purchase Agreement, Prudential provided Prizm Fund with a short-term supplemental facility of up to \$4 million to ensure the business had sufficient liquidity to continue operations while a longer-term plan was developed. Prudential also agreed to extend to the Prizm Entities a debtor-in-possession financing facility (the "**DIP Facility**") with maximum availability of \$2.9 million pursuant (subject to certain conditions).

Papernick Affidavit at paras. 94-96, Application Record, Tab 2.

32. In September 2010, the Prizm Entities also commenced a sales process in an effort to divest some of their restaurants which resulted in an Asset Purchase Agreement between Prizm LP, Prizm GP and Soul Restaurants Canada Inc. (formerly 7716443 Canada Inc.) (the "**Purchaser**"), an affiliate of Soul Foods Group, a U.K. based franchisee of YUM! Restaurants International, for the sale of 232 operating restaurants in Ontario and British Columbia for an aggregate purchase price of approximately \$46.4 million before customary purchase price adjustments,

subject to, among other things, satisfactory due diligence and financing by the purchaser by January 15, 2011 (the "**Soul APA**"). The number of stores was subsequently reduced to 231 with no reduction in the purchase price.

Papernick Affidavit at paras. 91 and 92, Application Record, Tab 2.

33. Both the due diligence and financing conditions were satisfied by January 15, 2011. The transaction under the Soul APA (the "**Soul Sale Transaction**") remains subject to customary closing conditions, adequate landlord and material contract consents, any approvals as required by law and by the Prizm Entities' governing documents, and consent to the transaction by both Yum! Restaurants International and Prudential.

Papernick Affidavit at para. 93, Application Record, Tab 2.

34. On January 19, 2011, Kit Finance, Prizm GP and Prizm LP and Prudential entered into a forbearance agreement whereby Prudential agreed to temporarily suspend any action on account of the existing defaults and forbear from exercising their remedies until January 31, 2011, subject to an earlier termination in the event of certain events of default. On February 1, 2011, Kit Finance, Prizm GP and Prizm LP and Prudential entered into a second forbearance agreement until May 20, 2011, subject to earlier termination in certain circumstances.

Papernick Affidavit at paras. 75-77, Application Record, Tab 2.

35. On or about January 28, 2011, the Franchisor and Prudential entered into an agreement pursuant to which the Franchisor and Prudential documented their agreement to establish and cooperate in respect of a sales process for the sale of Prizm's business (the "**Stakeholder Agreement**"). Pursuant to the Stakeholder Agreement, the Franchisor agreed with Prudential (but not with the Prizm Entities) to continue to forebear on collecting the continuing fees and other amounts owing and accruing pursuant to the Franchise Agreement (other than the Advertising Contributions) and to extend and not provide for the termination of expired franchises until the earlier of the sale of such franchises and May 20, 2011, provided that Prudential has not abandoned its support for the sale process established with the Franchisor and Prizm is continuing to operate outside of an insolvency proceeding (other than a proceeding consented to by the Franchisor).

Papernick Affidavit at para. 83, Application Record, Tab 2.

36. On January 14, 2011, Prudential and the Franchisor informed the Prizm Entities that they require the Prizm Entities to conduct a sale process for their remaining restaurants and assets. Kit Finance, Prizm GP and Prizm LP and Prudential entered into an agreement dated as of February 1, 2011, pursuant to which Prizm agreed to use their best commercial efforts to comply with the sale process described therein (the "**Second Sales Process**").

Papernick Affidavit at paras. 97 and 98, Application Record, Tab 2.

37. On February 10, 2011, Prizm Fund retained Canaccord Genuity to act as financial advisor and sales agent in connection with the potential sale of some or all of its restaurants and commenced the Second Sales Process. The Prizm Entities intend to bring a motion in the short term for Court approval of the Second Sales Process by the Prizm Entities with the assistance of Canaccord Genuity.

Papernick Affidavit at paras. 99 and 100, Application Record,
Tab 2.

38. For the reasons described above, the Prizm Entities are insolvent and require the protection of the CCAA in order to close the Soul Sale Transaction and complete the Second Sales Process for the remaining restaurants and assets of the Prizm Entities.

