SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

N°: 500-11-059267-209
DATE : July 21, 2021

PRESIDING: THE HONOURABLE BRIAN RIORDAN, J.S.C.

ÉLÉMENT AI INC.
Applicant/Respondent

v.

SERVICENOW CANADA INC.
-and-
SERVICENOW, INC.
-and-
RÉAL INVESTMENT MANAGEMENT INC.
-and-
THE DIRECTOR APPOINTED PURSUANT TO THE CBCA
Impleaded Parties/Respondents

and

THE LOGIC INC.
Intervenor/Petitioner

JUDGMENT ON A MOTION TO TERMINATE A SEALING ORDER ON EXHIBITS

THE ISSUES

[1] This case initially raised two principal questions relating to confidentiality orders in civil proceedings, being:

- May an interested third party obtain access to exhibits filed in court where a final judgment has been rendered in the file and the exhibits have been validly removed from the court file by the parties?
- May the Respondents continue to benefit from the protection accorded by the confidentiality order rendered in the final judgment in the present file?

[2] After the close of the hearing, several events occurred that opened new vistas in the proceedings.

[3] First, shortly after the trial, the Supreme Court rendered its five-judges-to-four decision in the file of *MediaQMI Inc.* v*. Kamal* ("**QMI**")[1], a judgment appearing to be directly on point. There, the majority held that a party may remove its exhibits from the court record even after a third party has applied for access thereto. The four dissenting judges, including two of the three judges from Québec, would have imposed a stay on the right to remove exhibits in the face of a pending access application.

[4] Whether one applies the majority's position in QMI or the more nuanced one of the minority, the result would be a summary dismissal of Petitioner's motion in the present file. Respondent urges us to follow this precedent.

[5] At the time the lawyers filed their supplementary arguments dealing with QMI, the Court raised a second matter that tended to cloud the issue in this particular instance: the concept raised in the third paragraph of article 108 of the Code of Civil Procedure relating to the question of documents made enforceable by a judgment. In light of the terms of the Final Judgment, this issue merits analysis.

[6] Adhering to the "*jamais deux sans trois*" rule, a third new issue arose in the form of another newly-delivered decision of the Supreme Court in the matter of *Sherman (Succession)* v*. Donovan*[2]. There, the court re-examined the criteria for granting a request for a sealing order in a court file.

FACTUAL BACKGROUND

[7] By judgment dated January 4, 2021, the Superior Court approved a plan of arrangement whereby, *inter alia*, ServiceNow Canada Inc. acquired all the issued and outstanding shares of Élément AI Inc. (the "**Final Judgment**"). There was no appeal of the Final Judgment, which contains the following key conclusion as far as the arrangement is concerned:

> **DECLARES** that **the Arrangement as set forth in the Arrangement Agreement and the Plan of Arrangement, in Exhibit R-1**[3] (with such amendments thereto as the Company or the Shareholders may advise are necessary or desirable) **is hereby approved** and **ORDERS** that **the Arrangement will take effect in accordance with the terms of the Plan of Arrangement** on the Effective Date, as defined therein.

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1 2021 SCC 23.

2 2021 SCC 25.

3 This conclusion indicates that the Plan of Arrangement is included in the Arrangement Agreement, however, paragraph 41 of the Originating Application, as reproduced in Appendix A to the present judgment, leads to believe that the Plan of Arrangement is found in Appendix C to the Circular, being Exhibit R-2. Nevertheless, it is only Exhibit R-1 that is homologated by the Final Judgment.

(The Court's emphasis)

[8] The conclusion of the Final Judgment with respect to the confidentiality issue is the following:

> **ORDERS** that Exhibits R-1, R-2, R-5, R-6, R-8, R-10, R-12, R-13, R-16 and R-17 to the Application, produced under seal of confidentiality, shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and **shall only be opened upon further Order of the Court**.
>
> (The Court's emphasis)

[9] The Applicant here ("**TLI**") describes itself as a Canadian subscription news service, founded in 2018, with a commitment to providing in-depth reporting on "the innovation economy". It is admitted that TLI is a news medium.

[10] Élément AI describes itself as an artificial intelligence company based in Montreal specialized in providing large organizations with unparalleled access to cutting-edge technologies. The ServiceNow parties ("**ServiceNow**") describe their activities primarily as operating a cloud computing platform helping companies manage digital workflows for enterprise operations. It thus seems fair to say that the merger of Élément AI into ServiceNow would qualify as being of interest to "the innovation economy".

