

**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  
(Motion Returnable September 14, 2011 Re: Approval of the FMI  
Transactions and the 184 APA)**

Dated: September 13, 2011

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TO: **ATTACHED SERVICE LIST**

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**PART I - INTRODUCTION**

1. On March 31, 2011, Prizm Income Fund ("**Prizm Fund**"), Prizm Canadian Operating Trust ("**Prizm Trust**"), Prizm Inc. ("**Prizm GP**"), and KIT Finance Inc. ("**KIT Finance**") were granted protection from their creditors pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") by order of the Honourable Mr. Justice Morawetz, as amended and restated by order of the Honourable Madam Justice Mesbur on April 29, 2011 (the "**Initial Order**"). The stay of proceedings and other benefits of the Initial Order were extended to Prizm LP. Prizm Fund, Prizm Trust, Prizm GP, Prizm LP and Kit Finance will be referred to collectively herein as the "**Prizm Entities**".

2. The Prizm Entities seek orders for, *inter alia*, the following relief:

- (a) abridging the time for service of the Notice of Motion and Motion Record in respect of this motion and dispensing with further service thereof;
- (b) approving the Primary FMI Agreement (as defined below) between Prizm LP (the “**Vendor**”), Prizm GP, FMI Atlantic Inc. (the “**Purchaser**”) and FMI Ontario Inc. for the sale of 38 operating restaurants in New Brunswick and Nova Scotia;
- (c) approving the Occupation Agreement (as defined below);
- (d) authorizing the Prizm Entities and FTI Consulting Canada Inc., in its capacity as court-appointed monitor of the Prizm Entities (the “**Monitor**”), to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transaction (the “**Primary FMI Transaction**”) contemplated by the Primary FMI Agreement; and
- (e) vesting all of the Purchased Assets (as defined in the Affidavit of Jim Robertson sworn September 8, 2011 (the “**Robertson Affidavit**”) as contemplated by the Primary FMI Agreement in the Purchaser free and clear of any claims or encumbrances other than Permitted Encumbrances (as defined in the Primary FMI Agreement);
- (f) approving the Second FMI Agreement (as defined below) between the Vendor, Prizm GP, the Purchaser and FMI Ontario Inc. for the sale of five operating restaurants in New Brunswick and Nova Scotia;

- (g) authorizing the Monitor to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transaction (together with the Primary FMI Transaction, the “**FMI Transactions**”) contemplated by the Second FMI Agreement (together with the Primary FMI Agreement, the “**FMI Agreements**”); and
- (h) vesting all of the Second FMI Purchased Assets (as defined in the Robertson Affidavit) as contemplated by the Second FMI Agreement in the Purchaser free and clear of any claims or encumbrances other than Permitted Encumbrances (as defined in the Second FMI Agreement);
- (i) approving the 184 APA (as defined below) between the Vendor, Prizm GP and 1844440 Ontario Inc. (the “**184 Purchaser**”) for the sale of the 184 Purchased Assets (as defined below);
- (j) authorizing the Prizm Entities and the Monitor to take such additional steps and execute such additional documents as may be necessary or desirable for the completion of the transactions (the “**184 Transaction**”) contemplated by the 184 APA; and
- (k) vesting all of the 184 Purchased Assets in the 184 Purchaser free and clear of any claims or encumbrances.

## PART II - THE FACTS

3. The facts with respect to this Motion are more fully set out in the Robertson Affidavit.

Robertson Affidavit, Motion Record of the Applicants (the "Motion Record"), Tab 2.

4. All capitalized terms used but not defined herein shall have the meaning ascribed to them in the Robertson Affidavit.

5. Prizm LP is a franchisee of the Franchisor and was at one time Canada's largest independent quick service restaurant operator, operating approximately 425 KFC, Taco Bell and Pizza Hut restaurants across Canada.

Robertson Affidavit, Motion Record, Tab 2 at paras. 3 & 6.

6. As a result of same store sales declines and correspondingly poor financial performance in 2009 and 2010, Prizm Fund breached a covenant under its senior secured indebtedness with Prudential Investment Management, Inc. and certain affiliates (collectively, "**Prudential**") and remains in non-compliance today.

