

**Governance of Canadian REITs and Other Public Income Trusts**

CCGG is revisiting the governance of Canadian real estate investment trusts (“REITs”) and other public income trusts.

By way of background, in 2007 CCGG pointed out that Canadian public entities structured as trusts (including REITs) do not have uniform provisions in their constating documents (called declarations of trust or “DOTs”) relating to investor rights and, in some instances, have inappropriate provisions, resulting in inconsistencies in the governance provisions of Canadian public income trusts as well as, in some cases, significant gaps in investor protection. CCGG stated that investors should not be required to obtain and read the lengthy and complex DOT of each public trust whose units they are interested in purchasing in order to determine their rights as investors. CCGG’s view was that the rights of investors in public income trusts should be standardized (which has been the case for corporations in Canada for decades) and that those rights should mirror, to the extent legally possible given the differences in legal form, the rights given to shareholders of corporations governed by the *Canada Business Corporations Act* (“CBCA”). Accordingly, in December 2007 CCGG released for comment draft model DOT provisions containing rights for unitholders that CCGG wished to see enshrined in the DOTs of all Canadian REITs and other public income trusts.

CCGG has decided to revisit this project now for several reasons.

First, even though the number of public income trusts listed on the Toronto Stock Exchange (“TSX”) has decreased since 2007, mainly as a result of changes to federal income tax laws in Canada, there still are approximately 57 TSX (plus an additional 11 TSX-V) listed public income trusts of various kinds, the majority of which are REITs. In fact the number of TSX listed REITs has increased since 2007 (for example, since 2012 there have been 20 new REITs listed on the TSX plus an additional 6 new REITs listed on the TSX-V) and many of CCGG’s members are invested in REITs.

Second, in preparation for our engagements with trustees of public income trusts as part of CCGG’s board engagement program, we have read DOTs and seen first-hand that the DOTs of public income trusts are not uniform and that many basic investor rights which are provided to shareholders of corporations governed by the CBCA typically continue to be missing from DOTs of public income trusts.<sup>1</sup> For example, because a REIT or other public income trust is not

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<sup>1</sup> It is not only CCGG which has noticed this discrepancy. For example, in a paper entitled “An Empirical Examination of the Governance Choices of Income Trusts” written by Professors Anita Anand and Edward Iacobucci of the University of Toronto Faculty of Law and published in the Journal of Empirical Legal Studies, Volume 8, Issue 1, 147-176, March 2011, Professors Anand and Iacobucci note as follows: “On some dimensions, DOTs mimic the CBCA, but on other important dimensions, particularly remedial ones, they depart significantly from the CBCA”.

governed by a corporate statute such as the CBCA, there are few rights available to unitholders who are concerned about various types of major transactions. Concerned unitholders generally do not have the right to approve major transactions, for instance, nor do they have the ability to bring a statutory oppression action as they would be able to do if the entity was a corporation rather than a trust. In practice unitholders often are left with a decision whether to challenge a transaction by alleging that trustees have breached their fiduciary duty, which is a very serious allegation to allege and can be difficult to prove. While CCGG has been able to convince a few REITs during our private engagement meetings with trustees to make some changes to their DOTs<sup>2</sup>, many of the changes we have requested still have not been implemented at the REITs with which we have engaged, let alone at the REITs and other public income trusts with which we have not met.

In 2007, the Uniform Law Conference of Canada (“ULCC”) released a draft Uniform Income Trusts Act (“UITA”), which is posted on the ULCC website. The UITA was proposed as a legislative means by which unitholders of public income trusts could obtain rights and remedies similar to shareholders of corporations governed by the CBCA. CCGG had some concerns with the UITA, such as the fact that the opt-in provisions in that draft legislation would take away

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<sup>2</sup> As mentioned later in this memorandum, RioCan Real Estate Investment Trust received unitholder approval at its 2015 annual meeting to make many of the changes to its DOT which CCGG has advocated, thus taking a leadership role with respect to governance among Canada’s REITs.

from the uniformity CCGG wished to see in DOTs, but the fact that the ULCC decided to come forward with the UITA was a step in the right direction. There does not appear to have been any progress made in having an income trust statute adopted anywhere in Canada since the UITA's publication in 2007, however, and thus CCGG has another reason to revisit the governance of Canadian income trusts at this time through our model DOT provisions project.

CCGG appreciates that public income trusts are required by section 7.2 of National Instrument 41-201 of the Canadian Securities Administrators ("CSA") to set out in a prospectus a comparison of "the rights and obligations generally available to corporate shareholders under applicable corporate statutes with those provided in the declaration of trust, highlighting any material differences". The CSA also state in that section that

"[b]ecause we are concerned that a unitholder may not be afforded the same protections, rights and remedies as a shareholder in a corporation, issuers should also provide the following disclosure in the issuer's AIF (if an AIF is filed) and any prospectus filed by the issuer:

... A unitholder in the income trust has all of the material protections, rights and remedies a shareholder would have under the CBCA, except for the following: [list protections, rights and remedies that are not available to a unitholder]. The protections, rights and remedies available to a unitholder are contained in the [trust indenture dated \*\*\*]".

As previously stated, CCGG's view is that the rights of investors in public income trusts should be standardized and that these rights should mirror, to the extent legally possible given the

differences in legal form, the rights given to shareholders of corporations governed by the CBCA. Accordingly, CCGG does not believe that disclosure alone as required by National Instrument 41-201 is sufficient. We also note that Canada's largest REIT, RioCan Real Estate Investment Trust, has adopted many of CCGG's model DOT provisions, as explained in the following extract from RioCan's management information circular prepared for its 2015 annual meeting:

"RioCan assesses the continuing development of governance best practices on an ongoing basis, and in connection with its ongoing review it has assessed its current Declaration of Trust provisions and compared the rights, remedies and procedures available under it to the rights, remedies and procedures that are available to shareholders of a corporation under the CBCA. In connection with the foregoing, RioCan reviewed the draft provisions set forth in the Model Declaration of Trust Provisions prepared by the CCGG in December 2007 (together with such modifications currently being considered by the CCGG). ... The Trustees believe that investors in RioCan should enjoy certain rights and remedies, such as the oppression remedy and dissent and appraisal rights that are available to a shareholder of a corporation pursuant to the CBCA which have become fundamental aspects of investor protection in the corporate context. The Trustees also believe that enhancing the procedures for and conduct at the Unitholder meetings consistent with the provisions of the CBCA is beneficial to Unitholders and the Trust. ... Consequently, the Trustees have determined that is appropriate at this time for RioCan to seek the approval of Unitholders to amend the Declaration of Trust to include certain rights, remedies and procedures in favour of Unitholders that are consistent with those available to shareholders of a corporation governed by the CBCA as reflected in the CCGG Model Declaration of Trust Provisions. The Trustees believe that this alignment of rights is appropriate given RioCan's role as a senior issuer and that doing so will enable the Trust to continue to be a leader as it relates to good governance. The Trustees also believe that these changes will further enhance the Trust as an investment vehicle as it provides Unitholders with fundamental rights consistent with those afforded to shareholders under corporate statutes."

Attached to this memorandum are model DOT provisions together with a comparison against the comparable CBCA provisions, updated from the version CCGG previously released in December 2007 to reflect amendments made to the CBCA since then.<sup>3</sup> Some of the major substantive provisions which are set out in the CBCA as rights for shareholders, and which are contained in the model DOT provisions because CCGG believes they should be in all DOTs as rights for unitholders, include the following:

- a right of unitholders to file a unitholder proposal as set out in the CBCA;
- the unit ownership requirement to call a meeting being set at 5%, as in the CBCA, rather than at a higher percentage;
- a right of unitholders to obtain unitholder lists and to have access to the trust's records, similar to the rights of shareholders under the CBCA;
- dissent and appraisal rights for certain fundamental transactions as set out in the CBCA;
- the ability to seek an oppression remedy, as is provided in the CBCA;
- the ability of unitholders to ratify or reject DOT amendments at the next unitholder meeting held after an amendment is made by the trustees, which would be similar to satisfying or rejecting by-law amendments for a CBCA corporation;

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<sup>3</sup> Industry Canada is in the process of considering further amendments to the CBCA. To the extent that any amendments result in additional rights being given to shareholders of public CBCA corporations, CCGG wishes to see those additional rights also incorporated into the DOTs of public income trusts.

- being provided with more information as to how voting by proxy occurs, which again would be similar to what is set out in the CBCA; and
- being provided with the detailed nature of the business to be transacted at special meetings of unitholders and the text of the special resolution, as required by the CBCA.

CCGG hopes that existing public income trusts in Canada will follow RioCan's lead by amending their DOTs in order to add those model DOT provisions which they have yet to adopt and CCGG also hopes to see the model DOT provisions adopted on a going forward basis by any newly created public income trusts in Canada, thereby resulting in unitholders of public income trusts having rights comparable to the major rights of shareholders of public CBCA corporations.

If you have any questions or comments on the model DOT provisions, please feel free to contact our Executive Director, Stephen Erlichman, at [serlichman@ccgg.ca](mailto:serlichman@ccgg.ca) or 416-847-0524, or our Director of Policy Development, Catherine McCall, at [cmccall@ccgg.ca](mailto:cmccall@ccgg.ca) or 416-868-3582.

Thank you.

Canadian Coalition for Good Governance  
Model Declaration of Trust Provisions  
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**CCGG**

# MODEL DECLARATION OF TRUST PROVISIONS

**NOVEMBER 2015**

Canadian Coalition for  
**GOOD GOVERNANCE**  
THE VOICE OF THE SHAREHOLDER

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**A. GENERAL**

**1. General Rules of Interpretation and Related Matters**

**A. Suggested Provision**

(a) The Trustees, the Trust and the Unitholders agree that, to the greatest extent practicable, the provisions hereof should be interpreted in a manner consistent with the manner in which the corresponding provisions of the *Canada Business Corporations Act* (the “**CBCA**”) are interpreted.

(b) Without limiting the generality of subsection (a), the Trustees, the Trust and the Unitholders also agree as follows:

(i) To the extent permitted by law, and without limiting any other rights and remedies available at law or in equity, the Trustees, the Trust and the Unitholders intend that each Unitholder will have the rights and remedies in its capacity as a Unitholder of the Trust as are enjoyed by a shareholder of a corporation existing under the CBCA with respect to the provisions set out herein including, without limitation, with respect to:

(A) dissent and appraisal rights set out in Section <\*>, which currently are set forth in section 190 of the CBCA; and

(B) the oppression remedy set out in Section <\*>, which currently is set forth in section 241 of the CBCA.

The provisions of this Declaration of Trust provide more specific guidance about the application of these general principles.

(ii) The Trust and each Trustee will promptly do, make, execute or deliver, or cause to be done, made, executed or delivered, all such further acts, documents and things for the purpose of giving effect to this Section, and will use all reasonable efforts and take all such steps as may be reasonably within their power to implement this Section to the greatest extent practicable under applicable law.

(c) In addition to the provisions in this Declaration of Trust which provide a Unitholder the right to apply to a court in specific instances, a Unitholder may apply to a court having jurisdiction in the place where the Trust has its registered office or in the province in which the Unitholder resides if a subsidiary (whether a corporation, partnership, trust or other incorporated entity) of the Trust (a “**Subsidiary**”) has its registered office in that province (a “**Court**”) for any

remedy available at law or equity to enforce any of its rights under this Declaration of Trust.

- (d) Because the rights and remedies set out in this Declaration of Trust are not statute-based, the Trustees, the Trust and the Unitholders acknowledge that references in this Declaration of Trust to Unitholder rights that may be enforced by a Court or to remedies that may be granted by a Court are subject to the Court, in its discretion, accepting jurisdiction to consider and determine any proceeding commenced by a Unitholder applying to the Court pursuant to this Declaration of Trust.
- (e) Notwithstanding anything else contained herein, a Unitholder shall not apply for, nor shall it be entitled to enforce, any order which would result in the Trust not qualifying as a “unit trust” and as a “mutual fund trust” within the meaning of the *Income Tax Act* (Canada).
- (f) Any references in this Declaration of Trust to the Trust shall be deemed to refer to the Trustees unless the context otherwise requires.

**B. RIGHTS AND REMEDIES**

**1. Requisitioning Unitholder Meetings - unitholders requisitioning a meeting**

**A. CBCA provision (section 143):**

*143. (1) The holders of not less than five per cent of the issued shares of a corporation that carry the right to vote at a meeting sought to be held may requisition the directors to call a meeting of shareholders for the purposes stated in the requisition.*

*(2) The requisition referred to in subsection (1), which may consist of several documents of like form each signed by one or more shareholders, shall state the business to be transacted at the meeting and shall be sent to each director and to the registered office of the corporation.*

*(3) On receiving the requisition referred to in subsection (1), the directors shall call a meeting of shareholders to transact the business stated in the requisition, unless*

*(a) a record date has been fixed under paragraph 134(1)(c) and notice of it has been given under subsection 134(3);*

*(b) the directors have called a meeting of shareholders and have given notice thereof under section 135; or*

*(c) the business of the meeting as stated in the requisition includes matters described in paragraphs 137(5)(b) to (e).*

*(4) If the directors do not within twenty-one days after receiving the requisition referred to in subsection (1) call a meeting, any shareholder who signed the requisition may call the meeting.*

*(5) A meeting called under this section shall be called as nearly as possible in the manner in which meetings are to be called pursuant to the by-laws, this Part and Part XIII.*

*(6) Unless the shareholders otherwise resolve at a meeting called under subsection (4), the corporation shall reimburse the shareholders the expenses reasonably incurred by them in requisitioning, calling and holding the meeting.*

**B. Suggested provision:**

**Unitholder Requisitioned Meetings**

(a) The holders of not less than five per cent of the Units may requisition the Trustees to call a meeting of Unitholders for the purposes stated in the requisition.

(b) The requisition referred to in subsection (a), which may consist of several documents of like form each signed by one or more Unitholders, shall state the

business to be transacted at the meeting and shall be sent to each Trustee and to the principal office of the Trust.