PART III - ISSUES AND THE LAW

39. The issues on this application are as follows:

- (a) Should this Honourable Court grant protection under the CCAA to the Applicants?
- (b) Should this Honourable Court extend protection under the CCAA to Prizm LP?
- (c) Should this Honourable Court grant an order designating certain suppliers of goods and services to the Prizm Entities as critical

suppliers, requiring such suppliers to continue to supply on terms and conditions consistent with existing arrangements and past practices, as amended by the terms of the CCAA Initial Order, and grant a priority charge over the property of the Prizm Entities (the "**Property**") (the "**Critical Suppliers' Charge**") in favour of such suppliers?

- (d) Should this Honourable Court approve the DIP Facility and grant a priority charge to secure payment of the DIP Facility (the "**DIP Lenders' Charge**") over the Property?
- (e) Should this Honourable Court authorize the appointment of 2279549 Ontario Inc. as Chief Restructuring Officer (the "**CRO**") of the Prizm Entities?
- (f) Should this Honourable Court grant a priority charge over the Property to secure the fees and disbursements incurred in connection with services rendered to the Prizm Entities both before and after the commencement of the CCAA proceedings by counsel to the Prizm Entities, the Monitor, the Monitor's counsel and the CRO (the "**Administration Charge**")?
- (g) Should this Honourable Court grant a charge over the Property to protect the Prizm Entities' directors and officers and the CRO from certain potential liabilities (the "**Directors' Charge**")?

A. THE APPLICANTS SHOULD BE GRANTED PROTECTION UNDER THE CCAA

The Applicants are "Debtor Companies" to which the CCAA Applies

40. The CCAA applies to a "debtor company" or affiliated debtor companies where the total of claims against the debtor or its affiliates exceeds five million dollars. The CCAA defines "company" as, *inter alia*, a company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, including an income trust. Pursuant to section 2 of the CCAA, a "debtor company" is defined in the CCAA as, *inter alia*, a company that is insolvent.

CCAA s. 2(1), "debtor company", "company."

41. Prizm GP and KIT Finance are corporations established under the laws of Canada and Alberta, respectively, and are therefore "companies" within the definition of the CCAA.

42. Following the coming into force of certain amendments in 2009, income trusts are also recognized as companies to which the CCAA applies, as long as:

(a) the trust's units are listed on a prescribed stock exchange on the day on which the CCAA proceedings commence; or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which CCAA proceedings commence.

CCAA s. 2(1), "income trust."

43. Prizm Fund units currently trade on the Toronto Stock Exchange, which is a prescribed stock exchange under the CCAA regulations. Prizm Trust is wholly-owned by Prizm Fund. Therefore, both Prizm Fund and Prizm Trust fall within the definition of "income trust" under the CCAA and are "companies" to which the CCAA applies.

Companies' Creditors Arrangement Regulations SOR/2009-219, s. 2.
A stock exchange that is regulated by an Act of Parliament or of the legislature of a province is prescribed for the purposes of the definition "income trust" in subsection 2(1) of the CCAA. All stock exchanges operating in Ontario, including the Toronto Stock Exchange, must be recognized by the Ontario Securities Commission to carry on business (*Securities Act, R.S.O., 1990, c. S.5*)

44. The CCAA does not define "insolvent," but the definition of "insolvent person" under the *Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3*, as amended ("BIA") is commonly referenced in establishing that an applicant is a debtor company in the context of the CCAA. The definition of "insolvent person" in the BIA is as follows:

s. 2(1)

... "insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, and whose liability to creditors provable as claims under this Act amount to one thousand dollars, and

(a) who is for any reason unable to meet his obligations as they generally become due,

(b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.) [Stelco] leave to appeal to O.C.A. refused, 2004 CarswellOnt 2936, leave to appeal to S.C.C. refused, 2004 CarswellOnt 5200, at paras. 21 and 22, Applicants' Book of Authorities, Tab 1

BIA, s. 2, "insolvent person."

45. In *Stelco*, Justice Farley applied an expanded definition of insolvent in the CCAA context to reflect the "rescue" emphasis of the CCAA, modifying (a) of the BIA's definition of "insolvent person" to include a financially troubled corporation that is "reasonably expected to run out of liquidity within reasonable proximity of time as compared with the time reasonably required to implement a restructuring."

Stelco at paras. 25 and 26, Applicants' Book of Authorities, Tab 1.

46. The Prizm Entities are unable to meet their obligations to creditors as they come due and have ceased paying certain obligations as they come due, including, Prizm Fund failed to make the required interest payments to Prudential on December 10, 2010, failed to make the interest payment in respect of its Subordinated Debentures on December 31, 2010 and has failed to pay the continuing fees to the Franchisor since December 2010. The Prizm Entities meet both the BIA and *Stelco* tests. The Applicants are therefore insolvent.