Robertson Affidavit, Motion Record, Tab 2 at paras. 6 & 7.

7. Prizm Fund also failed to make an interest payment of \$0.975 million due on December 31, 2010 with respect to its subordinated debentures due June 30, 2012 and remains in default of its interest payment obligation.

Robertson Affidavit, Motion Record, Tab 2 at para. 8.

8. The Priszm Entities also ceased paying certain obligations to the Franchisor as they became due, including continuing fees payments pursuant to the Franchise Agreement starting in December 2010.

Robertson Affidavit, Motion Record, Tab 2 at para. 9.

9. The Priszm Entities were ultimately granted protection from their creditors under the CCAA, pursuant to the Initial Order.

Robertson Affidavit, Motion Record, Tab 2 at para. 4.

10. As more fully described in the affidavit of Deborah Papernick sworn May 24, 2011 in support of the Soul Agreement, The Vendor and Priszm GP entered into an agreement with Soul Restaurants Canada Inc. (the "**Soul Agreement**") for the sale of 204 operating restaurants in Ontario, British Columbia and Quebec. The Soul Agreement was approved by this court by Order dated May 30, 2011 and the transaction contemplated by the Soul Agreement closed on June 1, 2011.

Robertson Affidavit, Motion Record, Tab 2 at paras. 12-13.

11. Following the closing of the transaction contemplated by the Soul Agreement, the Priszm Entities had 192 remaining operating restaurant outlets (the "**Remaining Restaurants**").

Robertson Affidavit, Motion Record, Tab 2 at para. 15.

*I - The FMI Agreements*

12. By Order dated May 30, 2011, this Court approved, *nunc pro tunc*, an agreement initially entered into on February 1, 2011 between The Vendor, Prizm GP, Kit Finance Inc. and Prudential (the "**Sales Process Agreement**") and the subsequent retainer of Canaccord Genuity as financial advisor and sales agent in connection with the Sales Process Agreement. The Sales Process Agreement contemplates the sale of the restaurant outlets not forming part of the Soul Agreement.

Robertson Affidavit, Motion Record, Tab 2 at paras. 17-18.

13. Following the sales process and negotiations more fully described at paragraphs 19 to 24 of the Robertson Affidavit, on July 29, 2011, the Vendor and the Purchaser entered into an asset purchase agreement with respect to the sale of 38 operating restaurants in Nova Scotia and New Brunswick (the "**Primary FMI Agreement**"). The terms of the Primary FMI Agreement are set out at paragraphs 27-61 of the Robertson Affidavit.

Robertson Affidavit, Motion Record, Tab 2 at paras 19-24 & 27-61.

14. On August 23, 2011, the Vendor and the Purchaser entered into a subsequent asset purchase agreement with respect to the sale of an additional five operating restaurants in Nova Scotia and New Brunswick (the "**Second FMI Agreement**"), described more fully in paragraphs 25-26 of the Robertson Affidavit. The terms of the Second FMI Agreement are set out at paragraphs 62-83 of the Robertson Affidavit.

Robertson Affidavit, Motion Record, Tab 2 at paras 25-26 & 62-83.

*Occupation Agreement*

15. One of the terms of the Primary FMI Agreement is that where, at the time of the Closing, the Purchaser has not been able to obtain a Landlord Consent to the assignment of the applicable Lease to the Purchaser or an order assigning the Lease for any of the outlets at the time of the Closing, the Vendor will be obligated to, among other things, hold the Outstanding Lease in trust for the Purchaser for up to three months.

Robertson Affidavit, Motion Record, Tab 2 at paras. 37-42, 48 & 55.

16. Accordingly, the Prizm Entities are also seeking the Court's approval of an agreement (the "**Occupation Agreement**") pursuant to which the Vendor will grant to the Purchaser a license to occupy each of the outlets for which a Landlord Consent or an order has not been obtained for a period commencing, in respect of each of the outlets, on the Closing Date and ending, in respect of each of the outlets, on the earlier of: (a) three months after the Closing Date; (b) the time the relevant landlord's consent to the assignment of the applicable lease is obtained or the assignment has been ordered by the Court and such lease has been assigned to the Purchaser; (c) the time the applicable lease is lawfully terminated or expires; and (d) the time the license is terminated in respect of any given lease in accordance with Section 10 of the Occupation Agreement. The Occupation Agreement is described in greater detail at paragraphs 55-61 of the Robertson Affidavit.