- (c) On receiving the requisition referred to in subsection (a), the Trustees shall call a meeting of Unitholders to transact the business stated in the requisition, unless
- (i) a record date for a meeting of the Unitholders has been fixed and notice thereof has been given to each stock exchange in Canada on which the Units are listed for trading;
  - (ii) the Trustees have called a meeting of the Unitholders and have given notice thereof pursuant to Section <\*> [Note: reference the section setting out procedures for calling meetings]; or
  - (iii) in connection with the business as stated in the requisition:
    - (A) it clearly appears that the matter covered by the requisition is (1) submitted by the Unitholder primarily for the purpose of enforcing a personal claim or redressing a personal grievance against the Trust, the Trustees, the Unitholders or other securityholders of the Trust, or (2) does not relate in a significant way to the business or affairs of the Trust;
    - (B) the Trust, at the Unitholder's request, included a matter covered by a requisition in an information circular relating to a meeting of the Unitholders held within two years preceding the receipt of such request and the Unitholder failed to present the matter, in person or by proxy, at the meeting;
    - (C) substantially the same matter covered by the requisition was submitted to Unitholders in an information circular relating to a meeting of the Unitholders held within two years preceding the receipt of the Unitholder's request and the matter covered by the requisition was not approved at the meeting; or
    - (D) the rights conferred by this Section are being abused to secure publicity.
- (d) If the Trustees do not within twenty-one days after receiving the requisition referred to in subsection (a) call a meeting, any Unitholder who signed the requisition may call the meeting.
- (e) A meeting called under this Section shall be called as nearly as possible in the manner in which meetings are to be called pursuant to Article <\*> hereof [Note: reference the Article setting out provisions for calling meetings].

- (f) Unless the Unitholders otherwise resolve at a meeting called under subsection (d), the Trust shall reimburse the Unitholders the expenses reasonably incurred by them in requisitioning, calling and holding the meeting.

## 2. Requisitioning Unitholder Meetings - unitholders applying to a court to call a meeting

### A. CBCA provision (section 144):

*144. (1) A court, on the application of a director, a shareholder who is entitled to vote at a meeting of shareholders or the Director, may order a meeting of a corporation to be called, held and conducted in the manner that the court directs, if*

*(a) it is impracticable to call the meeting within the time or in the manner in which those meetings are to be called;*

*(b) it is impracticable to conduct the meeting in the manner required by this Act or the by-laws; or*

*(c) the court thinks that the meeting should be called, held and conducted within the time or in the manner it directs for any other reason.*

*(2) Without restricting the generality of subsection (1), the court may order that the quorum required by the by-laws or this Act be varied or dispensed with at a meeting called, held and conducted pursuant to this section.*

*(3) A meeting called, held and conducted pursuant to this section is for all purposes a meeting of shareholders of the corporation duly called, held and conducted.*

### B. Suggested provision:

## Court Requisitioned Meetings

(a) A Unitholder may apply to a Court to order a meeting of the Unitholders to be called, held and conducted in the manner that the Court directs, if:

(i) it is impracticable to call the meeting within the time or in the manner in which those meetings are to be called pursuant to this Declaration of Trust;

(ii) it is impracticable to conduct the meeting in the manner required by this Declaration of Trust; or

(iii) the Court thinks that the meeting should be called, held and conducted within the time or in the manner it directs for any other reason.

(b) Without restricting the generality of subsection (a), the Trustees, the Trust and the Unitholders agree that the Court may order that the quorum required by this Declaration of Trust be varied or dispensed with at a meeting called, held and conducted pursuant to this section.

- (c) A meeting called, held and conducted pursuant to this Section is for all purposes a meeting of Unitholders duly called, held and conducted.



**3. Making Unitholder Proposals**

**A. CBCA provision (section 137 and Regs 46 to 53):**

*137. (1) Subject to subsections (1.1) and (1.2), a registered holder or beneficial owner of shares that are entitled to be voted at an annual meeting of shareholders may*

*(a) submit to the corporation notice of any matter that the person proposes to raise at the meeting (a "proposal"); and*

*(b) discuss at the meeting any matter in respect of which the person would have been entitled to submit a proposal.*

*(1.1) To be eligible to submit a proposal, a person*

*(a) must be, for at least the prescribed period, the registered holder or the beneficial owner of at least the prescribed number of outstanding shares of the corporation; or*

*(b) must have the support of persons who, in the aggregate, and including or not including the person that submits the proposal, have been, for at least the prescribed period, the registered holders, or the beneficial owners of, at least the prescribed number of outstanding shares of the corporation.*

*(1.2) A proposal submitted under paragraph (1)(a) must be accompanied by the following information:*

*(a) the name and address of the person and of the person's supporters, if applicable; and*

*(b) the number of shares held or owned by the person and the person's supporters, if applicable, and the date the shares were acquired.*

*(1.3) The information provided under subsection (1.2) does not form part of the proposal or of the supporting statement referred to in subsection (3) and is not included for the purposes of the prescribed maximum word limit set out in subsection (3).*

*(1.4) If requested by the corporation within the prescribed period, a person who submits a proposal must provide proof, within the prescribed period, that the person meets the requirements of subsection (1.1).*

*(2) A corporation that solicits proxies shall set out the proposal in the management proxy circular required by section 150 or attach the proposal thereto.*

*(3) If so requested by the person who submits a proposal, the corporation shall include in the management proxy circular or attach to it a statement in support of the proposal by the person and the name and address of the person. The statement and the proposal must together not exceed the prescribed maximum number of words.*

*(4) A proposal may include nominations for the election of directors if the proposal is signed by one or more holders of shares representing in the aggregate not less than five per cent of the shares or five per cent of the shares of a class of shares of the corporation entitled to vote at the meeting to which the proposal is to be presented, but this subsection does not preclude nominations made at a meeting of shareholders.*

*(5) A corporation is not required to comply with subsections (2) and (3) if*

*(a) the proposal is not submitted to the corporation at least the prescribed number of days before the anniversary date of the notice of meeting that was sent to shareholders in connection with the previous annual meeting of shareholders;*

*(b) it clearly appears that the primary purpose of the proposal is to enforce a personal claim or redress a personal grievance against the corporation or its directors, officers or security holders;*

*(b.1) it clearly appears that the proposal does not relate in a significant way to the business or affairs of the corporation;*

*(c) not more than the prescribed period before the receipt of a proposal, a person failed to present, in person or by proxy, at a meeting of shareholders, a proposal that at the person's request, had been included in a management proxy circular relating to the meeting;*

*(d) substantially the same proposal was submitted to shareholders in a management proxy circular or a dissident's proxy circular relating to a meeting of shareholders held not more than the prescribed period before the receipt of the proposal and did not receive the prescribed minimum amount of support at the meeting; or*

*(e) the rights conferred by this section are being abused to secure publicity.*

*(5.1) If a person who submits a proposal fails to continue to hold or own the number of shares referred to in subsection (1.1) up to and including the day of the meeting, the corporation is not required to set out in the management proxy circular, or attach to it, any proposal submitted by that person for any meeting held within the prescribed period following the date of the meeting.*

*(6) No corporation or person acting on its behalf incurs any liability by reason only of circulating a proposal or statement in compliance with this section.*

*(7) If a corporation refuses to include a proposal in a management proxy circular, the corporation shall, within the prescribed period after the day on which it receives the proposal or the day on which it receives the proof of ownership under subsection (1.4), as the case may be, notify in writing the person submitting the proposal of its intention to omit the proposal from the management proxy circular and of the reasons for the refusal.*

*(8) On the application of a person submitting a proposal who claims to be aggrieved by a corporation's refusal under subsection (7), a court may restrain the holding of the meeting to which the proposal is sought to be presented and make any further order it thinks fit.*

*(9) The corporation or any person claiming to be aggrieved by a proposal may apply to a court for an order permitting the corporation to omit the proposal from the management proxy circular, and the court, if it is satisfied that subsection (5) applies, may make such order as it thinks fit.*

*(10) An applicant under subsection (8) or (9) shall give the Director notice of the application and the Director is entitled to appear and be heard in person or by counsel.*

**Reg 46.** *For the purpose of subsection 137(1.1) of the Act,*

- (a) the prescribed number of shares is the number of voting shares
 
  - (i) that is equal to 1% of the total number of the outstanding voting shares of the corporation, as of the day on which the shareholder submits a proposal, or*
  - (ii) whose fair market value, as determined at the close of business on the day before the shareholder submits the proposal to the corporation, is at least \$2,000; and**
- (b) the prescribed period is the six-month period immediately before the day on which the shareholder submits the proposal.*

**Reg 47.** *For the purpose of subsection 137(1.4) of the Act,*

- (a) a corporation may request that a shareholder provide the proof referred to in that subsection within 14 days after the corporation receives the shareholder's proposal; and*
- (b) the shareholder shall provide the proof within 21 days after the day on which the shareholder receives the corporation's request, or if the request was mailed to the shareholder, within 21 days after the postmark date stamped on the envelope containing the request.*

**Reg 48.** *For the purpose of subsection 137(3) of the Act, a proposal and a statement in support of it shall together consist of not more than 500 words.*

**Reg 49.** *For the purpose of paragraph 137(5)(a) of the Act, the prescribed number of days for submitting a proposal to the corporation is at least 90 days before the anniversary date.*

**Reg 50.** *For the purpose of paragraph 137(5)(c) of the Act, the prescribed period before the receipt of a proposal is two years.*

**Reg 51.** (1) *For the purpose of paragraph 137(5)(d) of the Act, the prescribed minimum amount of support for a shareholder's proposal is*

(a) *3% of the total number of shares voted, if the proposal was introduced at an annual meeting of shareholders;*

(b) *6% of the total number of shares voted at its last submission to shareholders, if the proposal was introduced at two annual meetings of shareholders; and*

(c) *10% of the total number of shares voted at its last submission to shareholders, if the proposal was introduced at three or more annual meetings of shareholders.*

(2) *For the purpose of paragraph 137(5)(d) of the Act, the prescribed period is five years.*

**Reg 52.** *For the purpose of subsection 137(5.1) of the Act, the prescribed period during which the corporation is not required to set out a proposal in a management proxy circular is two years.*

**Reg 53.** *For the purpose of subsection 137(7) of the Act, the prescribed period for giving notice is 21 days after the receipt by the corporation of the proposal or of proof of ownership under subsection 137(1.4) of the Act, as the case may be.*

B. Suggested Provision:

### Unitholder Proposals

- (a) Subject to subsections (b) and (c), a registered holder or beneficial owner of Units may (i) submit notice to the Trust of any matter that the person proposes to raise at an annual meeting of Unitholders (a “**Proposal**”) and (ii) discuss at the meeting any matter with respect to which the person would have been entitled to submit a Proposal.
- (b) To be eligible to submit a Proposal, a person:
  - (i) must be, for at least the six-month period immediately before the day on which the person submits the Proposal, the registered holder or the beneficial owner of (i) at least 1% of the total number of outstanding Units, as of the day on which the person submits a Proposal, or (ii) Units whose fair market value, as determined at the close of business on the day before the person submits the Proposal, is at least \$2,000; or
  - (ii) must have the support of persons who, in the aggregate, and including or not including the person that submits the Proposal, have been, for at least the six-month period immediately before the day on which the person submits the Proposal, the registered holders or beneficial owners of (i) at least 1% of the total number of outstanding Units, as of the day on which the person submits the Proposal, or (ii) Units whose fair market value, as

determined at the close of business on the day before the person submits the Proposal, is at least \$2,000.

- (c) A Proposal must be accompanied by the following information:
  - (i) the name and address of the person submitting the Proposal and the person's supporters, if applicable; and
  - (ii) the number of Units held or owned by the person submitting the Proposal and the person's supporters, if applicable, and the date the Units were acquired.
- (d) If requested by the Trust within 14 days of the receipt of the Proposal, a person who submits a proposal must provide proof, within 21 days following the day on which the person receives the Trust's request, or if the request was mailed to the person, within 21 days after the postmark date stamped on the envelope containing the request, that the person meets the requirements set out in subsection (b).
- (e) The Trust shall set out the Proposal in its proxy circular delivered in connection with its annual meeting or attach the Proposal thereto.
- (f) If so requested by the person who submits the Proposal, the Trust shall include in, or attach to, its proxy circular delivered in connection with its annual meeting, a statement in support of the Proposal by the person and the name and address of the person making the Proposal. The statement and Proposal so included must not exceed 500 words excluding the information required by subsection (c).
- (g) A Proposal may include nominations for the election of Trustees if the Proposal is signed by one or more holders of Units representing in the aggregate not less than 5% of the outstanding Units, provided that this subsection (g) shall not limit the right of a Unitholder to make nominations at the meeting.
- (h) The Trust shall not be required to comply with subsections (e) and (f) if:
  - (i) the Proposal is submitted less than 90 days before the anniversary date of the notice of meeting that was sent to Unitholders in connection with the Trust's previous annual meeting of Unitholders;
  - (ii) it clearly appears that (A) the primary purpose of the Proposal is to enforce a personal claim or redress a personal grievance against the Trust, the Trustees, its officers, the Unitholders or other securityholders of the Trust, or (B) the Proposal does not relate in a significant way to the business or affairs of the Trust;
  - (iii) not more than two years preceding the receipt of such Proposal, the proposing person failed to present, in person or by proxy, at a meeting of

Unitholders, a Proposal that, at the person's request, had been included in a proxy circular relating to a meeting of the Unitholders;

- (iv) substantially the same proposal was submitted to Unitholders in a proxy circular relating to a meeting of the Unitholders held within five years preceding the receipt of the Proposal and the matter covered by the Proposal did not receive the required support at that meeting. For the purposes hereof, the required support for a Proposal is:
  - (A) 3% of the total number of Units voted, if the Proposal has been introduced at only one annual meeting of Unitholders;
  - (B) 6% of the total number of Units voted at the last meeting at which the matter was submitted to Unitholders, if the proposal was introduced at two annual meetings of Unitholders; and
  - (C) 10% of the total number of Units voted at the last meeting at which the matter was submitted to Unitholders, if the Proposal was introduced at three or more annual meetings of Unitholders; or
- (v) the rights conferred by this Section are being abused to secure publicity.
- (i) If a person who submits a Proposal fails to continue to hold or own the number of Units referred to in subsection (b) up to and including the day of the meeting, the Trust is not required to set out in its proxy circular for such meeting, or attach to it, any proposal submitted by that person for any meeting held within two years following the date of the meeting.
- (j) Neither the Trust nor any person acting on its behalf will incur any liability to Unitholders or any other person by reason only of circulating a Proposal or statement of compliance with this Section.
- (k) If the Trust refuses to include a Proposal in its proxy circular, it shall, within 21 days of the later of receipt of the proposal or proof of ownership under subsection (d), as the case may be, notify in writing the person submitting the Proposal of its intention to omit the Proposal from the Trust's proxy circular and of the reasons for the refusal.
- (l) The Trustees, the Trust and the Unitholders agree that, on the application of a person submitting a Proposal who claims to be aggrieved by the Trust's refusal under subsection (h), a Court may restrain the holding of the meeting to which the Proposal is sought to be presented and make any further order it thinks fit.
- (m) The Trust or any person claiming to be aggrieved by a Proposal may apply to a Court for an order permitting the Trust to omit the Proposal from the proxy circular, and the Trustees, the Trust and the Unitholders agree that the Court, if it is satisfied that subsection (h) applies, may make such order as it thinks fit.