Papernick Affidavit at para. 101, Application Record, Tab 2.

47. Furthermore, as described in the Papernick Affidavit, the Prizm Entities are affiliated debtor companies with total claims against them in excess of \$100 million.

Papernick Affidavit at paras. 55-64, Application Record, Tab 2.

48. Accordingly, it is respectfully submitted that the Applicants are “debtor companies” to which the CCAA applies.

An Order Granting a Stay of Proceedings is Appropriate

49. Pursuant to section 11.02(3) of the CCAA, on an initial application in respect of a debtor company the Court may make an order on any terms that it may impose where the applicant satisfies the Court that circumstances exist that make the order appropriate.

CCAA, s. 11.02(3).

50. In *Re Lehndorff General Partner Ltd.*, Justice Farley described the CCAA as a statute intended to “*facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy*” and, as such, being a “*remedial legislation entitled to a liberal interpretation*”. Justice Farley stated, *inter alia*:

The CCAA is intended to provide a structured environment for the negotiation of compromises between a debtor company and its creditors for the benefit of both. Where a debtor company realistically plans to continue operating or to otherwise deal with its assets but it requires the protection of the court in order to do so and it is otherwise too early for the court to determine whether the debtor company will succeed, relief should be granted under the CCAA.

Re Lehndorff General Partner Ltd. (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.) [*Lehndorff*] at 31, Applicants’ Book of Authorities, Tab 2.

51. Justice Farley also expressly recognized one of the purposes of the CCAA to be a facilitation of ongoing operations of a business where its assets have a greater value as part of an integrated system than individually and stated:

The CCAA facilitates reorganization of a company where the alternative, sale of the property piecemeal, is likely to yield far less satisfaction to the creditors.

...

It appears to me that the purpose of the CCAA is also to protect the interests of creditors and to enable an orderly distribution of the debtor company's affairs. This may involve a winding-up or liquidation of a company or simply a substantial downsizing of its business operations, provided the same is proposed in the best interests of the creditors generally.

Lehndorff at 32, Applicants' Book of Authorities, Tab 2.

52. More recently, in *Re Nortel Networks Corp.*, Justice Morawetz also held that the CCAA is intended to be flexible and must be given a broad and liberal interpretation to achieve its objectives and that a sale by the debtor which preserves its business as a going concern is consistent with those objectives.

Nortel Networks Corp. (Re), [2009] O.J. No. 3169 (S.C.J.) at para. 47, Applicants' Book of Authorities, Tab 3.

53. The power to grant a stay of proceeding should be construed broadly in order to permit the CCAA to accomplish its legislative purpose and to enable continuance of the company seeking CCAA protection.

Lehndorff at 33, Applicants' Book of Authorities, Tab 2.

54. The Applicants require the protection of the CCAA to allow them to close the Soul Sale Transaction and continue with the Second Sale Process in order to secure a

going concern solution for the business, including approximately 6,500 employees and numerous suppliers, landlords, and to maximize recovery for the Prizm Entities' stakeholders.

55. The Applicants respectfully submit that circumstances exist that make an order granting them protection under the CCAA appropriate.

B. THIS COURT SHOULD EXTEND CCAA PROTECTION TO PRIZM LP

56. The CCAA definition of an eligible company does not expressly include partnerships. However, the CCAA Courts often exercised their inherent jurisdiction to stay proceedings with respect to partnerships and limited partnerships where it is just and convenient to do so. The Courts have held that this relief is appropriate where the operations of the debtor companies are so intertwined with those of the partnerships or limited partnerships in question that not extending the stay would significantly impair the effectiveness of a stay in respect of the debtor companies.

See e.g., Lehdorff, Applicants' Book of Authorities, Tab 2; Re Calpine Canada Energy Ltd. (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.), Applicants' Book of Authorities, Tab 4.

Re Canwest Global Communications Corp. 2009 CarswellOnt 6184 (S.C.J.) [Canwest Global], at para. 29, Applicants' Book of Authorities, Tab 5.