[11] In this context, TLI petitions the Court to terminate the sealing order granted in the Final Judgment with respect to ten exhibits (the "**Contested Exhibits**"). They are described as follows:

PIÈCES VISÉES PAR ORDONNANCES DE MISES SOUS SCELLÉS	
COTE	**DESCRIPTION**
R-1	Arrangement Agreement dated November 28, 2020
R-2	Management Information Circular dated December 13, 2020
R-5	Form of Letter of transmittal
R-6	Letter from the President, Chief Executive Officer of the Company to Shareholders
R-8	Pro forma unaudited consolidated balance sheet dated December 2, 2020 and audited financial statements dated January 31, 2020, (en liasse)
R-10	Final Management Proxy Circular to the shareholders
R-12	Final Letter of Transmittal
R-13	Final Letter from the President to the Shareholders
R-16	Dissent notice (by a shareholder)

PIÈCES VISÉES PAR ORDONNANCES DE MISES SOUS SCELLÉS	
COTE	**DESCRIPTION**
R-17	Scrutineer's report on shareholders' attendance

[12] TLI's request butts up against two obstacles: the Contested Exhibits were not in the file at the time of TLI's motion, and, moreover, they had never been physically in the file, whether in paper or electronic form. The parties proceeded solely in electronic format with respect to all exhibits and never deposited copies into the court record.

THE EFFECT OF THE QMI DECISION

[13] Given the absence of the Contested Exhibits from the court record, coupled with the majority position in QMI, TLI's not unreasonable argument about the timing of Element AI's May 11, 2021 request to remove the exhibits is doomed to fail. Although that request came nearly two months after TLI served its present motion, the majority in QMI would not attribute any importance to that and would refuse access.

[14] It is true that this Court favours the minority's view in QMI, which would bar the removal of the documents when litigation on the point is pending, as was the case here, but that holds little sway and does not change the freshly-minted current state of the law. In any event, it is something of a moot point in the present case, since the Contested Exhibits never found their way into the record. In that light, the request by Element AI to remove them appears to be nothing more than an afterthought having no real impact on anything relevant to this matter.

[15] Be that as it may, other things being equal, QMI settles the initial questions in favour of Element AI and would result in a dismissal of TLI's motion. This said, other things do not appear to be equal in the present instance.

DOCUMENTS MADE ENFORCEABLE BY A JUDGMENT

[16] The third paragraph of article 108 of the Code of Civil Procedure, although not directly applicable here, stimulates serious thought about the treatment to be accorded to "documents made enforceable by a judgment", which is the status of Exhibit R-1 under the Final Judgment. That paragraph reads as follows:

108. […] However, **in reviewable or reassessable matters and, in non-contentious cases**, notices, certificates, minutes, inventories, medical and psychosocial evidence, affidavits, statements, declarations and **documents made enforceable by a judgment**, including any child support determination form	**108.** Toutefois, **dans les matières susceptibles de révision ou de réévaluation ainsi que, dans les affaires non contentieuses**, les avis, les procès-verbaux, les inventaires, les preuves médicales et psychosociales, les déclarations et **les documents rendus exécutoires par le prononcé d'un jugement**, y compris le cas échéant le formulaire de fixation des pensions

attached to a judgment, **cannot be removed from the record or destroyed.** (The Court's emphasis)	alimentaires pour enfants qui y est joint, **ne doivent être ni retirés ni détruits.** (The Court's emphasis)

[17] Admittedly, as noted, this provision would not apply in the present instance, since this is not a reviewable or reassessable matter or a non-contentious case. Nevertheless, it seems unavoidably logical that documents made enforceable or homologated by a judgment should always be found in the court dossier, whatever the type of file. Otherwise, how is one to know what is to be enforced? Their absence leaves a body without a head[4].