4. **Removal of Trustees**

A. CBCA provision (sections 109(1) and 6(4))

*109. (1) Subject to paragraph 107(g)<sup>1</sup>, the shareholders of a corporation may by ordinary resolution at a special meeting remove any director or directors from office*

*6. (4) The articles may not require a greater number of votes of shareholders to remove a director than the number required by section 109.*

B. Suggested provision

**Removal of Trustees**

The Unitholders of the Trust may by Ordinary Resolution at a meeting of Unitholders called for that purpose remove any Trustee or Trustees from office. This Declaration of Trust may not be amended to require a greater number of votes of Unitholders to remove a Trustee unless the Unitholders unanimously agree.

*Or, if cumulative voting provisions are included:*

The Unitholders may remove any Trustee from office by resolution approved by Unitholders holding a number of Units greater than the product of the number of Trustees required by the Declaration of Trust<sup>2</sup> and the number of votes cast against the resolution.

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<sup>1</sup> 107(g) Where the articles provide for cumulative voting a director may be removed from office only if the number of votes cast in favour of the director's removal is greater than the product of the number of directors required by the articles and the number of votes cast against the motion.

<sup>2</sup> Note: if cumulative voting is to be provided, the Declaration of Trust will provide for a fixed number of directors.

### 5. Dissent and Appraisal Rights

#### A. CBCA provision (section 190)

*190. (1) Subject to sections 191<sup>3</sup> and 241<sup>4</sup>, a holder of shares of any class of a corporation may dissent if the corporation is subject to an order under paragraph 192(4)(d) that affects the holder or if the corporation resolves to*

*(a) amend its articles under section 173 or 174 to add, change or remove any provisions restricting or constraining the issue, transfer or ownership of shares of that class;*

*(b) amend its articles under section 173 to add, change or remove any restriction on the business or businesses that the corporation may carry on;*

*(c) amalgamate otherwise than under section 184<sup>5</sup>;*

*(d) be continued under section 188;*

*(e) sell, lease or exchange all or substantially all its property under subsection 189(3); or*

*(f) carry out a going-private transaction or a squeeze-out transaction.*

*(2) A holder of shares of any class or series of shares entitled to vote under section 176 may dissent if the corporation resolves to amend its articles in a manner described in that section.*

*(2.1) The right to dissent described in subsection (2) applies even if there is only one class of shares.*

*(3) In addition to any other right the shareholder may have, but subject to subsection (26), a shareholder who complies with this section is entitled, when the action approved by the resolution from which the shareholder dissents or an order made under subsection 192(4) becomes effective, to be paid by the corporation the fair value of the shares in respect of which the shareholder dissents, determined as of the close of business on the day before the resolution was adopted or the order was made.*

*(4) A dissenting shareholder may only claim under this section with respect to all the shares of a class held on behalf of any one beneficial owner and registered in the name of the dissenting shareholder.*

<sup>3</sup> Corporate reorganizations

<sup>4</sup> Oppression claims

<sup>5</sup> Vertical short form amalgamation



*(5) A dissenting shareholder shall send to the corporation, at or before any meeting of shareholders at which a resolution referred to in subsection (1) or (2) is to be voted on, a written objection to the resolution, unless the corporation did not give notice to the shareholder of the purpose of the meeting and of their right to dissent.*

*(6) The corporation shall, within ten days after the shareholders adopt the resolution, send to each shareholder who has filed the objection referred to in subsection (5) notice that the resolution has been adopted, but such notice is not required to be sent to any shareholder who voted for the resolution or who has withdrawn their objection.*

*(7) A dissenting shareholder shall, within twenty days after receiving a notice under subsection (6) or, if the shareholder does not receive such notice, within twenty days after learning that the resolution has been adopted, send to the corporation a written notice containing*

*(a) the shareholder's name and address;*

*(b) the number and class of shares in respect of which the shareholder dissents;  
and*

*(c) a demand for payment of the fair value of such shares.*

*(8) A dissenting shareholder shall, within thirty days after sending a notice under subsection (7), send the certificates representing the shares in respect of which the shareholder dissents to the corporation or its transfer agent.*

*(9) A dissenting shareholder who fails to comply with subsection (8) has no right to make a claim under this section.*

*(10) A corporation or its transfer agent shall endorse on any share certificate received under subsection (8) a notice that the holder is a dissenting shareholder under this section and shall forthwith return the share certificates to the dissenting shareholder.*

*(11) On sending a notice under subsection (7), a dissenting shareholder ceases to have any rights as a shareholder other than to be paid the fair value of their shares as determined under this section except where*

*(a) the shareholder withdraws that notice before the corporation makes an offer under subsection (12),*

*(b) the corporation fails to make an offer in accordance with subsection (12) and the shareholder withdraws the notice, or*

*(c) the directors revoke a resolution to amend the articles under subsection 173(2) or 174(5), terminate an amalgamation agreement under subsection 183(6) or an application for continuance under subsection 188(6), or abandon a sale, lease or exchange under subsection 189(9),*

*in which case the shareholder's rights are reinstated as of the date the notice was sent.*

*(12) A corporation shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the corporation received the notice referred to in subsection (7), send to each dissenting shareholder who has sent such notice*

*(a) a written offer to pay for their shares in an amount considered by the directors of the corporation to be the fair value, accompanied by a statement showing how the fair value was determined; or*

*(b) if subsection (26) applies, a notification that it is unable lawfully to pay dissenting shareholders for their shares.*

*(13) Every offer made under subsection (12) for shares of the same class or series shall be on the same terms.*

*(14) Subject to subsection (26), a corporation shall pay for the shares of a dissenting shareholder within ten days after an offer made under subsection (12) has been accepted, but any such offer lapses if the corporation does not receive an acceptance thereof within thirty days after the offer has been made.*

*(15) Where a corporation fails to make an offer under subsection (12), or if a dissenting shareholder fails to accept an offer, the corporation may, within fifty days after the action approved by the resolution is effective or within such further period as a court may allow, apply to a court to fix a fair value for the shares of any dissenting shareholder.*

*(16) If a corporation fails to apply to a court under subsection (15), a dissenting shareholder may apply to a court for the same purpose within a further period of twenty days or within such further period as a court may allow.*

*(17) An application under subsection (15) or (16) shall be made to a court having jurisdiction in the place where the corporation has its registered office or in the province where the dissenting shareholder resides if the corporation carries on business in that province.*

*(18) A dissenting shareholder is not required to give security for costs in an application made under subsection (15) or (16).*

*(19) On an application to a court under subsection (15) or (16),*

*(a) all dissenting shareholders whose shares have not been purchased by the corporation shall be joined as parties and are bound by the decision of the court; and*

*(b) the corporation shall notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to appear and be heard in person or by counsel.*

*(20) On an application to a court under subsection (15) or (16), the court may determine whether any other person is a dissenting shareholder who should be joined as a party, and the court shall then fix a fair value for the shares of all dissenting shareholders.*

*(21) A court may in its discretion appoint one or more appraisers to assist the court to fix a fair value for the shares of the dissenting shareholders.*

*(22) The final order of a court shall be rendered against the corporation in favour of each dissenting shareholder and for the amount of the shares as fixed by the court.*

*(23) A court may in its discretion allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective until the date of payment.*

*(24) If subsection (26) applies, the corporation shall, within ten days after the pronouncement of an order under subsection (22), notify each dissenting shareholder that it is unable lawfully to pay dissenting shareholders for their shares.*

*(25) If subsection (26) applies, a dissenting shareholder, by written notice delivered to the corporation within thirty days after receiving a notice under subsection (24), may*

*(a) withdraw their notice of dissent, in which case the corporation is deemed to consent to the withdrawal and the shareholder is reinstated to their full rights as a shareholder; or*

*(b) retain a status as a claimant against the corporation, to be paid as soon as the corporation is lawfully able to do so or, in a liquidation, to be ranked subordinate to the rights of creditors of the corporation but in priority to its shareholders.*

*(26) A corporation shall not make a payment to a dissenting shareholder under this section if there are reasonable grounds for believing that*

*(a) the corporation is or would after the payment be unable to pay its liabilities as they become due; or*

*(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities*

#### B. Suggested provision

#### Dissent Rights

(a) Subject to Section <\*> in connection with the oppression remedy, a Unitholder may dissent if the Trust resolves to:

(i) carry out any transaction which requires approval of the Unitholders by Extraordinary Resolution pursuant to Section <\*>, including without

limitation, a sale, lease or exchange of all or substantially all of the property of the Trust;

- (ii) carry out a going-private transaction or a squeeze-out transaction; or
  - (iii) amend this Declaration of Trust to (A) add, change or remove any provision restricting or constraining the issue, transfer or ownership of Units, (B) add, change or remove any restriction on the business that the Trust may carry on, (C) add, change or remove the rights, privileges, restrictions or conditions attached to the Units of the class held by the dissenting Unitholder, (D) increase the rights or privileges of any class of units having rights or privileges equal or superior to the class of Units held by the dissenting Unitholder, (E) create a new class of units equal to or superior to the Units of the class held by the dissenting Unitholder, (F) make any class of units having rights or privileges inferior to the class of Units held by the dissenting Unitholder superior to that class, or (G) effect an exchange or create a right of exchange in all or part of a class of Units into the class of Units held by the dissenting Unitholder.
- (b) In addition to any other right the Unitholder may have, a Unitholder who complies with this Section is entitled, when the action approved by the resolution from which the Unitholder dissents becomes effective, to be paid by the Trust the fair value of the Units held by the Unitholder in respect of which the Unitholder dissents, determined as of the close of business on the day before the resolution was adopted.
  - (c) A dissenting Unitholder may only claim under this Section with respect to all the Units held by the dissenting Unitholder on behalf of any one beneficial owner and registered in the name of the dissenting Unitholder.
  - (d) A dissenting Unitholder shall send to the Trust, at or before any meeting of Unitholders at which a resolution referred to in subsection (a) is to be voted on, a written objection to the resolution, unless the Trust did not give notice to the Unitholder of the purpose of the meeting and of the Unitholder's right to dissent.
  - (e) The Trust shall, within ten days after the Unitholders adopt the resolution, send to each Unitholder who has filed the objection referred to in subsection (d) notice that the resolution has been adopted, but such notice is not required to be sent to any Unitholder who voted for the resolution or who has withdrawn its objection.
  - (f) A dissenting Unitholder shall, within twenty days after receiving a notice under subsection (e) or, if the Unitholder does not receive such notice, within twenty days after learning that the resolution has been adopted, send to the Trust a written notice containing:
    - (i) the Unitholder's name and address;

- (ii) the number of Units in respect of which the Unitholder dissents; and
- (iii) a demand for payment of the fair value of such Units.
- (g) A dissenting Unitholder shall, within thirty days after the sending of a notice under subsection (f), send the certificates representing the Units in respect of which the Unitholder dissents to the Trust or its transfer agent.
- (h) A dissenting Unitholder who fails to comply with subsection (g) has no right to make a claim under this Section.
- (i) The Trust or its transfer agent shall endorse on any certificate received under subsection (g) a notice that the holder is a dissenting Unitholder under this Section and shall return forthwith the certificates to the dissenting Unitholder.
- (j) On sending a notice under subsection (f), a dissenting Unitholder ceases to have any rights as a Unitholder other than the right to be paid the fair value of its Units as determined under this Section except where:
  - (i) the Unitholder withdraws that notice before the Trust makes an offer under subsection (k);
  - (ii) the Trust fails to make an offer in accordance with subsection (k) and the dissenting Unitholder withdraws the notice; or
  - (iii) the Trustees revoke the resolution which gave rise to the dissent rights under this Section, and to the extent applicable, terminate the related agreements or abandon a sale, lease or exchange to which the resolution relates,in which case the Unitholder's rights are reinstated as of the date the notice was sent.
- (k) The Trust shall, not later than seven days after the later of the day on which the action approved by the resolution is effective or the day the Trust received the notice referred to in subsection (f), send to each dissenting Unitholder who has sent such notice a written offer to pay for the dissenting Unitholder's Units in an amount considered by the Trustees to be the fair value, accompanied by a statement showing how the fair value was determined.
- (l) Every offer made under subsection (k) for Units of the same class or series shall be on the same terms.
- (m) The Trust shall pay for the Units of a dissenting Unitholder within ten days after an offer made under subsection (k) has been accepted, but any such offer lapses if the Trust does not receive an acceptance thereof within thirty days after the offer has been made.

- (n) Where the Trust fails to make an offer under subsection (k), or if a dissenting Unitholder fails to accept an offer, the Trustees, the Trust and the Unitholders agree that the Trust may, within fifty days after the action approved by the resolution is effective or within such further period as a Court may allow, apply to a Court to fix a fair value for the Units of any dissenting Unitholder.
- (o) If the Trust fails to apply to a Court under subsection (n), a dissenting Unitholder may apply to a Court for the same purpose within a further period of twenty days or within such further period as a Court may allow.
- (p) The Trustees, the Trust and the Unitholders agree that the Court where an application under subsection (n) or (o) may be made is the Court defined in Section <\*> [Note: reference the section where the definition in A.1.A(c) appears]
- (q) A dissenting Unitholder is not required to give security for costs in an application made under subsection (n) or (o).
- (r) The Trustees, the Trust and the Unitholders agree that, on an application under subsection (n) or (o):
  - (i) all dissenting Unitholders whose Units have not been purchased by the Trust shall be joined as parties and bound by the decision of the Court; and
  - (ii) the Trust shall notify each affected dissenting Unitholder of the date, place and consequences of the application and of the dissenting Unitholder's right to appear and be heard in person or by counsel.
- (s) The Trustees, the Trust and the Unitholders agree that, on an application to a Court under subsection (n) and (o), the Court may determine whether any other person is a dissenting Unitholder who should be joined as a party, and the Court shall fix a fair value for the Units of all dissenting Unitholders.
- (t) The Trustees, the Trust and the Unitholders agree that a Court may in its discretion appoint one or more appraisers to assist the Court to fix a fair value for the Units of the dissenting Unitholders.
- (u) The Trustees, the Trust and the Unitholders agree that the final order of a Court in the proceedings commenced by an application under subsection (n) and (o) shall be rendered against the Trust in favour of each dissenting Unitholder and for the amount of the Units as fixed by the Court.
- (v) The Trustees, the Trust and the Unitholders agree that a Court may in its discretion allow a reasonable rate of interest on the amount payable to each dissenting Unitholder from the date the action approved by the resolution is effective until the date of payment.