57. Prizm LP is the entity that owns the vast majority of the operating assets and carries on the business of the Prizm Entities. Prizm LP is the franchisee and operator of the KFC, Taco Bell and Pizza Hut quick service restaurants. It is also the party to the majority of the Prizm Entities' critical contracts and leases. Prizm

Fund (as an indirect owner of 60% of Priszm LP) and the other Applicants have no source of income independent from Priszm LP and are entirely dependent for their results on the operations, assets and performance of Priszm LP.

Papernick Affidavit at paras. 6, 10, 14, 19 and 22, Application Record, Tab 2.

58. As a guarantor of the Prudential Loan, Priszm LP is in default of its obligations thereunder and therefore unable to meet its obligations as they become due.

59. Failure to extend the stay of proceedings to Priszm LP would have a significantly detrimental impact on the value of the Applicants and Priszm LP. Furthermore, exposing the assets of Priszm LP to demands of creditors would make it impossible for the Applicants to successfully restructure their business.

60. It is respectfully submitted that this Court should extend the CCAA protection to Priszm LP.

C. CERTAIN OF THE PRISZM ENTITIES' SUPPLIERS SHOULD BE DESIGNATED AS CRITICAL SUPPLIERS & THE CRITICAL SUPPLIERS' CHARGE SHOULD BE GRANTED

61. The Priszm Entities are seeking an Order: (a) declaring certain of their suppliers to be critical suppliers within the meaning of the CCAA; (b) requiring such suppliers to continue to supply on terms and conditions consistent with existing arrangements and past practice as amended by the Initial Order; and (c) granting a

charge over the Property as security for payment for goods and services supplied by such suppliers in the amount of the value of the goods and/or services received by the Prizm Entities after the date of the Initial Order less all amounts paid to the suppliers in respect of such goods and services.

62. Section 11.4 of the CCAA provides the Court jurisdiction to declare a person to be a critical supplier if the Court is satisfied that the person is a supplier of goods and services to the company and that the goods or services that are supplied are critical to the company's continued operation. The Court is also provided with jurisdiction to make an order requiring the person to supply any goods and services to the applicant on any terms and conditions that are consistent with the supply relationship or that the Court considers appropriate and to grant a charge over the applicant's property in favour of the person declared to be a critical supplier in an amount equal to the value of the goods or services supplied under the terms of the order such charge to rank in priority over the claim of any secured creditor of the applicant.

CCAA, s. 11.4.

63. The CCAA does not contain a definition of "critical suppliers" and no decisions considering same have been located. Pursuant to sub-section 11.4(1), the Court must be satisfied that the person sought to be declared a critical supplier "*is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation*".

CCAA, s. 11.4(1).

64. The Prizm Entities' business is virtually entirely reliant on their ability to prepare, cook and sell their products. Given the perishable nature of their products, the Prizm Entities maintain very little inventory and rely on an uninterrupted flow of deliveries and continued availability of various products. In addition, and as described in greater detail above, the Prizm Entities are highly dependent on continued and timely provision of waste disposal and information technology services and various utilities.

Papernick Affidavit at para. 108, Application Record, Tab 2.

65. With the assistance of the proposed monitor, the Prizm Entities have identified a number of suppliers which are critical to the ongoing operation of their business. The Prizm Entities have organized these suppliers into five categories: a) chicken suppliers; b) other food and restaurant consumables; c) utility service providers; d) suppliers of waste disposal services; and e) providers of appliance repair and information technology services. A complete listing of the suppliers considered critical by the Prizm Entities (the "**Critical Suppliers**") is attached as Schedule "A" to the proposed Initial Order.

Papernick Affidavit at para. 109, Application Record, Tab 2.

66. Any interruption of supply by the Critical Suppliers could have an immediate material adverse impact on the Prizm Entities' business, operations and cash flow.

Many of the Critical Suppliers supply their goods and services pursuant to purchase orders without the benefit of a long term supply contract. Without an order dealing with the Critical Suppliers as “critical suppliers” pursuant to the CCAA, the Prizm Entities will be vulnerable to interruption of supply and demands for payment of security deposits and potentially payments of pre-filing amounts. Making such payments could have a serious negative effect on the Prizm Entities’ cash flow.

67. If the Court grants the requested order declaring the Critical Suppliers as “critical suppliers” pursuant to the CCAA, the CCAA requires the Court to grant the Critical Suppliers a charge on the Property in an amount equal to the value of the goods and/or services supplied under the terms of the order. The Prizm Entities propose that the Critical Suppliers’ Charge rank behind the Administration Charge and the security interest of any person who is a “secured creditor”, as defined in the CCAA, as of the date of this Order and has not received notice of the application for CCAA protection.