Robertson Affidavit, Motion Record, Tab 2 at paras. 55-61.

## *II - The 184 APA*

17. Following the closing of the Soul Agreement and unsuccessful attempts to find a purchaser for the remaining Ontario outlets, the Prizm Entities delivered notices of disclaimer in respect of 28 restaurant outlets which were not included in that sale. Following disclaimer of these leases, the Prizm Entities had only one remaining outlet operating in Ontario located at 2032 Kipling Avenue, Toronto, Ontario (the “**Kipling Outlet**”).

Robertson Affidavit, Motion Record, Tab 2 at para. 93.

18. In or about May, 2011, the 184 Purchaser, an existing franchisee of the Franchisor, approached the Prizm Entities with respect to the purchase and sale of all of the assets related to the Kipling Outlet (the “**184 Purchased Assets**”), save and except the lease related thereto. On September 7, 2011, the Vendor and the 184 Purchaser entered into an Asset Purchase Agreement for the 184 Purchased Assets (the “**184 APA**”). A new lease will be negotiated between the 184 Purchaser and the landlord, Scott’s Real Estate Limited Partnership, as the 184 Purchaser intends to continue operations at the Kipling Outlet after closing. The 184 Transaction is described in greater detail at paragraphs 93-104 of the Robertson Affidavit.

Robertson Affidavit, Motion Record, Tab 2 at paras. 93-104.

### PART III - ISSUES AND THE LAW

19. The issues on this motion are:

- a) Should the Court grant the Orders approving the Primary FMI Agreement, the Second FMI Agreement and the Occupation Agreement and vesting the Purchased Assets and the Second FMI Purchased Assets in the Purchaser (the "FMI Sale Approval Orders")?
- b) Should the Court grant the Order approving the 184 APA and vesting the 184 Purchased Assets in the 184 Purchaser (the "184 Sale Approval Order")?

#### *Disposition of Assets by a Debtor in CCAA Proceedings*

20. The remedial nature of the CCAA confers on this Court broad powers to carry out the purpose of the CCAA, which is to facilitate the restructuring of insolvent companies.

*Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.)  
[*Nortel 2009*], Applicants' Book of Authorities, Tab 1 at paras. 30-32.

CCAA, s. 11

21. In *Nortel 2009*, Justice Morawetz reviewed the jurisdiction of the Court to approve a sales process in the absence of a plan under the CCAA. In finding that CCAA Courts have such jurisdiction, Justice Morawetz focused on the continuation of the business as a going concern, holding that:

... the CCAA should be given a broad and liberal interpretation to facilitate its underlying purpose... it should not matter whether the business continues as a going concern under the debtor's stewardship or under new ownership, for as long as the business continues as a going concern, a primary goal of the CCAA will be met. [emphasis added]

*Nortel 2009*, Applicants' Book of Authorities, Tab 1 at paras. 34, 40 & 47.

22. Justice Morawetz also noted that courts have repeatedly approved the sale of assets of insolvent companies despite the fact that a plan of arrangement has not been proposed, including in *Re Consumers Packaging Inc.*, where the Ontario Court of Appeal held that:

[the approval of an asset sale] is consistent with previous decisions in Ontario and elsewhere that have emphasized the broad remedial purpose of flexibility of the CCAA and have approved the sale and disposition of assets during CCAA proceedings prior to a formal plan being tendered.

*Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197 (Ont. C.A.), Applicants' Book of Authorities, Tab 2 at para 9.