**6. Applications to Court to commence an Oppression Action**

**A. CBCA provision (section 241)**

**241.** (1) *A complainant may apply to a court for an order under this section.*

(2) *If, on an application under subsection (1), the court is satisfied that in respect of a corporation or any of its affiliates*

*(a) any act or omission of the corporation or any of its affiliates effects a result,*

*(b) the business or affairs of the corporation or any of its affiliates are or have been carried on or conducted in a manner, or*

*(c) the powers of the directors of the corporation or any of its affiliates are or have been exercised in a manner*

*that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any security holder, creditor, director or officer, the court may make an order to rectify the matters complained of.*

(3) *In connection with an application under this section, the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,*

*(a) an order restraining the conduct complained of;*

*(b) an order appointing a receiver or receiver-manager;*

*(c) an order to regulate a corporation's affairs by amending the articles or by-laws or creating or amending a unanimous shareholder agreement;*

*(d) an order directing an issue or exchange of securities;*

*(e) an order appointing directors in place of or in addition to all or any of the directors then in office;*

*(f) an order directing a corporation, subject to subsection (6), or any other person, to purchase securities of a security holder;*

*(g) an order directing a corporation, subject to subsection (6), or any other person, to pay a security holder any part of the monies that the security holder paid for securities;*

*(h) an order varying or setting aside a transaction or contract to which a corporation is a party and compensating the corporation or any other party to the transaction or contract;*

*(i) an order requiring a corporation, within a time specified by the court, to produce to the court or an interested person financial statements in the form required by section 155 or an accounting in such other form as the court may determine;*

*(j) an order compensating an aggrieved person;*

*(k) an order directing rectification of the registers or other records of a corporation under section 243;*

*(l) an order liquidating and dissolving the corporation;*

*(m) an order directing an investigation under Part XIX to be made; and*

*(n) an order requiring the trial of any issue.*

*(4) If an order made under this section directs amendment of the articles or by-laws of a corporation,*

*(a) the directors shall forthwith comply with subsection 191(4); and*

*(b) no other amendment to the articles or by-laws shall be made without the consent of the court, until a court otherwise orders.*

*(5) A shareholder is not entitled to dissent under section 190 if an amendment to the articles is effected under this section.*

*(6) A corporation shall not make a payment to a shareholder under paragraph (3)(f) or (g) if there are reasonable grounds for believing that*

*(a) the corporation is or would after that payment be unable to pay its liabilities as they become due; or*

*(b) the realizable value of the corporation's assets would thereby be less than the aggregate of its liabilities.*

*(7) An applicant under this section may apply in the alternative for an order under section 214.*

**B. Suggested provision**

**Oppression Remedy**

(a) The Trustees, the Trust and the Unitholders agree that any registered holder or beneficial owner of Units or former registered holder or beneficial owner of Units (collectively, a “**Complainant**”) may apply to a Court for a remedy under this section.



- (b) The Trustees, the Trust and the Unitholders agree that if, on application, the Court is satisfied that in respect of the Trust or any of its Subsidiaries:
- (i) any act or omission of the Trust or any of its Subsidiaries effects a result,
  - (ii) the business or affairs of the Trust or any Subsidiary are or have been carried on or conducted in a manner, or
  - (iii) the power of the Trustees or of the directors or trustees of any Subsidiary are or have been exercised in a manner,
- that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of any Unitholder, the Court may make an order to rectify the matters complained of by the Complainant.
- (c) In connection with an application by a Complainant under subsection (a) and without limiting subsection (b), the Trustees, the Trust and the Unitholders agree that a Court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing,
- (i) an order restraining the conduct complained of;
  - (ii) an order appointing a receiver or receiver-manager;
  - (iii) an order to regulate the Trust's affairs or those of a Subsidiary by amending this Declaration of Trust or the articles or by-laws of a Subsidiary;
  - (iv) an order directing an issue or exchange of securities;
  - (v) an order appointing Trustees or directors of a Subsidiary in place of or in addition to all or any of the Trustees or directors then in office;
  - (vi) an order directing the Trust or any other person to purchase securities of a holder of securities;
  - (vii) an order directing the Trust or any other person to pay a security holder any part of the monies that the security holder paid for securities;
  - (viii) an order varying or setting aside a transaction or contract to which the Trust or a Subsidiary is a party and compensating the Trust or a Subsidiary or any other party to the transaction or contract;
  - (ix) an order requiring the Trust or a Subsidiary, within a time specified by the Court, to produce to the Court or an interested person financial statements or an accounting in such form as the Court may determine;
  - (x) an order compensating an aggrieved person;

- (xi) an order directing rectification of the registers or other records of the Trust or a Subsidiary;
  - (xii) an order winding up the Trust or liquidating and dissolving a Subsidiary;
  - (xiii) an order directing an investigation to be made; and
  - (xiv) an order requiring the trial of any issue.
- (d) The Trustees, the Trust and the Unitholders agree that if an order made under this Section directs an amendment of this Declaration of Trust or to the constating documents of a Subsidiary, then:
- (i) the Trustees shall request the Trust, such Subsidiary and all directors, Trustees, officers and other persons responsible for management to take all steps necessary to carry out that direction; and
  - (ii) no other amendment to this Declaration of Trust or such constating documents shall be made without the consent of the Court, until a Court otherwise orders.
- (e) A Unitholder is not entitled to dissent under this Declaration of Trust or other applicable law if an amendment to the Declaration of Trust or such constating documents is effected under this Section.
- (f) The Trustees, the Trust and the Unitholders agree that a Complainant may apply in the alternative for an order to wind up the Trust or liquidate and dissolve a Subsidiary and the Trustees, the Trust and the Unitholders agree that a Court may so order if the Court is satisfied that it is just and equitable that such winding up, liquidation or dissolution occur.

**7. Unitholders' right to appoint an Auditor and fix Auditor's Remuneration**

**A. CBCA provision (sections 162(1) and (4))**

**162.** (1) *Subject to section 163<sup>6</sup>, shareholders of a corporation shall, by ordinary resolution, at the first annual meeting of shareholders and at each succeeding annual meeting, appoint an auditor to hold office until the close of the next annual meeting.*

(4) *The remuneration of an auditor may be fixed by ordinary resolution of the shareholders or, if not so fixed, may be fixed by the directors.*

**B. Suggested provision**

**Appointment of Auditors**

The business transacted at annual meetings of the Unitholders shall include the appointment of auditors for the ensuing year. Such appointment shall be approved by a majority of the votes cast by Unitholders present in person or by proxy at the meeting. The remuneration of the auditors shall be fixed by ordinary resolution of the Unitholders or, if not fixed by the Unitholders, may be fixed by the Trustees.

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<sup>6</sup> 163. (1) *The shareholders of a corporation that is not a distributing corporation may resolve not to appoint an auditor.*

**C. UNITHOLDER MEETINGS AND VOTING**

**1. Voting Rights**

A. CBCA provision (section 140 (1))

*140. (1) Unless the articles otherwise provide, each share of a corporation entitles the holder thereof to one vote at a meeting of shareholders.*

B. Suggested provision

**Voting Rights**

Each Unit entitles the holder thereof to one vote at any meeting of Unitholders.

**2. Voting Units held by Trust**

A. CBCA provision (sections 33 and 153)

*33. (1) A corporation holding shares in itself or in its holding body corporate shall not vote or permit those shares to be voted unless the corporation*

*(a) holds the shares in the capacity of a personal representative; and*

*(b) has complied with section 153.*

*(2) A corporation shall not permit any of its subsidiary bodies corporate holding shares in the corporation to vote, or permit those shares to be voted, unless the subsidiary body corporate satisfies the requirements of subsection (1).*

*153. (1) Shares of a corporation that are registered in the name of an intermediary or their nominee and not beneficially owned by the intermediary must not be voted unless the intermediary, without delay after receipt of the notice of the meeting, financial statements, management proxy circular, dissident's proxy circular and any other documents other than the form of proxy sent to shareholders by or on behalf of any person for use in connection with the meeting, sends a copy of the document to the beneficial owner and, except when the intermediary has received written voting instructions from the beneficial owner, a written request for such instructions.*

*(2) An intermediary, or a proxyholder appointed by an intermediary, may not vote shares that the intermediary does not beneficially own and that are registered in the name of the intermediary or in the name of a nominee of the intermediary unless the intermediary or proxyholder, as the case may be, receives written voting instructions from the beneficial owner.*

*(3) A person by or on behalf of whom a solicitation is made shall provide, at the request of an intermediary, without delay, to the intermediary at the person's expense the*

*necessary number of copies of the documents referred to in subsection (1), other than copies of the document requesting voting instructions.*

*(4) An intermediary shall vote or appoint a proxyholder to vote any shares referred to in subsection (1) in accordance with any written voting instructions received from the beneficial owner.*

*(5) If a beneficial owner so requests and provides an intermediary with appropriate documentation, the intermediary must appoint the beneficial owner or a nominee of the beneficial owner as proxyholder.*

*(6) The failure of an intermediary to comply with this section does not render void any meeting of shareholders or any action taken at the meeting.*

*(7) Nothing in this section gives an intermediary the right to vote shares that the intermediary is otherwise prohibited from voting.*

*(8) An intermediary who knowingly fails to comply with this section is guilty of an offence and liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both.*

*(9) If an intermediary that is a body corporate commits an offence under subsection (8), any director or officer of the body corporate who knowingly authorized, permitted or acquiesced in the commission of the offence is a party to and guilty of the offence and is liable on summary conviction to a fine not exceeding five thousand dollars or to imprisonment for a term not exceeding six months or to both, whether or not the body corporate has been prosecuted or convicted.*

#### B. Suggested provision

#### **Voting Units held by Trust**

- (a) If the Trust holds any Units, the Trust shall not vote or permit those Units to be voted unless:
  - (i) the Trust holds the Units in the capacity of a personal representative;
  - (ii) the Trust, without delay following the filing or receipt by the Trust, as applicable, of the notice of the meeting, financial statements, management proxy circular, dissident's proxy circular and any other documents (other than the form of proxy) sent to registered Unitholders by or on behalf of any person for use in connection with the applicable meeting, sends a copy of the document to the beneficial owner of the Units and, except where the Trust has received written voting instructions from the beneficial owner of the Units, a written request for such instructions; and
  - (iii) the Trust receives written voting instructions from the beneficial owner of the Units;

in which case the Trust shall vote, or appoint a proxyholder to vote, any such Units in accordance with any written voting instructions received from the beneficial owner thereof.

- (b) A Unitholder by or on behalf of whom a solicitation is made shall provide, at the request of the Trust, without delay, to the Trust at the Unitholder's expense the necessary number of copies of the documents referred to in subsection (a), other than copies of the document requesting voting instructions.
- (c) If a beneficial owner of Units held by the Trust so requests and provides the Trust with appropriate documentation, the Trust must appoint the beneficial owner or a nominee of the beneficial owner as proxyholder.
- (d) The Trust, the Trustees and the Unitholders agree that the failure of the Trust to comply with this Section does not render void any meeting of Unitholders or any action taken at the meeting.
- (e) Nothing in this Section gives the Trust the right to vote Units that the Trust is otherwise prohibited from voting.
- (f) The Trust shall not permit any of its Subsidiaries holding Units to vote, or permit those Units to be voted, unless the Subsidiary satisfies the requirements of subsection (a).

**3. Requirement to call Unitholder Meetings**

**A. CBCA provision (section 133)**

*133. (1) The directors of a corporation shall call an annual meeting of shareholders*

*(a) not later than eighteen months after the corporation comes into existence; and*

*(b) subsequently, not later than fifteen months after holding the last preceding annual meeting but no later than six months after the end of the corporation's preceding financial year.*

*(2) The directors of a corporation may at any time call a special meeting of shareholders.*

*(3) Despite subsection (1), the corporation may apply to the court for an order extending the time for calling an annual meeting.*

**B. Suggested provision**

**Requirement to call Unitholder Meetings**

(a) The Trustees shall call an annual meeting of Unitholders:

(i) not later than eighteen months after the Trust comes into existence; and

(ii) subsequently, not later than fifteen months after holding the last preceding annual meeting of Unitholders but no later than six months after the end of the Trust's preceding financial year.

(b) The Trustees may at any time call a special meeting of Unitholders.

(c) Despite subsection (a), the Trust may apply to the Court for an order extending the time for calling an annual meeting.

**4. Required Notice Period for Unitholder Meetings**

**A. CBCA provision (section 135 and Reg 44)**

*135. (1) Notice of the time and place of a meeting of shareholders shall be sent within the prescribed period to<sup>7</sup>*

*(a) each shareholder entitled to vote at the meeting;*

*(b) each director; and*

*(c) the auditor of the corporation.*

*(1.1) In the case of a corporation that is not a distributing corporation, the notice may be sent within a shorter period if so specified in the articles or by-laws.*

*(2) A notice of a meeting is not required to be sent to shareholders who were not registered on the records of the corporation or its transfer agent on the record date determined under paragraph 134(1)(c) or subsection 134(2), but failure to receive a notice does not deprive a shareholder of the right to vote at the meeting.*

*(3) If a meeting of shareholders is adjourned for less than thirty days it is not necessary, unless the by-laws otherwise provide, to give notice of the adjourned meeting, other than by announcement at the earliest meeting that is adjourned.*

*(4) If a meeting of shareholders is adjourned by one or more adjournments for an aggregate of thirty days or more, notice of the adjourned meeting shall be given as for an original meeting but, unless the meeting is adjourned by one or more adjournments for an aggregate of more than ninety days, subsection 149(1) does not apply.*

*(5) All business transacted at a special meeting of shareholders and all business transacted at an annual meeting of shareholders, except consideration of the financial statements, auditor's report, election of directors and re-appointment of the incumbent auditor, is deemed to be special business.*

*(6) Notice of a meeting of shareholders at which special business is to be transacted shall state*

*(a) the nature of that business in sufficient detail to permit the shareholder to form a reasoned judgment thereon; and*

*(b) the text of any special resolution to be submitted to the meeting.*

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<sup>7</sup> Reg 44 prescribes a period of not less than 21 days and not more than 60 days



B. Suggested provision

**Notice of Unitholder Meetings**

- (a) Notice of the time and place of a meeting of Unitholders shall be sent, not less than 21 days and not more than 60 days before the meeting, by first class mail, postage prepaid, addressed to each Unitholder at his or her last address on the register of Unitholders of the Trust, and to each Trustee and the auditor of the Trust.
- (b) A notice of meeting is not required to be sent to Unitholders who were not registered on the records of the Trust or its transfer agent on the record date for the meeting, but failure to receive notice does not deprive a Unitholder of the right to vote at the meeting.
- (c) If a meeting is adjourned for less than thirty days it is not necessary to give notice of the adjourned meeting, other than by announcement at the earliest meeting that is adjourned.
- (d) If a meeting of Unitholders is adjourned by one or more adjournments for an aggregate of thirty days or more, notice of the adjourned meeting shall be given as for an original meeting.
- (e) All business to be conducted at a special meeting of Unitholders and all business to be transacted at an annual meeting of Unitholders, except consideration of the financial statements, auditor's report, election of Trustees and re-appointment of the incumbent auditor, is deemed to be special business.
- (f) Notice of a meeting of Unitholders at which special business is to be transacted shall state (i) the nature of the business in sufficient detail to permit a Unitholder to form a reasonable judgment thereon, and (ii) the text of any Extraordinary Resolution to be submitted to the meeting.