D. JURISDICTION AND DISCRETION TO APPROVE A DIP FACILITY AND DIP LENDERS’ CHARGE ON A PRIORITY BASIS

68. The Prizm Entities are seeking approval of the DIP Facility in the amount of up to \$3 million to be secured by the DIP Lenders’ Charge over the Property ranking ahead of all other charges except the Administration Charge, and the Critical Suppliers’ Charge and the security interest of any person who is a “secured creditor”,

as defined in the CCAA, as of the date of this Order and has not received notice of the application for CCAA protection.

Papernick Affidavit at paras. 111-113, Application Record, Tab 2.

69. Section 11.2 of the CCAA provides express jurisdiction to this Court to grant a DIP financing charge and provides, in part, as follows:

11.2(1) Interim Financing – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

11.2(2) Priority – Secured Creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, s. 11.2.

70. Sub-section 11.2(4) sets out the factors to be considered by the Court in deciding whether to grant a DIP financing charge:

11.2(4) Factors to be considered – In deciding whether to make an order, the court is to consider, among other things:

(a) the period during which the company is expected to be subject to proceedings under the CCAA;

(b) how the company's business and financial affairs are to be managed during the proceedings;

(c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) *the nature and value of the company's property;*

(f) *whether any creditor would be materially prejudiced as a result of the security or charge; and*

(g) *the monitor's report.*

CCAA, s. 11.2(4).

71. In *Canwest Global*, Justice Pepall stressed the importance of meeting the criteria set out in s. 11.2(1), namely:

- (a) whether notice has been given to secured creditors likely to be affected by the security or charge;
- (b) whether the amount to be granted under the DIP facility is appropriate and required having regard to the debtors' cash-flow statement; and
- (c) whether the DIP charge secures an obligation that existed before the Order was made (which it should not).

Canwest Global at paras. 32-34, Applicants' Book of Authorities, Tab 5.

72. In the present matter, the following factors support the granting of the DIP Lenders' Charge:

- (a) the Prizm Entities expect to continue daily operations during the proceedings;

- (b) management of the Prizm Entities throughout the CCAA process will be overseen by the Monitor who will oversee spending under the DIP financing;
- (c) while it is not anticipated that the Prizm Entities will require any additional financing prior to June 31, 2011, actual funding requirements are highly sensitive to timing variances, variances in forecast sales (which can be quite volatile), and other assumptions underlying the projected cashflow requirements;
- (d) the ability to borrow funds from a Court-approved DIP Facility (secured by the DIP Lender's Charge) will be crucial to retain the confidence of the Prizm Entities' creditors, employees and suppliers and will enhance the prospects of a going concern outcome;
- (e) secured creditors have either been given notice of the DIP Lenders' Charge or are not affected by it;
- (f) the DIP Lenders' Charge does not secure an obligation that existed before the granting of the Initial Order; and
- (g) the proposed monitor is supportive of the DIP Facility and the DIP Lenders' Charge.

Papernick Affidavit at paras. 111 and 113, Application Record, Tab 2.

73. Accordingly, the Prizm Entities respectfully submit that this Court should approve the DIP Facility and grant the DIP Lenders' Charge.

E. CRO SHOULD BE APPOINTED

74. The trustees and directors of the Prizm Entities have stated that it is their intention to resign their positions either prior to or immediately after the granting of an Initial Order. Accordingly, and in order to ensure ongoing corporate governance, the Prizm Entities are seeking an Order appointing 2279549 Ontario Inc. as the CRO.

Papernick Affidavit at paras. 118, Application Record, Tab 2.

75. The appointment of a chief restructuring officer for an entity under CCAA protection is within the inherent jurisdiction of this Court. In *Re ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.*, Justice Koch stated that the purpose of the CCAA is to facilitate the restructuring of troubled companies. His Honour found that to achieve this purpose, it is sometimes necessary to appoint an officer to oversee such a restructuring and that those professionals should be entitled to protection from liability in the execution of their duties.

Re ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 33 C.B.R. (5th) 39 (Sask. Q.B.), at para. 19, aff'd 2007 SKCA 72, Applicants' Book of Authorities, Tab 6. See also *Re Ivaco Inc.* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J.), Applicants' Book of Authorities, Tab 7.