23. The Court's power to approve a sale of assets prior to the formulation of a plan of compromise or arrangement is now codified in section 36 of the CCAA, which sets out the following list of non-exhaustive factors for the Court to consider in determining whether to approve a debtor's sale of assets outside the ordinary course of business:

- (a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;
- (b) whether the monitor approved the process leading to the proposed sale or disposition;
- (c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
- (d) the extent to which the creditors were consulted;

- (e) the effects of the proposed sale or disposition on the creditors and other interested parties; and
- (f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

CCAA, s. 36(3)

24. Section 36 of the CCAA has been considered in *Re Canwest Publishing Inc.* where Justice Pepall approved the proposed sale and held, among other things, that:

- (a) the monitor's support of the transaction spoke to the reasonableness of the process;
- (b) the creditors were sufficiently consulted as they had input or were otherwise involved at various stages in the process; and
- (c) the sale would result in a going concern outcome and earn significant recovery for secured and unsecured creditors and therefore the sale had a positive effect.

*Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J.) [*Canwest Publishing*], Applicants' Book of Authorities, Tab 3 at para. 13.

25. In making her decision, Justice Pepall also noted that the criteria set out in section 36(3) of the CCAA "largely overlap" with the criteria established in *Royal Bank v. Soundair Corp.*, which had been used by Courts to review the reasonableness of proposed sales in CCAA proceedings prior to the enactment of section 36 and which provide that the Courts should consider:

- 1) whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;

- 2) the interests of all parties;
- 3) the efficacy and integrity of the process by which offers have been obtained; and
- 4) whether there has been unfairness in the working out of the process.

CCAA, s. 36(3)

*Canwest Publishing*, Applicants' Book of Authorities, Tab 3 at para. 13.

*Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.) [*Soundair*], Commercial List Authorities Book at para. 24.

26. Section 36 was also considered in *Re White Birch Paper Holding Co.* where Justice Mongeon held that, although the sale under consideration provided insignificant recovery for unsecured creditors, the monitor's support indicated that this was the best opportunity for the creditors as a whole and that it would not be in the best interest of any of the parties for him to decline the order.

*Re White Birch Paper Holding Co.* 2010 QCCS 4915, Applicants' Book of Authorities, Tab 4 at paras. 48, 49, 51-52 & 57.

### ***The Prizm Entities Satisfy the Criteria for Approval of the FMI Transactions***

27. The FMI Transactions meet the criteria for approval of disposition of assets in CCAA proceedings for, *inter alia*, the following reasons:

- (a) the sales process that culminated in the FMI Agreements was:
  - (i) designed in consultation with the Prizm Entities' major stakeholders and the Monitor;
  - (ii) approved by the Court; and

- (iii) conducted in a competitive manner, including the use of a teaser, the NDA, and the CIM;
- (b) the Prizm Entities employed Canaccord Genuity, an independent financial advisor and sales agent, to assist in identifying potential buyers and implementing the sales process;
- (c) the Prizm Entities worked with the Franchisor to identify additional potential purchasers;
- (d) there was public disclosure prior to and at the time of the sales process which culminated in the FMI Agreements that the Prizm Entities were exploring the sale of some of their assets;
- (e) the Purchaser submitted the only offer for the outlets in Nova Scotia and New Brunswick;
- (f) the CRO is of the view that the purchase prices contemplated to be paid pursuant to the FMI Agreements represent the highest prices realizable through the sales process or in liquidation and the FMI Agreements represent the best possible transactions in the circumstances for the benefit of the Prizm Entities and their stakeholders; and
- (g) the Monitor: (i) is of the view that the Sales Process was carried out in a manner that was fair, transparent and reasonable in the circumstances and

that the purchase prices contemplated to be paid pursuant to the FMI Agreements are reasonable, and (ii) supports approval of the FMI Transactions.

Robertson Affidavit, Motion Record, Tab 2, at paras. 18-22, 86 & 87.

Fourth Report of the Monitor, dated September 9, 2011 (“**Monitor’s Fourth Report**”), paras. 47-50.

28. The FMI Agreements provide for a going concern outcome for a total of 43 restaurants in Nova Scotia and New Brunswick. They also provide continued employment for approximately 600 of the Prizm Entities’ remaining employees and preserve an ongoing customer for many of the Prizm Entities’ suppliers and distributors.