**5. Right to appoint a Proxy**

**A. CBCA provision (section 148)**

*148. (1) A shareholder entitled to vote at a meeting of shareholders may by means of a proxy appoint a proxyholder or one or more alternate proxyholders who are not required to be shareholders, to attend and act at the meeting in the manner and to the extent authorized by the proxy and with the authority conferred by the proxy.*

*(2) A proxy shall be executed or, in Quebec, signed by the shareholder or by the shareholder's personal representative authorized in writing.*

*(3) A proxy is valid only at the meeting in respect of which it is given or any adjournment thereof.*

*(4) A shareholder may revoke a proxy*

*(a) by depositing an instrument or act in writing executed or, in Quebec, signed by the shareholder or by the shareholder's personal representative authorized in writing*

*(i) at the registered office of the corporation at any time up to and including the last business day preceding the day of the meeting, or an adjournment thereof, at which the proxy is to be used, or*

*(ii) with the chairman of the meeting on the day of the meeting or an adjournment thereof; or*

*(b) in any other manner permitted by law.*

*(5) The directors may specify in a notice calling a meeting of shareholders a time not exceeding forty-eight hours, excluding Saturdays and holidays, before the meeting or adjournment before which time proxies to be used at the meeting must be deposited with the corporation or its agent or mandatary.*

**B. Suggested provision**

**Proxies**

(a) A Unitholder entitled to vote at a meeting of Unitholders, may by means of a proxy appoint a proxyholder or one or more alternate proxyholders who are not required to be Unitholders, to attend and act at a meeting of Unitholders in the manner and to the extent authorized by the proxy and the authority conferred by the proxy.

(b) A proxy shall be executed or, in Quebec, signed by the Unitholder or by the Unitholder's personal representative authorized in writing.

- (c) A proxy is valid only at the meeting in respect of which it is given or any adjournment thereof.
- (d) A Unitholder may revoke a proxy:
  - (i) by depositing an instrument or act in writing executed or, in Quebec, signed by the Unitholder or by the Unitholder's personal representative authorized in writing:
    - (A) at the principal office of the Trust at any time up to and including the last business day preceding the day of the meeting, or an adjournment thereof, at which the proxy is to be used; or
    - (B) with the chairman of the meeting on the day of the meeting or any adjournment thereof, or
  - (ii) in any other manner permitted by law.
- (e) The Trustees may specify in a notice calling a meeting of Unitholders a time not exceeding forty-eight hours, excluding Saturdays and holidays, before the meeting or adjournment before which time proxies to be used at the meeting must be deposited with the Trust or its agent or mandatary in order to be voted at the meeting. In any event, no proxy shall be voted at any meeting unless it shall have been received by the Trust or its agent or mandatary prior to the commencement of the meeting.

6. **Quorum**

A. CBCA provision (section 139)

*139. (1) Unless the by-laws otherwise provide, a quorum of shareholders is present at a meeting of shareholders, irrespective of the number of persons actually present at the meeting, if the holders of a majority of the shares entitled to vote at the meeting are present in person or represented by proxy.*

*(2) If a quorum is present at the opening of a meeting of shareholders, the shareholders present may, unless the by-laws otherwise provide, proceed with the business of the meeting, notwithstanding that a quorum is not present throughout the meeting.*

*(3) If a quorum is not present at the opening of a meeting of shareholders, the shareholders present may adjourn the meeting to a fixed time and place but may not transact any other business.*

*(4) If a corporation has only one shareholder, or only one holder of any class or series of shares, the shareholder present in person or by proxy constitutes a meeting.*

B. Suggested provision

**Quorum**

- (a) A quorum of Unitholders is present at a meeting of Unitholders, irrespective of the number of persons actually present at the meeting, if the holders of <\*>% [Note: this figure may be a majority or a lesser percent, given that the CBCA does not prescribe a minimum number of shareholders to constitute a quorum] of the Units entitled to vote at the meeting are present in person or represented by proxy.
- (b) If a quorum is present at the opening of a meeting of Unitholders, the Unitholders present may proceed with the business of the meeting, notwithstanding that a quorum is not present throughout the meeting.
- (c) If a quorum is not present at the opening of a meeting of Unitholders, the Unitholders present may adjourn the meeting to a fixed time and place but may not transact any other business.

7. Election of Trustees

A. CBCA provision (section 106(3))

*106(3) Subject to paragraph 107(b)<sup>8</sup>, shareholders of a corporation shall, by ordinary resolution at the first meeting of shareholders and at each succeeding annual meeting at which an election of directors is required, elect directors to hold office for a term expiring not later than the close of the third annual meeting of shareholders following the election.*

B. Suggested provision

**Election of Trustees**

Except as otherwise provided in this Declaration of Trust, Unitholders shall, by Ordinary Resolution at the first meeting of Unitholders and each succeeding annual meeting at which an election of Trustees is required, elect Trustees to hold office, subject to Section <\*> [Note: reference the section of the Declaration of Trust dealing with Removal of Trustees], for a term expiring not later than the close of the third annual meeting of Unitholders following the election. [Note: Please see Section 461.1 of the TSX Company Manual which no longer permits staggered boards for TSX listed companies.]

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<sup>8</sup> Paragraph 107(b) states: “Where the articles provide for cumulative voting, ... each shareholder entitled to vote at an election of directors has the right to cast a number of votes equal to the number of votes attached to the shares held by the shareholder multiplied by the number of directors to be elected, and may cast all of those votes in favour of one candidate or distribute them among the candidates in any manner”.

**8. Fundamental Changes**

**A. CBCA provision (sections 173(1) and 189(8))**

*173. (1) Subject to sections 176 and 177, the articles of a corporation may by special resolution be amended to*

- (a) change its name;*
- (b) change the province in which its registered office is situated;*
- (c) add, change or remove any restriction on the business or businesses that the corporation may carry on;*
- (d) change any maximum number of shares that the corporation is authorized to issue;*
- (e) create new classes of shares;*
- (f) reduce or increase its stated capital, if its stated capital is set out in the articles;*
- (g) change the designation of all or any of its shares, and add, change or remove any rights, privileges, restrictions and conditions, including rights to accrued dividends, in respect of all or any of its shares, whether issued or unissued;*
- (h) change the shares of any class or series, whether issued or unissued, into a different number of shares of the same class or series or into the same or a different number of shares of other classes or series;*
- (i) divide a class of shares, whether issued or unissued, into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;*
- (j) authorize the directors to divide any class of unissued shares into series and fix the number of shares in each series and the rights, privileges, restrictions and conditions thereof;*
- (k) authorize the directors to change the rights, privileges, restrictions and conditions attached to unissued shares of any series;*
- (l) revoke, diminish or enlarge any authority conferred under paragraphs (j) and (k);*
- (m) increase or decrease the number of directors or the minimum or maximum number of directors, subject to sections 107 and 112;*

*(n) add, change or remove restrictions on the issue, transfer or ownership of shares; or*

*(o) add, change or remove any other provision that is permitted by this Act to be set out in the articles.*

**189.** (8) *A sale, lease or exchange referred to in subsection (3)<sup>9</sup> is adopted when the holders of each class or series entitled to vote thereon have approved of the sale, lease or exchange by a special resolution*

#### B. Suggested provision

#### Fundamental Changes

The Trustees shall not undertake any of the following actions without the approval of the Unitholders:

- (a) amendments to this Declaration of Trust;
- (b) the termination of the Trust;
- (c) the sale, lease or exchange of all or substantially all the property of the Trust other than in the ordinary course of business of the Trust;
- (d) any merger or other combination of the Trust, except in conjunction with an internal reorganization;
- (e) entering into or amending any of the following plans if doing so requires Unitholder approval according to this Declaration of Trust, a regulator or a stock exchange upon which Units are listed: Unitholder rights plan, distribution reinvestment plan, distribution reinvestment and Unit purchase plan, Unit option plan or other compensation plan; and
- (f) any other matters which (i) expressly require the approval of the Unitholders pursuant to this Declaration of Trust or (ii) the Trustees determine to present to the Unitholders for their approval or ratification notwithstanding that there is no express requirement for such approval or ratification hereunder.

Any action taken or resolution passed in respect of any matter at a meeting of Unitholders shall be by Extraordinary Resolution, unless (i) the contrary is otherwise expressly provided under any specific provision of this Declaration of Trust or (ii) the matter is one which the Trustees present to the Unitholders for their approval or ratification notwithstanding that there is no express requirement for such approval or ratification hereunder, in which case any such action taken or

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<sup>9</sup> (3) *A sale, lease or exchange of all or substantially all the property of a corporation other than in the ordinary course of business of the corporation requires the approval of the shareholders in accordance with subsections (4) to (8).*

resolution passed shall be by Extraordinary Resolution or Ordinary Resolution as the Trustees may deem appropriate.



9. **Requirements for Written Consent**

A. CBCA provision (section 142(1))

*142. (1) Except where a written statement is submitted by a director under subsection 110(2) or by an auditor under subsection 168(5),*

*(a) a resolution in writing signed by all the shareholders entitled to vote on that resolution at a meeting of shareholders is as valid as if it had been passed at a meeting of the shareholders; and*

*(b) a resolution in writing dealing with all matters required by this Act to be dealt with at a meeting of shareholders, and signed by all the shareholders entitled to vote at that meeting, satisfies all the requirements of this Act relating to meetings of shareholders.*

B. Suggested provision

**Meaning of “Ordinary Resolution” and “Extraordinary Resolution”**

The expression “Extraordinary Resolution” when used in this Declaration of Trust means either:

- (a) a resolution proposed to be passed as an extraordinary resolution at a meeting of Unitholders (including an adjourned meeting) duly convened for that purpose and held in accordance with the provisions hereof at which a quorum is present and passed by the affirmative votes of not less than 66 2/3% of the votes cast by the Unitholders who voted in respect of such resolution; or
- (b) a resolution in writing signed by all of the Unitholders that would be entitled to vote on that resolution at a meeting of Unitholders.

The expression “Ordinary Resolution” when used in this Declaration of Trust means either:

- (a) a resolution proposed to be passed as an ordinary resolution at a meeting of Unitholders (including an adjourned meeting) duly convened for that purpose and held in accordance with the provisions hereof at which a quorum is present and passed by the affirmative votes of not less than a majority of the votes cast by the Unitholders who voted in respect of such resolution; or
- (b) a resolution in writing signed by all of the Unitholders that would be entitled to vote on that resolution at a meeting of Unitholders.

## **D. RECORDS**

### **1. Right to obtain Lists of Unitholders and other rights of Access to Corporate Records**

A. CBCA provision (sections 21(3), (4), (5), (6) and (9), 20(1), 21(1) and (1.1), 120(6.1) and 138)

*21(3) Shareholders and creditors of a corporation, their personal representatives, the Director and, if the corporation is a distributing corporation, any other person, on payment of a reasonable fee and on sending to a corporation or its agent or mandatary the affidavit referred to in subsection (7), may on application require the corporation or its agent or mandatary to provide within ten days after the receipt of the affidavit a list (in this section referred to as the "basic list") made up to a date not more than ten days before the date of receipt of the affidavit setting out the names of the shareholders of the corporation, the number of shares owned by each shareholder and the address of each shareholder as shown on the records of the corporation.*

*(4) A person requiring a corporation to provide a basic list may, by stating in the affidavit referred to in subsection (3) that they require supplemental lists, require the corporation or its agent or mandatary on payment of a reasonable fee to provide supplemental lists setting out any changes from the basic list in the names or addresses of the shareholders and the number of shares owned by each shareholder for each business day following the date the basic list is made up to.*

*(5) The corporation or its agent or mandatary shall provide a supplemental list required under subsection (4)*

*(a) on the date the basic list is furnished, where the information relates to changes that took place prior to that date; and*

*(b) on the business day following the day to which the supplemental list relates, where the information relates to changes that take place on or after the date the basic list is furnished.*

*(6) A person requiring a corporation to furnish a basic list or a supplemental list may also require the corporation to include in that list the name and address of any known holder of an option or right to acquire shares of the corporation.*

*(9) A list of shareholders or information from a securities register obtained under this section shall not be used by any person except in connection with*

*(a) an effort to influence the voting of shareholders of the corporation;*

*(b) an offer to acquire securities of the corporation; or*

*(c) any other matter relating to the affairs of the corporation.*

**20.** (1) A corporation shall prepare and maintain, at its registered office or at any other place in Canada designated by the directors, records containing

- (a) the articles and the by-laws, and all amendments thereto, and a copy of any unanimous shareholder agreement;
- (b) minutes of meetings and resolutions of shareholders;
- (c) copies of all notices required by section 106 or 113<sup>10</sup>; and
- (d) a securities register that complies with section 50.

**21.** (1) Subject to subsection (1.1), shareholders and creditors of a corporation, their personal representatives and the Director may examine the records described in subsection 20(1) during the usual business hours of the corporation, and may take extracts from the records, free of charge, and, if the corporation is a distributing corporation, any other person may do so on payment of a reasonable fee.

(1.1) Any person described in subsection (1) who wishes to examine the securities register of a distributing corporation must first make a request to the corporation or its agent or mandatary, accompanied by an affidavit referred to in subsection (7). On receipt of the affidavit, the corporation or its agent or mandatary shall allow the applicant access to the securities register during the corporation's usual business hours, and, on payment of a reasonable fee, provide the applicant with an extract from the securities register.

**120(6.1)** The shareholders of the corporation may examine the portions of any minutes of meetings of directors or of committees of directors that contain disclosures under this section, and any other documents that contain those disclosures, during the usual business hours of the corporation.

**138.** (1) A corporation shall prepare an alphabetical list of its shareholders entitled to receive notice of a meeting, showing the number of shares held by each shareholder,

- (a) if a record date is fixed under paragraph 134(1)(c), not later than ten days after that date; or
- (b) if no record date is fixed, on the record date established under paragraph 134(2)(a).

(2) If a record date for voting is fixed under paragraph 134(1)(d), the corporation shall prepare, no later than ten days after the record date, an alphabetical list of shareholders entitled to vote as of the record date at a meeting of shareholders that shows the number of shares held by each shareholder.