76. The Courts have also held that chief restructuring officers are entitled to protections from liability similar to those of the Court-appointed monitors. In *Re*

Collins & Aikman Automotive Canada Inc., a chief restructuring officer was appointed and afforded protections substantially similar to those afforded to the Court-appointed monitor, including the benefit of a stay of proceedings against it and a declaration that he would not incur any liability or obligation as a result of the execution of his duties. Justice Spence held that the Court had jurisdiction to make the appointment of the chief restructuring officer and to grant it protections from liability and noted that without the limitations on liability it would be difficult to find someone willing to take on that role.

Re Collins & Aikman Automotive Canada Inc. (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.) at paras. 134-138, Applicants' Book of Authorities, Tab 8.

77. Accordingly, the Prizm Entities respectfully request that 2279549 Ontario Inc. be appointed as CRO and be afforded the protections outlined in the draft Initial Order.

F. THE ADMINISTRATION CHARGE SHOULD BE GRANTED

78. The Applicants are seeking an Administration Charge over the Property in the amount of \$1.5 million to secure the fees of the Proposed Monitor, its counsel, counsel to the Prizm Entities' and the CRO. This charge is to rank in priority to all other security interests in the Prizm Entities' assets, other than any "secured creditor", as defined in the CCAA, as of the date of this Order, who has not received notice of the application for CCAA protection.

Papernick Affidavit at para. 124, Application Record, Tab 2.

79. Section 11.52 of the CCAA provides statutory jurisdiction to grant such a charge and states as follows:

11.52(1) Court may order security or charge to cover certain costs – On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge – in an amount that the court considers appropriate – in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

11.52(2) Priority – This court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, s. 11.52.

80. In *Re Canwest Publishing Inc.*, Justice Pepall stated that, in addition to the considerations provided for in section 11.52 of the CCAA, the following factors should also be considered:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is an unwarranted duplication of roles;

- (d) whether the quantum of the proposed charge appears to be fair and reasonable;
- (e) the position of the secured creditors likely to be affected by the charge; and
- (f) the position of the monitor.

Re Canwest Publishing Inc. 2010 ONSC 222 (CanLII) [*Canwest Publishing*] at para. 54, Commercial List Authorities Book.

81. Justice Pepall also noted that estimating quantum of an administration charge is dependent on the facts. In *Canwest Publishing*, Justice Pepall examined the surrounding circumstances and accepted a charge in the total amount of \$3 million as being appropriate.

Canwest Publishing at para. 52, Commercial List Authorities Book.

82. In the present matter, the following factors support the granting of the Administration Charge as requested:

- (a) the Prizm Entities operate an extensive business with 428 retail locations and approximately 6,500 employees spread over seven provinces;
- (b) the beneficiaries of the Administration Charge will provide essential legal and financial advice and leadership throughout the Prizm Entities' CCAA proceedings;

- (c) there is no anticipated unwarranted duplication of roles;
- (d) secured creditors likely to be affected by the charge were provided with notice of the Prizm Entities' application and do not object to the Administration Charge; and
- (e) the proposed monitor, in its pre-filing report, supports the Administration Charge.

Pre-filing report of the Monitor [Monitor's Pre-filing Report] at para. 47.

83. The Prizm Entities respectfully submit that this is an appropriate case in which to grant the Administration Charge. Each of the proposed beneficiaries will play a critical role in the Prizm Entities' restructuring and it is unlikely that the above-noted advisors will participate in the CCAA proceedings unless the Administration Charge is granted to secure their fees and disbursements.

G. DIRECTORS' CHARGE SHOULD BE GRANTED

84. The Prizm Entities seek a Directors' Charge in the amount of \$9.8 million on the Property to protect directors and officers and the CRO from certain potential liabilities.

85. The trustees and directors of the Prizm Entities have stated that it is their intention to resign their positions either prior to or immediately after the granting of

an Initial Order. Accordingly, and in order to ensure ongoing corporate governance, the Prizm Entities are seeking an Order appointing the CRO.

Papernick Affidavit at para. 118, Application Record, Tab 2.

86. The Prizm Entities will also require the continued participation of their officers and other executives who manage the business, commercial activities and internal affairs of the Prizm Entities. These individuals are essential to the ongoing stability of the Prizm Entities' business while these proceedings are underway.

Papernick Affidavit at paras. 119, Application Record, Tab 2.