Robertson Affidavit, Motion Record, Tab 2, at paras. 85.

29. Accordingly, the Prizm Entities respectfully submit that the criteria set out in section 36(3) of the CCAA are satisfied with respect to the FMI Agreement and that the agreements should therefore be approved.

***Additional Criteria for Approval under Section 36 of the CCAA***

30. In addition to the factors set out in subsection 36(3), subsection 36(7) of the CCAA sets out the following restrictions on disposition of assets within CCAA proceedings:

36 (7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been

required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

CCAA, s. 36(7)

Section 36(7) references paragraphs 6(4)(a) and (5)(a), which appears to be a drafting error. It is submitted that this section should read 6(5)(a) and (6)(a).

31. Justice Pepall considered section 36(7) of the CCAA in *Re Canwest Global Communications Corp.* where (although she held that section 36 was not applicable to the facts of that case) she was satisfied by confirmation by counsel for the debtors of compliance with section 36(7), and asked the monitor to report to the court on the status of those payments should a compromise or arrangement be made in future.

*Re Canwest Global Communications Corp.* [2009] O.J. No. 4788 (S.C.J.), Applicants' Book of Authorities, Tab 5 at para 42.

32. The Prizm Entities have been and intend to continue paying the wages, salaries, commissions or compensation to their employees contemplated by section 6(5)(a) of the CCAA in the regular course.

CCAA, s. 6(5)(a)

*Bankruptcy and Insolvency Act*, R.S.C. 1985, B-3, as amended s. 81.3, s. 81.4 & s. 136(1)(d)

Robertson Affidavit, Motion Record, Tab 2, at para. 89 & 90.

33. All contributions due and owing to the Pension Plan in respect of both employer and employee contributions (as contemplated by subsections 6(6)(a)(i) and (iii)(B) of the CCAA) have been remitted to the Pension Plan fund. The Prizm Entities do not sponsor any other pension plans that are subject to section 6(6)(a)(ii) or 6(6)(a)(iii)(A) of the CCAA.



CCAA, s. 6(6)(a)

Robertson Affidavit, Motion Record, Tab 2, at para. 91.

34. The Prizm Entities intend to continue making the payments required under sections 6(5)(a) and 6(6)(a) of the CCAA in the ordinary course. In addition, Prudential will be applying to the Court to appoint a receiver over the Prizm Entities on a motion returnable at the same time as the Prizm Entities' motion and will be seeking an order providing, among other things, that (a) all wages, salaries, vacation pay and expenses (which shall not include termination and/or severance pay) that are properly due or accruing to any employee or former employee of the Prizm Entities up to the date that the appointment of the receiver becomes effective; and (b) any pension related obligations required to be paid by the Prizm Entities pursuant to s. 36(7) of the CCAA, shall be paid.

35. for the payment of all wages, salaries, vacation pay and expenses properly due and accruing to any employee or former employee of the Prizm Entities, as well as any pension payments required to be made under section 6(6)(a) of the CCAA.

Robertson Affidavit, Motion Record, Tab 2, at para. 92.

36. The additional factors and restrictions under section 36(4) and (5) of the CCAA are not applicable in this case as the Vendor and the Purchaser are not related persons within the meaning of the CCAA.

Robertson Affidavit, Motion Record, Tab 2, at para. 88.

***Third Party Releases***

37. Courts have also held that they have jurisdiction under the CCAA to release claims against third parties as part of approving a plan of arrangement and compromise or as part of approving settlement agreements, even over the objections of some dissenting creditors.

*Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.) [*Metcalfe*], Applicants' Book of Authorities, Tab 6 at paras. 61-63.

*Re Nortel Networks Corp.* (2010), 63 C.B.R. (5th) 44 (Ont. S.C.J.) [*Nortel 2010*], Applicants' Book of Authorities, Tab 7 at paras. 30, 77-82.

38. Courts considering whether to approve releases in favour of third parties have noted that some of the factors to be considered in such circumstances include:

- (a) Whether the parties to be released from claims are necessary and essential to the restructuring of the debtor;
- (b) Whether the claims to be released were rationally connected to the purpose of the restructuring;
- (c) In the context of a plan of arrangement, whether the parties being released were contributing to the plan;
- (d) Whether the release benefitted the debtor as well as the creditors generally; and
- (e) Whether the releases were fair and reasonable and not overly broad.