<sup>10</sup> Notice of directors or a change of directors

*(3) If a record date for voting is not fixed under paragraph 134(1)(d), the corporation shall prepare, no later than ten days after a record date is fixed under paragraph 134(1)(c) or no later than the record date established under paragraph 134(2)(a), as the case may be, an alphabetical list of shareholders who are entitled to vote as of the record date that shows the number of shares held by each shareholder.*

*(3.1) A shareholder whose name appears on a list prepared under subsection (2) or (3) is entitled to vote the shares shown opposite their name at the meeting to which the list relates.*

*(4) A shareholder may examine the list of shareholders*

*(a) during usual business hours at the registered office of the corporation or at the place where its central securities register is maintained; and*

*(b) at the meeting of shareholders for which the list was prepared.*

**B. Suggested provision**

**Information Available to Unitholders and other Securityholders**

- (a) Unitholders and other securityholders of the Trust and their respective personal representatives, on payment of a reasonable fee therefor and on sending the Trust or its agent or mandatary an affidavit required by Section <\*>, [Note: reference the section of the Declaration of Trust equivalent to CBCA section 21(7)] may on application require the Trust or its agent or mandatary to provide within 10 days after receipt of the affidavit a list (in this section referred to as the “**basic list**”) made up to a date not more than ten days before the receipt of the affidavit setting out the names of the Unitholders, the number of Units held by each Unitholder and the address of each Unitholder as shown in the records of the Trust.
- (b) A person requiring the Trust to provide a basic list may, by stating in the affidavit referred to in subsection (a) that they require supplemental lists, require the Trust or its agent or mandatary on payment of a reasonable fee to provide supplemental lists setting out any changes from the basic list in the names or addresses of the Unitholders and the number of Units owned by each Unitholder for each business day following the date the basic list is made up to.
- (c) The Trust or its agent or mandatary shall provide a supplemental list required under subsection (b):
- (i) on the date the basic list is furnished, where the information relates to changes that took place prior to that date; and
  - (ii) on the business day following the day to which the supplemental list relates, where the information relates to changes that take place on or after the date the basic list is furnished.

- (d) A person requiring the Trust to furnish a basic list or a supplemental list may also require the Trust to include in that list the name and address of any known holder of an option or right to acquire Units.
- (e) A list of Unitholders or information from a securities register obtained pursuant to the provisions of this Declaration of Trust shall not be used by any person except in connection with
  - (i) an effort to influence the voting of Unitholders of the Trust;
  - (ii) an offer to acquire securities of the Trust; or
  - (iii) any other matter relating to the affairs of the Trust.

### Records of the Trust

- (a) The Trustees shall cause the Trust to prepare and maintain, at its principal office or at any other place in Canada designated by the Trustees, records containing:
  - (i) this Declaration of Trust and any amendments hereto;
  - (ii) minutes of meetings and resolutions of Unitholders; and
  - (iii) a securities register which records the Units and any other securities issued by the Trust in registered form, showing with respect to each class of securities:
    - (A) the names, alphabetically arranged, and the latest known address of each person who is or has been a security holder;
    - (B) the number of securities held by each security holder; and
    - (C) the date and particulars of the issue and transfer of each security.
- (b) Unitholders and other securityholders of the Trust and their respective personal representatives may examine the records described in subsection (a) during normal business hours, and take extracts from the records, free of charge.
- (c) Any person described in subsection (b) who wishes to examine the securities register of the Trust must first make a request to Trust or its agent or mandatory, accompanied by an affidavit referred to in Section <\*> [Note: reference the section of the Declaration of Trust equivalent to CBCA s. 21(7)]. On receipt of the affidavit, the Trust or its agent or mandatory shall allow the applicant access to the securities register during the normal business hours, and, on payment of a reasonable fee, provide the applicant with an extract from the securities register.
- (d) The Trustees shall cause the Trust to prepare an alphabetical list of Unitholders entitled to receive notice of a meeting, showing the number of Units held by each

Unitholder, no later than ten days after the record date for receiving notice and for voting. A Unitholder may examine the list during normal business hours at the principal office of the Trust or at the place where its central securities register is maintained, and at the meeting of Unitholders for which the list was prepared.

## E. RESTRICTIONS

### 1. Items which may not be delegated to Officers

#### A. CBCA provision (sections 121(a) and 115(3))

*121. Subject to the articles, the by-laws or any unanimous shareholder agreement,*

*(a) the directors may designate the offices of the corporation, appoint as officers persons of full capacity, specify their duties and delegate to them powers to manage the business and affairs of the corporation, except powers to do anything referred to in subsection 115(3).*

*115. (3) Notwithstanding subsection (1), no managing director and no committee of directors has authority to*

*(a) submit to the shareholders any question or matter requiring the approval of the shareholders;*

*(b) fill a vacancy among the directors or in the office of auditor, or appoint additional directors;*

*(c) issue securities except as authorized by the directors;*

*(c.1) issue shares of a series under section 27 except as authorized by the directors;*

*(d) declare dividends;*

*(e) purchase, redeem or otherwise acquire shares issued by the corporation;*

*(f) pay a commission referred to in section 41 except as authorized by the directors;*

*(g) approve a management proxy circular referred to in Part XIII;*

*(h) approve a take-over bid circular or directors' circular referred to in Part XVII;*

*(i) approve any financial statements referred to in section 155; or*

*(j) adopt, amend or repeal by-laws.*



B. Suggested provision

**Delegation**

The Trustees may not delegate to any managing Trustee or any committee of Trustees or any officer the authority to:

- (i) submit to the Unitholders any question or matter requiring the approval of the Unitholders;
- (ii) fill a vacancy among the Trustees or in the office of auditor, or appoint additional Trustees;
- (iii) issue Units except as authorized by the Trustees;
- (iv) declare distributions;
- (v) purchase, redeem or otherwise acquire Units or other securities issued by the Trust;
- (vi) pay a commission to any person in consideration of the person's agreeing to purchase securities of the Trust or procuring or agreeing to procure purchasers for such securities, except as authorized by the Trustees;
- (vii) approve a proxy circular;
- (viii) approve a take-over bid circular or directors' circular;
- (ix) approve the annual financial statements of the Trust; or
- (x) adopt, amend or repeal the by-laws of the Trust, if any, or amend this Declaration of Trust.

**[Note: Please be aware that CCGG generally recommends against the use of Executive Committees. If a board has an Executive Committee, it should act on behalf of the board in exceptional circumstances only and it should report to the board promptly after any action is taken on the board's behalf.]**



## **F. TRUSTEES**

### **1. Qualifications**

#### **A. CBCA provision (section 105(1))**

*105. (1) The following persons are disqualified from being a director of a corporation:*

- (a) anyone who is less than eighteen years of age;*
- (b) anyone who is of unsound mind and has been so found by a court in Canada or elsewhere;*
- (c) a person who is not an individual; or*
- (d) a person who has the status of bankrupt*

#### **B. Suggested provision**

### **Qualification of Trustees**

The following persons are disqualified from being a Trustee of the Trust:

- (a) anyone who is less than eighteen years of age;
- (b) anyone who is of unsound mind and has been so found by a court in Canada or elsewhere;
- (c) a person who is not an individual; or
- (d) a person who has the status of bankrupt.

2. **Composition of the Board of Trustees**

A. CBCA provision (section 105(3))

*105(3) Subject to subsection (3.1), at least twenty-five per cent of the directors of a corporation must be resident Canadians. However, if a corporation has less than four directors, at least one director must be a resident Canadian.*

B. Suggested provision

**Composition of the Board of Trustees**

At least a majority of the Trustees must be resident Canadians. **[Note: A majority of the Trustees must be resident Canadian to satisfy Canadian income tax requirements]**

3. **Duty to Manage or Supervise Management**

A. CBCA provision (section 102(1))

*102. (1) Subject to any unanimous shareholder agreement, the directors shall manage, or supervise the management of, the business and affairs of a corporation.*

B. Suggested provision

**Duty to Manage or Supervise Management**

The Trustees shall have, and shall exercise at any time and from time to time, the power and duty to manage, or supervise the management of, the business and affairs of the Trust.

4. **Duty of Care**

A. CBCA provision (section 122)

*122. (1) Every director and officer of a corporation in exercising their powers and discharging their duties shall*

*(a) act honestly and in good faith with a view to the best interests of the corporation; and*

*(b) exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.*

*(2) Every director and officer of a corporation shall comply with this Act, the regulations, articles, by-laws and any unanimous shareholder agreement.*

*(3) Subject to subsection 146(5), no provision in a contract, the articles, the by-laws or a resolution relieves a director or officer from the duty to act in accordance with this Act or the regulations or relieves them from liability for a breach thereof.*

B. Suggested provision

**Duty of Care**

- (a) Every Trustee and officer of the Trust, in exercising their powers and discharging their duties, shall:
  - (i) act honestly and in good faith with a view to the best interests of the Trust and the Unitholders; and
  - (ii) exercise the degree of care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances.
- (b) Each Trustee and officer of the Trust shall comply with this Declaration of Trust and the by-laws, if any, of the Trust.

**[Note: The duty of care in subsection (a)(i) is with a view to the best interests of the Trust and the Unitholders. Some declarations of trust refer only to the best interests of the Trust. We believe that if the reference is only to the best interests of the Trust, then the declaration of trust should contain the right for Unitholders to pursue a derivative action on behalf of the Trust or any Subsidiaries similar to sections 239 and 240 of the CBCA.]**

## 5. Conflicts of Interest

### A. CBCA provision (section 120)

*120. (1) A director or an officer of a corporation shall disclose to the corporation, in writing or by requesting to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of any interest that he or she has in a material contract or material transaction, whether made or proposed, with the corporation, if the director or officer*

*(a) is a party to the contract or transaction;*

*(b) is a director or an officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or*

*(c) has a material interest in a party to the contract or transaction.*

*(2) The disclosure required by subsection (1) shall be made, in the case of a director,*

*(a) at the meeting at which a proposed contract or transaction is first considered;*

*(b) if the director was not, at the time of the meeting referred to in paragraph (a), interested in a proposed contract or transaction, at the first meeting after he or she becomes so interested;*

*(c) if the director becomes interested after a contract or transaction is made, at the first meeting after he or she becomes so interested; or*

*(d) if an individual who is interested in a contract or transaction later becomes a director, at the first meeting after he or she becomes a director.*

*(3) The disclosure required by subsection (1) shall be made, in the case of an officer who is not a director,*

*(a) immediately after he or she becomes aware that the contract, transaction, proposed contract or proposed transaction is to be considered or has been considered at a meeting;*

*(b) if the officer becomes interested after a contract or transaction is made, immediately after he or she becomes so interested; or*

*(c) if an individual who is interested in a contract later becomes an officer, immediately after he or she becomes an officer.*

*(4) If a material contract or material transaction, whether entered into or proposed, is one that, in the ordinary course of the corporation's business, would*

*not require approval by the directors or shareholders, a director or officer shall disclose, in writing to the corporation or request to have it entered in the minutes of meetings of directors or of meetings of committees of directors, the nature and extent of his or her interest immediately after he or she becomes aware of the contract or transaction.*

*(5) A director required to make a disclosure under subsection (1) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction unless the contract or transaction*

*(a) relates primarily to his or her remuneration as a director, officer, employee, agent or mandatary of the corporation or an affiliate;*

*(b) is for indemnity or insurance under section 124; or*

*(c) is with an affiliate.*

*(6) For the purposes of this section, a general notice to the directors declaring that a director or an officer is to be regarded as interested, for any of the following reasons, in a contract or transaction made with a party, is a sufficient declaration of interest in relation to the contract or transaction:*

*(a) the director or officer is a director or officer, or acting in a similar capacity, of a party referred to in paragraph (1)(b) or (c);*

*(b) the director or officer has a material interest in the party; or*

*(c) there has been a material change in the nature of the director's or the officer's interest in the party.*

*(6.1) The shareholders of the corporation may examine the portions of any minutes of meetings of directors or of committees of directors that contain disclosures under this section, and any other documents that contain those disclosures, during the usual business hours of the corporation.*

*(7) A contract or transaction for which disclosure is required under subsection (1) is not invalid, and the director or officer is not accountable to the corporation or its shareholders for any profit realized from the contract or transaction, because of the director's or officer's interest in the contract or transaction or because the director was present or was counted to determine whether a quorum existed at the meeting of directors or committee of directors that considered the contract or transaction, if*

*(a) disclosure of the interest was made in accordance with subsections (1) to (6);*

*(b) the directors approved the contract or transaction; and*

*(c) the contract or transaction was reasonable and fair to the corporation when it was approved.*

*(7.1) Even if the conditions of subsection (7) are not met, a director or officer, acting honestly and in good faith, is not accountable to the corporation or to its shareholders for any profit realized from a contract or transaction for which disclosure is required under subsection (1), and the contract or transaction is not invalid by reason only of the interest of the director or officer in the contract or transaction, if*

*(a) the contract or transaction is approved or confirmed by special resolution at a meeting of the shareholders;*

*(b) disclosure of the interest was made to the shareholders in a manner sufficient to indicate its nature before the contract or transaction was approved or confirmed; and*

*(c) the contract or transaction was reasonable and fair to the corporation when it was approved or confirmed.*

*(8) If a director or an officer of a corporation fails to comply with this section, a court may, on application of the corporation or any of its shareholders, set aside the contract or transaction on any terms that it thinks fit, or require the director or officer to account to the corporation for any profit or gain realized on it, or do both those things*

#### B. Suggested provision

#### **Conflicts of Interests**

- (a) A Trustee or an officer of the Trust shall disclose to the Trust, in writing or by requesting to have entered in the minutes of meetings of the Trustees or of meetings of committees of Trustees, the nature and extent of any interest that he or she has in a material contract or transaction, whether made or proposed, with the Trust, if such Trustee or officer:
  - (i) is a party to the contract or transaction;
  - (ii) is a director or officer, or an individual acting in a similar capacity, of a party to the contract or transaction; or
  - (iii) has a material interest in a party to the contract or transaction.
- (b) The disclosure required in subsection (a) must be made, in the case of a Trustee:
  - (i) at the meeting at which the proposed material contract or transaction is first considered;