87. The CCAA has codified the granting of directors' and officers' charges on a priority basis in section 11.51 which provides as follows:

11.51(1) Security or charge relating to director's indemnification – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) Priority – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51(3) Restriction – indemnification insurance – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) Negligence, misconduct or fault – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in

Quebec, the director's or officer's gross or intentional fault.

CCAA, s. 11.51.

88. In *Canwest Global*, Justice Pepall applied s. 11.51 at the debtor company's request for a directors' and officers' charge, noting that the Court must be satisfied that the amount of the charge is appropriate in light of obligations and liabilities that may be incurred after the commencement of proceedings. In approving the request, Justice Pepall stated:

The purpose of such a charge is to keep the directors and officers in place during the restructuring by providing them with protections against liabilities they could incur during the restructuring: Re General Publishing Co. [(2003), 39 C.B.R. (4th) 216]. Retaining the current directors and officers of the applicants would avoid destabilization and would assist in the restructuring. The proposed charge would enable the applicants to keep the experienced board of directors supported by experienced senior management. The proposed Monitor believes that the charge is required and reasonable in the circumstances and also observes that it will not cover all of the directors' and officers' liabilities in the worst case scenario. In all of these circumstances, I approve the request.

Canwest Global at para. 48, Applicants' Book of Authorities, Tab 5.

89. The Prizm Entities maintain directors' and officers' liability insurance ("**D&O Insurance**") for its directors and officers. The current D&O Insurance policy provides a total of \$31 million in coverage (\$10 million in coverage; plus \$10 million and \$5 million in excess coverage; plus \$5 million in Side A DIC and \$1 million in Side A DIC).

Papernick Affidavit at para. 121, Application Record, Tab 2.

90. It is expected that the D&O Insurance will provide coverage sufficient to protect the directors and officers from all of the above costs and expenses, and the draft Initial Order provides that the Directors' Charge shall only apply to the extent that the D&O Insurance is not adequate. In addition, there are also contractual indemnities which have been given to the directors by Prizm GP. Prizm GP does not have sufficient funds to satisfy those indemnities should its directors and officers be found responsible for the full amount of the potential directors' liabilities. In addition, the deductible for certain claims is \$100,000 and the presence of a large number of exclusions creates a degree of uncertainty.

Papernick Affidavit at para. 123, Application Record, Tab 2.

91. The Prizm Entities submit that the requested Directors' Charge is reasonable in amount given the complexity of the Prizm Entities' business, its substantial workforce and the corresponding potential exposure of the directors and officers to personal liability. The Directors' Charge will also provide assurances to the employees of the Prizm Entities that obligations for accrued wages and termination and severance pay will be satisfied.

92. In its pre-filing report, the proposed monitor has advised that it is supportive of the Directors' Charge, including the amount thereof. All secured creditors likely to be affected by the Directors' Charge have been given notice of this application.

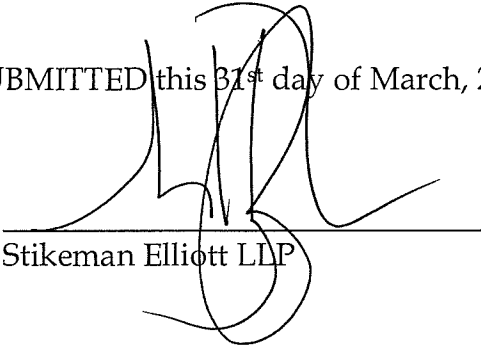
Monitor's Pre-filing Report at paras. 42 and 43.

93. For these reasons, it is submitted that this Honourable Court should grant the Directors' Charge.

PART IV - ORDER REQUESTED

94. The Prizm Entities therefore request an Order substantially in the form of the draft Initial Order attached as Schedule "A" to the Notice of Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of March, 2011.



Stikeman Elliott LLP

Lawyers for Prizm Entities

TAB A

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. S.C.J.)
2. *Re Lehndorff General Partner Ltd.* (1993), 17 C.B.R. (3rd) 24 (Ont. Gen. Div.)
3. *Re Nortel Networks Corp.*, [2009] O.J. No. 1044 (S.C.J.)
4. *Re Calpine Canada Energy Ltd.* (2006), 19 C.B.R. (5th) 187 (Alta. Q.B.)
5. *Re Canwest Global Communications Corp.* 2009 CarswellOnt 6184 (S.C.J.)
6. *Re Canwest Publishing Inc.* 2010 ONSC 222 (CanLII)
7. *Re ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* (2007), 33 C.B.R. (5th) 39 (Sask. Q.B.)
8. *Re Ivaco Inc.* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J.)
9. *Re Collins & Aikman Automotive Canada Inc.* (2007), 37 C.B.R. (5th) 282 (Ont. S.C.J.)