*Metcalfe*, Applicants' Book of Authorities, Tab 6 at paras 69-71, 113.

*Nortel 2010*, Applicants' Book of Authorities, Tab 7 at paras. 77-82.

39. In the case at bar, the consent of the Franchisor to the assignment of the Franchise Agreement is a condition precedent under the FMI Agreements and the Franchisor requires a release as a condition of its consent. Accordingly, the release is required to complete the FMI Transactions which will benefit the Prizm Entities and its creditors and stakeholders generally. The claims proposed to be released are limited to those arising as a result of the operation of the Purchased Assets and Second FMI Purchased Assets and are, therefore, rationally connected to the proposed sale to the Purchaser and are not overly broad. The Franchisor has agreed to grant a similar release to the Prizm Entities. For these reasons, it is respectfully submitted that the requested release of the Franchisor as outlined in the draft FMI Sale Approval Orders should be granted. The proposed release is similar in scope to the release granted and approved by this Court in connection with the Soul Agreement.

Robertson Affidavit, Motion Record, Tab 2, at paras. 24.

40. For the foregoing reasons, it is respectfully submitted that this Court should approve the FMI Transactions and grant the FMI Sale Approval Orders.

***The Prizm Entities Satisfy the Criteria for Approval of the 184 Transaction***

41. Pursuant to the Order of Justice Morawetz dated June 29, 2011, the Prizm Entities have the right, subject to the prior consent of the Monitor, to dispose of redundant or non-material assets and to sell assets or operations not exceeding \$100,000

in any one transaction or \$1,000,000, in the aggregate. At the request of the 184 Purchaser, the Prizm Entities are seeking the 184 Sale Approval Order.

Robertson Affidavit, Motion Record, Tab 2, at para. 100.

42. As discussed above, with the assistance of Canaccord Genuity, the Prizm Entities were unable to find any purchaser for the Remaining Restaurants in Ontario, and ceased their operations in Ontario in all but one location. The Kipling Outlet, therefore was subject to the initial sales process (which culminated in the Soul Agreement) and a subsequent informal sales process for the remaining Ontario outlets, carried out with the assistance of an independent financial advisor and sales agent, for the remaining Ontario outlets. The 184 Purchaser is the only party that submitted an offer to purchase the 184 Purchased Assets.

Robertson Affidavit, Motion Record, Tab 2, at para. 101.

43. In the view of the CRO, the purchase price payable under the 184 APA represents the best possible transaction in the circumstances for the benefit of the Prizm Entities and their stakeholders.

Robertson Affidavit, Motion Record, Tab 2, at para. 102.

44. The Franchisor and Prudential have both consented to the 184 APA and the Monitor supports the 184 Transaction.

Robertson Affidavit, Motion Record, Tab 2, at para. 103.

Monitor's Fourth Report, para. 66.

45. The Vendor and the 184 Purchaser are not related persons within the meaning of the CCAA and therefore the additional factors and restrictions under section 36(4) and (5) of the CCAA are not applicable.

Robertson Affidavit, Motion Record, Tab 2, at para. 104.

46. For the foregoing reasons, it is respectfully submitted that this Court should approve the 184 Transaction and grant the 184 Sale Approval Order.

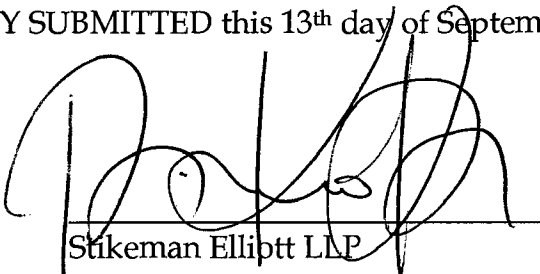
#### **PART IV - ORDER REQUESTED**

47. The Prizm Entities respectfully request Orders, *inter alia*:

(a) approving the FMI Agreements and vesting the Purchased Assets and the Second FMI Purchased Assets in the Purchaser; and

(b) approving the 184 APA and vesting the 184 Purchased Assets in the 184 Purchaser.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of September, 2011.