- (ii) if the Trustee was not then interested in the proposed material contract or transaction, at the first such meeting after he or she becomes so interested;
  - (iii) if the Trustee becomes interested after a material contract or transaction is entered into, at the first meeting of Trustees after he or she becomes so interested; or
  - (iv) if a person who is interested in a material contract or transaction later becomes a Trustee, at the first such meeting after he or she becomes a Trustee.
- (c) The disclosure required in subsection (a) must be made, in the case of an officer of the Trust who is not a Trustee:
  - (i) immediately after he or she becomes aware that the contract, transaction, proposed contract or proposed transaction is to be considered or has been considered at a meeting;
  - (ii) if the officer becomes interested after a contract or transaction is made, immediately after he or she becomes so interested;
  - (iii) if a person who is interested in a contract or transaction later becomes an officer, immediately after he or she becomes an officer.
- (d) Notwithstanding subsection (b), if a material contract or material transaction, whether entered into or proposed, is one that, in the ordinary course of business of the Trust, would not require approval by the Trustees or Unitholders, then a Trustee or officer shall disclose in writing to the Trustees, or request to have entered in the minutes of meetings of the Trustees or of meetings of committees of the Trustees, the nature and extent of his or her interest immediately after he or she becomes aware of the contract or transaction.
- (e) A Trustee required to make disclosure under subsection (a) shall not vote on any resolution to approve the contract or transaction unless the contract or transaction:
  - (i) relates primarily to his or her remuneration as a Trustee, officer, employee, agent or mandatary of the Trust or any affiliate of the Trust;
  - (ii) is for indemnity or insurance as permitted hereunder; or
  - (iii) is with an affiliate.
- (f) For the purposes hereof, a general notice to the Trustees by a Trustee or an officer of the Trust declaring that he or she is to be regarded as interested, for any of the following reasons, in a contract or transaction made with a party, is a sufficient declaration of interest in relation to the contract or transaction:



- (i) the Trustee or officer is a director or officer, or acting in a similar capacity, of a party;
  - (ii) the Trustee or officer has a material interest in the party; or
  - (iii) there has been a material change in the nature of the interest of the Trustee or officer in the party.
- (g) The Unitholders may examine the portions of any minutes of meetings of Trustees or of committees of Trustees that contain disclosures under this section, and any other documents that contain those disclosures, during normal business hours.
- (h) A contract or transaction for which disclosure is required under subsection (a) is not invalid, and the Trustee or officer, as applicable, is not accountable to the Trust or to the Unitholders for any profit or gain realized from the contract or transaction because of that interest in the contract or transaction or because the Trustee was present or was counted to determine whether a quorum existed at the meeting of Trustees or committee of Trustees that considered the contract or transaction, if
  - (A) the Trustee or officer disclosed his or her interest as set out above,
  - (B) the Trustees approved the contract or transaction, and
  - (C) the contract or transaction was reasonable and fair to the Trust at the time it was so approved.
- (i) Even if the conditions of subsection (h) are not met, a Trustee or officer of the Trust, acting honestly and in good faith, is not accountable to the Trust or to the Unitholders for any profit realized from a contract or transaction for which disclosure is required under subsection (a), and the contract or transaction is not invalid by reason only of the interest of the Trustee or officer in the contract or transaction, if:
  - (i) the contract or transaction is approved or confirmed by Extraordinary Resolution at a meeting of Unitholders;
  - (ii) disclosure of the interest was made to Unitholders in a manner sufficient to indicate its nature before the contract or transaction was approved or confirmed; and
  - (iii) the contract or transaction was reasonable and fair to the Trust when it was approved or confirmed.
- (j) If a Trustee or officer fails to comply with this section, the Trust, any Trustee or any Unitholder may apply to Court for an order setting aside the contract or transaction on any terms that it sees fit, or require the Trustee or officer to account to the Trust for any profit or gain realized on it, or do both of those things.

**G. MISCELLANEOUS**

**1. Unitholder Immunity**

**A. CBCA provision (section 45(1))**

*45(1) The shareholders of a corporation are not, as shareholders, liable for any liability, act or default of the corporation except under subsection 38(4)<sup>11</sup>, 118(4) or (5)<sup>12</sup>, 146(5) or 226(4) or (5)<sup>13</sup>.*

**B. Suggested provision**

**Liability of Unitholders**

- (a) The Unitholders are not, as Unitholders, liable to any person for any liability, act or default of the Trustees or the Trust. No Unitholder shall be subject to any personal liability whatsoever, in tort, contract or otherwise, to any person in connection with the assets or liabilities of the Trust or the obligations or the affairs of the Trust and all such persons shall look solely to the Trust for satisfaction of claims of any nature arising out of or in connection therewith and the assets of the Trust only shall be subject to levy or execution.
- (b) Without limiting the generality of subsection (a), no Unitholder in its capacity as a Unitholder shall be liable to indemnify the Trustees or any other person with respect to any liabilities of the Trust.

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<sup>11</sup> (4) A creditor of a corporation is entitled to apply to a court for an order compelling a shareholder or other recipient

(a) to pay to the corporation an amount equal to any liability of the shareholder that was extinguished or reduced contrary to this section; or  
(b) to pay or deliver to the corporation any money or property that was paid or distributed to the shareholder or other recipient as a consequence of a reduction of capital made contrary to this section

<sup>12</sup> (4) A director liable under subsection (2) is entitled to apply to a court for an order compelling a shareholder or other recipient to pay or deliver to the director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 34, 35, 36, 41, 42, 124, 190 or 241.

(5) In connection with an application under subsection (4) a court may, if it is satisfied that it is equitable to do so,

(a) order a shareholder or other recipient to pay or deliver to a director any money or property that was paid or distributed to the shareholder or other recipient contrary to section 34, 35, 36, 41, 42, 124, 190 or 241;

(b) order a corporation to return or issue shares to a person from whom the corporation has purchased, redeemed or otherwise acquired shares; or

(c) make any further order it thinks fit

<sup>13</sup> (4) Notwithstanding the dissolution of a body corporate under this Act, a shareholder to whom any of its property has been distributed is liable to any person claiming under subsection (2) to the extent of the amount received by that shareholder on such distribution, and an action to enforce such liability may be brought within two years after the date of the dissolution of the body corporate.

(5) A court may order an action referred to in subsection (4) to be brought against the persons who were shareholders as a class, subject to such conditions as the court thinks fit and, if the plaintiff establishes a claim, the court may refer the proceedings to a referee or other officer of the court who may

(a) add as a party to the proceedings each person who was a shareholder found by the plaintiff;

(b) determine, subject to subsection (4), the amount that each person who was a shareholder shall contribute towards satisfaction of the plaintiff's claim; and

(c) direct payment of the amounts so determined.

- (c) To the extent that, notwithstanding the provisions of this section, any Unitholder, in its capacity as such, is determined by a judgment of a court of competent jurisdiction to be, or is otherwise held, personally liable in respect of any of the liabilities of the Trust or is required to indemnify the Trustees or any other person, the Trustees, the Trust and the Unitholders agree that:
  - (i) any such judgment, writ of execution or similar process in respect thereof will be enforceable only against, and will be satisfied only out of, the assets of the Trust; and
  - (ii) in the event that, notwithstanding subsection (i), the judgment, writ of execution or similar process is enforceable against the Unitholder, or the Unitholder is otherwise held personally liable, the Unitholder will be entitled to indemnity and reimbursement out of the assets of the Trust to the full extent of the liability and for all costs of any litigation or other proceedings in which such liability has been determined, including all fees and disbursements of counsel.
- (d) The rights accruing to a Unitholder under this Section and the limitations of a Unitholder's liability set out herein are in addition to, and do not exclude, any other rights or limitations of liability to which such Unitholder may be lawfully entitled, pursuant to statute, regulation or otherwise, nor does anything herein contained restrict the right of the Trustees to indemnify or reimburse a Unitholder out of the assets of the Trust in any appropriate situation not specially provided herein but, for greater certainty, the Trustees have no liability to reimburse Unitholders for taxes assessed against them by reason of or arising out of their ownership of Units.

## 2. Requirement to Ratify Amendments to Declaration of Trust

### A. CBCA provision (sections 103(1), (2), (3) and (4))

*103. (1) Unless the articles, by-laws or a unanimous shareholder agreement otherwise provide, the directors may, by resolution, make, amend or repeal any by-laws that regulate the business or affairs of the corporation.*

*(2) The directors shall submit a by-law, or an amendment or a repeal of a by-law, made under subsection (1) to the shareholders at the next meeting of shareholders, and the shareholders may, by ordinary resolution, confirm, reject or amend the by-law, amendment or repeal.*

*(3) A by-law, or an amendment or a repeal of a by-law, is effective from the date of the resolution of the directors under subsection (1) until it is confirmed, confirmed as amended or rejected by the shareholders under subsection (2) or until it ceases to be effective under subsection (4) and, where the by-law is confirmed or confirmed as amended, it continues in effect in the form in which it was so confirmed.*

*(4) If a by-law, an amendment or a repeal is rejected by the shareholders, or if the directors do not submit a by-law, an amendment or a repeal to the shareholders as required under subsection (2), the by-law, amendment or repeal ceases to be effective and no subsequent resolution of the directors to make, amend or repeal a by-law having substantially the same purpose or effect is effective until it is confirmed or confirmed as amended by the shareholders.*

### B. Suggested provision

## Ratifying Amendments to Declaration of Trust

- (a) Subject to subsection (d), the Trustees shall submit to the Unitholders at the next meeting of Unitholders any amendment to the Declaration of Trust that has not been approved by the Unitholders, and the Unitholders may, by Ordinary Resolution, confirm, reject or amend the amendment to the Declaration of Trust.
- (b) An amendment to this Declaration of Trust which the Trustees are expressly empowered to make pursuant to the terms hereof is effective from the date of the resolution of the Trustees approving the amendment until it is confirmed, confirmed as amended or rejected by the Unitholders under subsection (a) or until it ceases to be effective under subsection (c) and, where the amendment is confirmed or confirmed as amended, it continues in effect in the form in which it was so confirmed.
- (c) If an amendment to this Declaration of Trust is rejected by the Unitholders, or if the Trustees do not submit an amendment to the Unitholders as required under subsection (a), the amendment ceases to be effective and no subsequent resolution of the Trustees to amend the Declaration of Trust having substantially the same

purpose or effect is effective until it is confirmed or confirmed as amended by the Unitholders.

- (d) The Trustees may make the following amendments to this Declaration of Trust without the approval or ratification of the Unitholders:
- (i) amendments in order to ensure continuing compliance with applicable laws (including the *Income Tax Act* (Canada)), regulations, requirements or policies of any governmental authority having jurisdiction over the Trustees, the Trust or the distribution of Units;
  - (ii) amendments which, in the opinion of the Trustees, are necessary or desirable to provide additional protection or added benefits for Unitholders;
  - (iii) amendments to remove any conflicts or inconsistencies in the Declaration of Trust or to make corrections (including the rectification of any ambiguities, defective provisions, errors, mistakes or omissions), which amendments, in the opinion of the Trustees, are necessary or desirable and not prejudicial to the Unitholders;
  - (iv) amendments of a minor or clerical nature or to correct typographical mistakes, ambiguities or manifest omissions or errors, which amendments, in the opinion of the Trustees, are necessary or desirable and not prejudicial to the Unitholders; and
  - (v) amendments which, in the opinion of the Trustees, are necessary or desirable as a result of changes in taxation or other laws or accounting standards from time to time which may affect the Trust or the Unitholders.

The Trustees, the Trust and the Unitholders agree that any Unitholder may apply to a Court for an order setting aside any such amendment on the grounds that it does not fall within clauses (i) to (v) above.

### 3. Compulsory Acquisitions

#### A. CBCA provision (sections 206 and 206.1)

**206.** (1) *The definitions in this subsection apply in this Part.*

*“dissenting offeree” means, where a take-over bid is made for all the shares of a class of shares, a holder of a share of that class who does not accept the take-over bid and includes a subsequent holder of that share who acquires it from the first mentioned holder;*

*“offer” includes an invitation to make an offer.*

*“offeree” means a person to whom a take-over bid is made.*

*“offeree corporation” means a distributing corporation whose shares are the object of a take-over bid.*

*“offeror” means a person, other than an agent or mandatary, who makes a take-over bid, and includes two or more persons who, directly or indirectly,*

*(a) make take-over bids jointly or in concert; or*

*(b) intend to exercise jointly or in concert voting rights attached to shares for which a take-over bid is made.*

*“share” means a share, with or without voting rights, and includes*

*(a) a security currently convertible into such a share; and*

*(b) currently exercisable options and rights to acquire such a share or such a convertible security.*

*“take-over bid” means an offer made by an offeror to shareholders of a distributing corporation at approximately the same time to acquire all of the shares of a class of issued shares, and includes an offer made by a distributing corporation to repurchase all of the shares of a class of its shares.*

*(2) If within one hundred and twenty days after the date of a take-over bid the bid is accepted by the holders of not less than ninety per cent of the shares of any class of shares to which the take-over bid relates, other than shares held at the date of the take-over bid by or on behalf of the offeror or an affiliate or associate of the offeror, the offeror is entitled, on complying with this section, to acquire the shares held by the dissenting offerees.*

*(3) An offeror may acquire shares held by a dissenting offeree by sending by registered mail within sixty days after the date of termination of the take-over bid and in any event within one hundred and eighty days after the date of the take-over bid, an offeror's notice to each dissenting offeree and to the Director stating that*

*(a) the offerees holding not less than ninety per cent of the shares to which the bid relates accepted the take-over bid;*

*(b) the offeror is bound to take up and pay for or has taken up and paid for the shares of the offerees who accepted the take-over bid;*

*(c) a dissenting offeree is required to elect*

*(i) to transfer their shares to the offeror on the terms on which the offeror acquired the shares of the offerees who accepted the take-over bid, or*

*(ii) to demand payment of the fair value of the shares in accordance with subsections (9) to (18) by notifying the offeror within twenty days after receiving the offeror's notice;*

*(d) a dissenting offeree who does not notify the offeror in accordance with subparagraph (5)(b)(ii) is deemed to have elected to transfer the shares to the offeror on the same terms that the offeror acquired the shares from the offerees who accepted the take-over bid; and*

*(e) a dissenting offeree must send their shares to which the take-over bid relates to the offeree corporation within twenty days after receiving the offeror's notice.*

*(4) Concurrently with sending the offeror's notice under subsection (3), the offeror shall send to the offeree corporation a notice of adverse claim in accordance with section 78 with respect to each share held by a dissenting offeree.*

*(5) A dissenting offeree to whom an offeror's notice is sent under subsection (3) shall, within twenty days after receiving the notice,*

*(a) send the share certificates of the class of shares to which the take-over bid relates to the offeree corporation; and*

*(b) elect*

*(i) to transfer the shares to the offeror on the terms on which the offeror acquired the shares of the offerees who accepted the take-over bid, or*

*(ii) to demand payment of the fair value of the shares in accordance with subsections (9) to (18) by notifying the offeror within those twenty days.*

*(5.1) A dissenting offeree who does not notify the offeror in accordance with subparagraph (5)(b)(ii) is deemed to have elected to transfer the shares to the offeror on*



*the same terms on which the offeror acquired the shares from the offerees who accepted the take-over bid.*