TAB B

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Definitions

2. In this Act,

...

"**insolvent person**" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

- (a) who is for any reason unable to meet his obligations as they generally become due,
- (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Definitions

2. In this Act,

...

"**debtor company**" means any company that

- (a) is bankrupt or insolvent,
- (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
- (c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

(d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent;

“**company**” means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies;

“**income trust**” means a trust that has assets in Canada if

- (a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or
- (b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

11.02 Stays, etc. – initial application

(1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act;
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Stays, etc. – other than initial application

(2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

- (a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);
- (b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

Burden of proof on application

(3) The court shall not make the order unless

(a) the applicant satisfies the court that circumstances exist that make the order appropriate; and

(b) in the case of an order under subsection (2), the applicant also satisfies the court that the applicant has acted, and is acting, in good faith and with due diligence.

Restriction

(4) Orders doing anything referred to in subsection (1) or (2) may only be made under this section.

11.2 Interim financing

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge – in an amount that the court considers appropriate – in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.

Priority – secured creditors

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Priority – other orders

(3) The court may order that the security or charge rank in priority over any security or charge arising from a previous order made under subsection (1) only with the consent of the person in whose favour the previous order was made.

Factors to be considered

(4) In deciding whether to make an order, the court is to consider, among other things,

- (a) the period during which the company is expected to be subject to proceedings under this Act;
- (b) how the company's business and financial affairs are to be managed during the proceedings;
- (c) whether the company's management has the confidence of its major creditors;
- (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- (e) the nature and value of the company's property;
- (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
- (g) the monitor's report referred to in paragraph 23(1)(b), if any.

11.4 Critical supplier

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

(4) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51 Security or charge relating to director's indemnification

(1) On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge — in an amount that the court considers appropriate — in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Restriction — indemnification insurance

(3) The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

Negligence, misconduct or fault

(4) The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

11.52 Court may order security or charge to cover certain costs

(1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge — in an amount that the court considers appropriate — in respect of the fees and expenses of

(a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;

(b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and

(c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

Companies' Creditors Arrangement Regulations SOR/2009-219

Stock exchange

2. A stock exchange that is regulated by an Act of Parliament or of the legislature of a province is prescribed for the purposes of the definition "income trust" in subsection 2(1) of the Act.

Securities Act, R.S.O. 1990, c. S.5

Exchanges

21. (1) No person or company shall carry on business as an exchange in Ontario unless recognized by the Commission under this section.

Exception, commodity futures exchange

(1.1) Subsection (1) does not apply to a person or company with respect to carrying on business as a commodity futures exchange if the person or company is registered to do so under the Commodity Futures Act.

Recognition

(2) The Commission may, on the application of a person or company proposing to carry on business as an exchange in Ontario, recognize the person or company if the Commission is satisfied that to do so would be in the public interest.

Same

(3) A recognition under this section shall be made in writing and shall be subject to such terms and conditions as the Commission may impose.

Standards and conduct

(4) A recognized exchange shall regulate the operations and the standards of practice and business conduct of its members and their representatives in accordance with its by-laws, rules, regulations, policies, procedures, interpretations and practices.

Commission's powers

(5) The Commission may, if it considers it in the public interest, make any decision with respect to,

- (a) the manner in which a recognized exchange carries on business;
- (b) the trading of securities or derivatives on or through the facilities of a recognized exchange;
- (c) any security or derivative listed or posted for trading on a recognized exchange;
- (d) issuers, whose securities are listed or posted for trading on a recognized exchange, to ensure that they comply with Ontario securities law; or
- (e) any by-law, rule, regulation, policy, procedure, interpretation or practice of a recognized exchange.

**IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C.
1985, c. C-36, AS AMENDED**

Court File No: CV-11-9159-00CL

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
OF PRISZM INCOME FUND, PRISZM CANADIAN OPERATING TRUST, PRISZM
INC. AND KIT FINANCE INC.**

**ONTARIO
SUPERIOR COURT OF JUSTICE -
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANT
(Returnable March 31, 2011)**

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