Stikeman Elliott LLP  
Lawyers for the Applicants

**SCHEDULE "A"**  
**LIST OF AUTHORITIES**

1. *Re Nortel Networks Corp.* (2009), 55 C.B.R. (5th) 229 (Ont. S.C.J.)
2. *Re Consumers Packaging Inc.*, (2001), 27 C.B.R. (4th) 197 (Ont. C.A.)
3. *Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (Ont. S.C.J.)
4. *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (C.A.)
5. *Re White Birch Paper Holding Co.* 2010 QCCS 4915
6. *Re Canwest Global Communications Corp.* [2009] O.J. No. 4788 (S.C.J.)
7. *Re Metcalfe & Mansfield Alternative Investments II Corp.* (2008), 92 O.R. (3d) 513 (C.A.)
8. *Re Nortel Networks Corp.* (2010), 63 C.B.R. (5th) 44 (Ont. S.C.J.)

**SCHEDULE "B"**  
**RELEVANT STATUTES**

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

**Security for unpaid wages, etc. – bankruptcy**

81.3 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a bankrupt for services rendered during the period beginning on the day that is six months before the date of the initial bankruptcy event and ending on the date of the bankruptcy is secured, as of the date of the bankruptcy, to the extent of \$2,000 – less any amount paid for those services by the trustee or by a receiver – by security on the bankrupt's current assets on the date of the bankruptcy.

**Commissions**

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the period referred to in that subsection, are deemed to have been earned in that period.

**Security for disbursements**

(3) The claim of a travelling salesperson who is owed money by a bankrupt for disbursements properly incurred in and about the bankrupt's business during the period referred to in subsection (1) is secured, as of the date of the bankruptcy, to the extent of \$1,000 – less any amount paid for those disbursements by the trustee or by a receiver – by security on the bankrupt's current assets on that date.

**Rank of security**

(4) A security under this section ranks above every other claim, right, charge or security against the bankrupt's current assets – regardless of when that other claim, right, charge or security arose – except rights under sections 81.1 and 81.2 and amounts referred to in subsection 67(3) that have been deemed to be held in trust.

**Liability of trustee**

(5) If the trustee disposes of current assets covered by the security, the trustee is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is

subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the trustee.

### **Claims of officers and directors**

(6) No officer or director of the bankrupt is entitled to have a claim secured under this section.

### **Non-arm's length**

(7) A person who, in respect of a transaction, was not dealing at arm's length with the bankrupt is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the trustee, having regard to the circumstances – including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered – it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

### **Proof by delivery**

(8) A claim referred to in this section is proved by delivering to the trustee a proof of claim in the prescribed form.

### **Definitions**

(9) The following definitions apply in this section.

“compensation”

“compensation” includes vacation pay but does not include termination or severance pay.

“receiver”

“receiver” means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

### **Security for unpaid wages, etc. – receivership**

81.4 (1) The claim of a clerk, servant, travelling salesperson, labourer or worker who is owed wages, salaries, commissions or compensation by a person who is subject to a receivership for services rendered during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$2,000 – less any amount paid for those services by a receiver or trustee – by security on the person's current assets that are in the possession or under the control of the receiver.



## **Commissions**

(2) For the purposes of subsection (1), commissions payable when goods are shipped, delivered or paid for, if shipped, delivered or paid for during the six-month period referred to in that subsection, are deemed to have been earned in those six months.

## **Security for disbursements**

(3) The claim of a travelling salesperson who is owed money by a person who is subject to a receivership for disbursements properly incurred in and about the person's business during the six months before the first day on which there was a receiver in relation to the person is secured, as of that day, to the extent of \$1,000 – less any amount paid for those disbursements by a receiver or trustee – by security on the person's current assets that are in the possession or under the control of the receiver.

## **Rank of security**

(4) A security under this section ranks above every other claim, right, charge or security against the person's current assets – regardless of when that other claim, right, charge or security arose – except rights under sections 81.1 and 81.2.