*(6) Within twenty days after the offeror sends an offeror's notice under subsection (3), the offeror shall pay or transfer to the offeree corporation the amount of money or other consideration that the offeror would have had to pay or transfer to a dissenting offeree if the dissenting offeree had elected to accept the take-over bid under subparagraph (5)(b)(i).*

*(7) The offeree corporation is deemed to hold in trust for the dissenting shareholders the money or other consideration it receives under subsection (6), and the offeree corporation shall deposit the money in a separate account in a bank or other body corporate any of whose deposits are insured by the Canada Deposit Insurance Corporation or guaranteed by the Quebec Deposit Insurance Board, and shall place the other consideration in the custody of a bank or such other body corporate.*

*(7.1) A corporation that is an offeror making a take-over bid to repurchase all of the shares of a class of its shares is deemed to hold in trust for the dissenting shareholders the money and other consideration that it would have had to pay or transfer to a dissenting offeree if the dissenting offeree had elected to accept the take-over bid under subparagraph (5)(b)(i), and the corporation shall, within twenty days after a notice is sent under subsection (3), deposit the money in a separate account in a bank or other body corporate any of whose deposits are insured by the Canada Deposit Insurance Corporation or guaranteed by the Quebec Deposit Insurance Board, and shall place the other consideration in the custody of a bank or such other body corporate.*

*(8) Within thirty days after the offeror sends a notice under subsection (3), the offeree corporation shall*

*(a) if the payment or transfer required by subsection (6) is made, issue to the offeror a share certificate in respect of the shares that were held by dissenting offerees;*

*(b) give to each dissenting offeree who elects to accept the take-over bid terms under subparagraph (5)(b)(i) and who sends share certificates as required by paragraph (5)(a) the money or other consideration to which the offeree is entitled, disregarding fractional shares, which may be paid for in money; and*

*(c) if the payment or transfer required by subsection (6) is made and the money or other consideration is deposited as required by subsection (7) or (7.1), send to each dissenting shareholder who has not sent share certificates as required by paragraph (5)(a) a notice stating that*

*(i) the dissenting shareholder's shares have been cancelled,*



*(ii) the offeree corporation or some designated person holds in trust for the dissenting shareholder the money or other consideration to which that shareholder is entitled as payment for or in exchange for the shares, and*

*(iii) the offeree corporation will, subject to subsections (9) to (18), send that money or other consideration to that shareholder without delay after receiving the shares.*

*(9) If a dissenting offeree has elected to demand payment of the fair value of the shares under subparagraph (5)(b)(ii), the offeror may, within twenty days after it has paid the money or transferred the other consideration under subsection (6), apply to a court to fix the fair value of the shares of that dissenting offeree.*

*(10) If an offeror fails to apply to a court under subsection (9), a dissenting offeree may apply to a court for the same purpose within a further period of twenty days.*

*(11) Where no application is made to a court under subsection (10) within the period set out in that subsection, a dissenting offeree is deemed to have elected to transfer their shares to the offeror on the same terms that the offeror acquired the shares from the offerees who accepted the take-over bid.*

*(12) An application under subsection (9) or (10) shall be made to a court having jurisdiction in the place where the corporation has its registered office or in the province where the dissenting offeree resides if the corporation carries on business in that province.*

*(13) A dissenting offeree is not required to give security for costs in an application made under subsection (9) or (10).*

*(14) On an application under subsection (9) or (10)*

*(a) all dissenting offerees referred to in subparagraph (5)(b)(ii) whose shares have not been acquired by the offeror shall be joined as parties and are bound by the decision of the court; and*

*(b) the offeror shall notify each affected dissenting offeree of the date, place and consequences of the application and of their right to appear and be heard in person or by counsel.*

*(15) On an application to a court under subsection (9) or (10), the court may determine whether any other person is a dissenting offeree who should be joined as a party, and the court shall then fix a fair value for the shares of all dissenting offerees.*

*(16) A court may in its discretion appoint one or more appraisers to assist the court to fix a fair value for the shares of a dissenting offeree.*

*(17) The final order of the court shall be made against the offeror in favour of each dissenting offeree and for the amount for the shares as fixed by the court.*

*(18) In connection with proceedings under this section, a court may make any order it thinks fit and, without limiting the generality of the foregoing, it may*

*(a) fix the amount of money or other consideration that is required to be held in trust under subsection (7) or (7.1);*

*(b) order that that money or other consideration be held in trust by a person other than the offeree corporation;*

*(c) allow a reasonable rate of interest on the amount payable to each dissenting offeree from the date they send or deliver their share certificates under subsection (5) until the date of payment; and*

*(d) order that any money payable to a shareholder who cannot be found be paid to the Receiver General and subsection 227(3) applies in respect thereof.*

**206.1** *(1) If a shareholder holding shares of a distributing corporation does not receive an offeror's notice under subsection 206(3), the shareholder may*

*(a) within ninety days after the date of termination of the take-over bid, or*

*(b) if the shareholder did not receive an offer pursuant to the take-over bid, within ninety days after the later of*

*(i) the date of termination of the take-over bid, and*

*(ii) the date on which the shareholder learned of the take-over bid,*

*require the offeror to acquire those shares.*

*(2) If a shareholder requires the offeror to acquire shares under subsection (1), the offeror shall acquire the shares on the same terms under which the offeror acquired or will acquire the shares of the offerees who accepted the take-over bid.*

B. Suggested provision

### Compulsory Acquisitions

(a) For the purposes of this Section:

**“Dissenting Unitholder”** means, where an Take-Over Bid is made for all the Units of a class, a holder of a Unit of that class who does not accept the Take-Over Bid and includes a subsequent holder of that Unit who acquires it from the first mentioned holder;

**“Offer”** includes an invitation to make an offer;

“**Offeror**” means a person, other than an agent or mandatary, who makes a Take-Over Bid, and includes two or more persons who, directly or indirectly,

- (a) make the Take-Over Bid jointly or in concert; or
- (b) intend to exercise jointly or in concert voting rights attached to Units for which a Take-Over Bid is made; and

“**Take-Over Bid**” means an Offer made by an Offeror to Unitholders at approximately the same time to acquire all of the Units of a class of issued Units (other than Units held by or on behalf of the Offeror or an affiliate or associate of the Offeror), and includes an offer made by the Trust to repurchase all of the Units of a class of its Units;

“**Unit**” includes:

- (a) a security currently convertible into a Unit; and
  - (b) currently exercisable options and rights to acquire a Unit or such a convertible security.
- (b) If within 120 days after the date of a Take-Over Bid the Take-Over Bid is accepted by holders of not less than 90% of the Units of any class of Units to which the Take-Over Bid, relates other the Units held at the date of the Take-Over Bid by or on behalf of the Offeror or an affiliate or associate of the Offeror, the Offeror is entitled, on complying with this Section, to acquire the Units held by Dissenting Unitholders.
- (c) An Offeror may acquire Units held by a Dissenting Unitholder by sending by registered mail within sixty days after the date of termination of the Take-Over Bid and in any event within one hundred and eighty days after the date of the Take-Over Bid, a notice (an “**Offeror’s Notice**”) to each Dissenting Unitholder stating that:
- (i) Unitholders holding not less than ninety per cent of the Units to which the Take-Over Bid relates accepted the Take-Over Bid;
  - (ii) the Offeror is bound to take up and pay for or has taken up and paid for the Units of the Unitholders who accepted the Take-Over Bid;
  - (iii) a Dissenting Unitholder is required to elect:
    - (A) to transfer its Units to the Offeror on the terms on which the Offeror acquired the Units of the Unitholders who accepted the Take-Over Bid, or

- (B) to demand payment of the fair value of the Units in accordance with subsections (k) to (t) by notifying the Offeror within twenty days after receiving the Offeror's Notice;
- (iv) a Dissenting Unitholder who does not notify the Offeror in accordance with subsection (e)(ii)(B) is deemed to have elected to transfer the Units to the Offeror on the same terms that the Offeror acquired the Units from the Unitholders who accepted the Take-Over Bid; and
- (v) a Dissenting Unitholder must send its certificates representing Units to which the Take-Over Bid relates to the Trust within twenty days after receiving the Offeror's Notice.
- (d) Concurrently with sending the Offeror's Notice, the Offeror shall send to the Trust a notice of adverse claim with respect to each Unit held by a Dissenting Unitholder.
- (e) A Dissenting Unitholder to whom an Offeror's Notice is sent shall, within twenty days after receiving the Offeror's Notice:
  - (i) send the certificates representing the Units of the class of Units to which Take-Over Bid relates to the Trust; and
  - (ii) elect
    - (A) to transfer the Units to the Offeror on the terms on which the Offeror acquired the Units of the Unitholders who accepted the Take-Over Bid, or
    - (B) to demand payment of the fair value of the shares in accordance with subsections (k) to (t) by notifying the Offeror within those twenty days.
- (f) A Dissenting Unitholder who does not notify the Offeror in accordance with subsection (e)(ii)(B) is deemed to have elected to transfer the Units to the Offeror on the same terms on which the Offeror acquired the Units from the Unitholders who accepted the Take-Over Bid.
- (g) Within twenty days after the Offeror sends an Offeror's Notice, the Offeror shall pay or transfer to the Trust the amount of money or other consideration that the Offeror would have had to pay or transfer to a Dissenting Unitholder if the Dissenting Unitholder had elected to accept the Take-Over Bid under subsection (e)(ii)(A).
- (h) The Trust is deemed to hold in trust for the Dissenting Unitholders the money or other consideration it receives under subsection (g), and the Trust shall deposit the money in a separate account in a bank or other body corporate any of whose deposits are insured by the Canada Deposit Insurance Corporation or guaranteed

by the Quebec Deposit Insurance Board, and shall place the other consideration in the custody of a bank or such other body corporate.

- (i) If the Trust is the Offeror, it is deemed to hold in trust for the Dissenting Unitholders the money and other consideration that it would have had to pay or transfer to a Dissenting Unitholder if the Dissenting Unitholder had elected to accept the Take-Over Bid under subsection (e)(ii)(A), and the Trust shall, within twenty days after the Offeror's Notice is sent, deposit the money in a separate account in a bank or other body corporate any of whose deposits are insured by the Canada Deposit Insurance Corporation or guaranteed by the Quebec Deposit Insurance Board, and shall place the other consideration in the custody of a bank or such other body corporate.
- (j) Within thirty days after the Offeror sends an Offeror's Notice, the Trust shall:
  - (i) if the payment or transfer required by subsection (g) is made, issue to the Offeror a Unit certificate in respect of the Units that were held by Dissenting Unitholders;
  - (ii) give to each Dissenting Unitholder who elects to accept the Take-Over Bid under subsection (e)(ii)(A) and who sends Unit certificates as required by subsection (e)(i) the money or other consideration to which the Unitholder is entitled, disregarding fractional Units, which may be paid for in money; and
  - (iii) if the payment or transfer required by subsection (g) is made and the money or other consideration is deposited as required by subsection (h) or (i), send to each Dissenting Unitholder who has not sent Unit certificates as required by subsection (e)(i) a notice stating that:
    - (A) the Dissenting Unitholder's Units have been cancelled;
    - (B) the Trust or some designated person holds in trust for the Dissenting Unitholder the money or other consideration to which that Unitholder is entitled as payment for or in exchange for the Units; and
    - (C) the Trust will, subject to subsections (k) to (t), send that money or other consideration to that shareholder without delay after receiving the shares.
- (k) If a Dissenting Unitholder has elected to demand payment of the fair value of the shares under subsection (e)(ii)(B), the Trustees, the Trust and the Unitholders agree that the Offeror may, within twenty days after it has paid the money or transferred the other consideration under subsection (g), apply to a Court to fix the fair value of the Units of that Dissenting Unitholder.

- (l) If an Offeror fails to apply to a Court under subsection (k), a Dissenting Unitholder may apply to a Court for the same purpose within a further period of twenty days.
- (m) Where no application is made to a Court under subsection (l) within the period set out in that subsection, a Dissenting Unitholder is deemed to have elected to transfer their Units to the Offeror on the same terms that the Offeror acquired the Units from the Unitholders who accepted the Take-Over Bid.
- (n) The Trustees, the Trust and the Unitholders agree that the Court where an application under subsection (k) or (l) may be made is the Court defined in Section <\*> [Note: reference the section where the definition in A.1.A(c) appears].
- (o) The Trustees, the Trust and the Unitholders agree that a Dissenting Unitholder is not required to give security for costs in an application made under subsection (k) or (l).
- (p) The Trustees, the Trust and the Unitholders agree that, on an application under subsection (k) or (l):
  - (i) all Dissenting Unitholders referred to in subsection (e)(ii)(B) whose Units have not been acquired by the Offeror shall be joined as parties and are bound by the decision of the Court; and
  - (ii) the Offeror shall notify each affected Dissenting Unitholder of the date, place and consequences of the application and of their right to appear and be heard in person or by counsel.
- (q) The Trustees, the Trust and the Unitholders agree that, on an application to a Court under subsection (k) or (l), the Court may determine whether any other person is a Dissenting Unitholder who should be joined as a party, and the Court shall then fix a fair value for the Units of all Dissenting Unitholders.
- (r) The Trustees, the Trust and the Unitholders agree that a Court may in its discretion appoint one or more appraisers to assist the Court to fix a fair value for the Units of a Dissenting Unitholder.
- (s) The Trustees, the Trust and the Unitholders agree that the final order of the Court shall be made against the Offeror in favour of each Dissenting Unitholder and for the amount for the Units as fixed by the Court.
- (t) The Trustees, the Trust and the Unitholders agree that, in connection with proceedings under this Section, a Court may make any order it thinks fit and, without limiting the generality of the foregoing, it may
  - (i) fix the amount of money or other consideration that is required to be held in trust under subsection (g) or (i);

- (ii) order that that money or other consideration be held in trust by a person other than the Trust;
- (iii) allow a reasonable rate of interest on the amount payable to each Dissenting Unitholder from the date they send or deliver their Unit certificates under subsection (e) until the date of payment; and
- (iv) order that any money payable to a Unitholder who cannot be found be paid to the Receiver General.
- (u) If a Unitholder does not receive an Offeror's Notice, the Unitholder may:
  - (i) within ninety days after the date of termination of the Take-Over Bid, or
  - (ii) if the Unitholder did not receive an offer pursuant to the Take-Over Bid, within ninety days after the later of:
    - (A) the date of termination of the Take-Over Bid, and
    - (B) the date on which the Unitholder learned of the Take-Over Bid,require the Offeror to acquire those Units.
- (v) If a Unitholder requires the Offeror to acquire Units under subsection (u), the Offeror shall acquire the Units on the same terms under which the Offeror acquired or will acquire the Units of the Unitholders who accepted the Take-Over Bid.