## **Liability of receiver**

(5) If the receiver takes possession or in any way disposes of current assets covered by the security, the receiver is liable for the claim of the clerk, servant, travelling salesperson, labourer or worker to the extent of the amount realized on the disposition of the current assets and is subrogated in and to all rights of the clerk, servant, travelling salesperson, labourer or worker in respect of the amounts paid to that person by the receiver.

## **Claims of officers and directors**

(6) No officer or director of the person who is subject to a receivership is entitled to have a claim secured under this section.

## **Non-arm's length**

(7) A person who, in respect of a transaction, was not dealing at arm's length with a person who is subject to a receivership is not entitled to have a claim arising from that transaction secured by this section unless, in the opinion of the receiver, having regard to the circumstances – including the remuneration for, the terms and conditions of and the duration, nature and importance of the services rendered – it is reasonable to conclude that they would have entered into a substantially similar transaction if they had been dealing with each other at arm's length.

## **Proof by delivery**

(8) A claim referred to in this section is proved by delivering to the receiver a proof of claim in the prescribed form.

## **Definitions**

(9) The following definitions apply in this section.

“compensation”

“compensation” includes vacation pay but does not include termination or severance pay.

“person who is subject to a receivership”

“person who is subject to a receivership” means a person any of whose property is in the possession or under the control of a receiver.

“receiver”

“receiver” means a receiver within the meaning of subsection 243(2) or an interim receiver appointed under subsection 46(1), 47(1) or 47.1(1).

## **Priority of claims**

136. (1) Subject to the rights of secured creditors, the proceeds realized from the property of a bankrupt shall be applied in priority of payment as follows:

...

(d) the amount of any wages, salaries, commissions, compensation or disbursements referred to in sections 81.3 and 81.4 that was not paid

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

### **Restriction — employees, etc.**

6.(5) The court may sanction a compromise or an arrangement only if

(a) the compromise or arrangement provides for payment to the employees and former employees of the company, immediately after the court's sanction, of

(i) amounts at least equal to the amounts that they would have been qualified to receive under paragraph 136(1)(d) of the *Bankruptcy and Insolvency Act* if the company had become bankrupt on the day on which proceedings commenced under this Act, and

(ii) wages, salaries, commissions or compensation for services rendered after proceedings commence under this Act and before the court sanctions the compromise or arrangement, together with, in the case of travelling salespersons, disbursements properly incurred by them in and about the company's business during the same period

6.(6) If the company participates in a prescribed pension plan for the benefit of its employees, the court may sanction a compromise or an arrangement in respect of the company only if

(a) the compromise or arrangement provides for payment of the following amounts that are unpaid to the fund established for the purpose of the pension plan:

(i) an amount equal to the sum of all amounts that were deducted from the employees' remuneration for payment to the fund,

(ii) if the prescribed pension plan is regulated by an Act of Parliament,

(A) an amount equal to the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that was required to be paid by the employer to the fund, and

(B) an amount equal to the sum of all amounts that were required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, and

(iii) in the case of any other prescribed pension plan,

(A) an amount equal to the amount that would be the normal cost, within the meaning of subsection 2(1) of the *Pension Benefits Standards Regulations, 1985*, that the employer would be required to pay to the fund if the prescribed plan were regulated by an Act of Parliament, and

(B) an amount equal to the sum of all amounts that would have been required to be paid by the employer to the fund under a defined contribution provision, within the meaning of subsection 2(1) of the *Pension Benefits Standards Act, 1985*, if the prescribed plan were regulated by an Act of Parliament;

## **General power of court**

11. Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

## **Restriction on disposition of business assets**

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

## **Notice to creditors**

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

## **Factors to be considered**

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

## **Additional factors – related persons**

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

### **Related persons**

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

### **Assets may be disposed of free and clear**

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

### **Restriction – employers**

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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 APPLICANTS  
(MOTION RETURNABLE SEPTEMBER 14,  
2011 RE: APPROVAL OF THE FMI  
TRANSACTIONS AND THE 184 APA)**

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