[18] In fact, the Code of Civil Procedure does support this position, although it takes two articles to arrive at the result: articles 528 and 334. They read as follows:

528. L'homologation est l'approbation par un tribunal d'un acte juridique de la nature d'une décision ou d'une entente. Elle confère à l'acte homologué la force exécutoire qui se rattache à un jugement de ce tribunal. […]	**528.** Homologation is approval by a court of a juridical act in the nature of a decision or of an agreement. It gives the homologated act the same force and effect as a judgment of the court. […]
334. Le jugement daté et signé par celui qui l'a rendu est un acte authentique. Il est déposé au greffe et inscrit sans délai dans les registres, sous la date qu'il porte. **Il est conservé dans les archives du tribunal**.	**334.** A judgment dated and signed by the person who rendered it is an authentic act. It is deposited at the court office and entered without delay in the registers under the date appearing on it. **It is kept in the court records**. (The Court's emphasis)

[19] Thus, pursuant to article 528, a homologated act has the same force and effect as a judgment and, pursuant to article 334, judgments are to be kept in the court records (in French: *conservé dans les archives du tribunal*). As noted by Justice André Forget in a 1992 judgment, agreements homologated by a judgment, in that case an agreement on corollary relief in a divorce, "*deviennent partie intégrante du jugement*".

[20] Thus, Exhibit R-1 is an integral part of the Final Judgment and must be kept in the court records. To respect that requirement, in this case it must be deposited into the record, something that was never done initially. By an amendment made pursuant to a notice from the Court pursuant to article 268 of the Code of Civil Procedure[5], TLI added the following conclusions to its Motion to Terminate Sealing Order:

> **ORDER** that all the exhibits sent to Justice Castonguay and Justice Corriveau in Court file 500-11-059267-209 be filed to court record (sic) by the court clerk.

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[4] Moreover, the missing head could well change faces, since the Final Judgment permits the Arrangement Agreement and the Plan of Arrangement to be amended "as the Company or the Shareholders may advise are necessary or desirable".

[5] The Court wrote the following message to TLI's attorney on July 13, 2021:
Je note que les conclusions de votre requête se limitent à demander que les sealing orders soient terminés en ce qui concerne des pièces. Puisqu'aucune pièce ne se trouve au dossier en ce moment, une possible décision de terminer les sealing orders n'aurait pas d'effet pratique en l'absence d'une ordonnance que lesdites pièces soient déposées en format papier. Pourtant, une telle ordonnance dans l'état actuel du dossier serait ultra petita. Qu'en dites-vous?

SUBSIDIARILY:

ORDER that all the exhibits sent to Justice Castonguay and Justice Corriveau in Court file 500-11-059267-209 be provided to the court clerk by the parties.

ORDER that a copy of Exhibits R-1, R-2, R-5, R-6, R-8, R-10, R-12, R-13, R-16 and R-17 filed in Court file 500-11-059267-209 be provided to the Intervenor by the court clerk

[21] ServiceNow objects on a number of points.

[22] First, it disputes the Court's right to point out there was no conclusion in TLI's motion to deal with the absence of the exhibits from the court record. TLI initially sought only a lifting of the sealing order, since it only learned of the absence of the exhibits at the hearing. The Court advised the parties that it felt that it was duty bound to point out this "procedural defect" in light of the interpretation given to article 268[6]. That is still the Court's position.

[23] Second, ServiceNow argues that the amendment, being injunctive in nature, changes the nature of the case and, pursuant to article 206 of the Code of Civil Procedure, should not be allowed. It argues: "An injunction against the court clerk and our client was never the nature of the procedure of the intervener The Logic, and that modification at this stage of the procedure is contrary to the interests of justice"**.**

[24] Article 206 permits amendments provided they do not delay the proceeding, are not contrary to the interests of justice and do not result in an entirely new application having no connection with the original one. In the Court's view, all of these criteria are met in the present case.

[25] Since there is no allegation that the amendment would delay the proceedings, we shall deal with the other two arguments.

[26] On the point that it would be contrary to the interests of justice, we cannot see how that would be the case. Since we find below that the sealing orders should be lifted, a judgment to that effect, without a conclusion providing for access to the documents, would have no practical effect. It would require TLI to make a further motion in order to complete the process. That is contrary to the objective of proportionality, as well as to common sense. The interests of justice are clearly served by allowing the issue to be dealt with in the present context.

[27] Finally, how can it be alleged that the amended application would have no connection with the original one? Once one learns that that documents are missing from the file, the next step seems obvious. Moreover, that point was argued by TLI's attorney at the hearing, without requesting to amend at that time. ServiceNow can hardly pretend to be taken by surprise.

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[6] Article 268 reads as follows :

268. À tout moment avant le jugement, le tribunal peut, dans les conditions qu'il fixe, signaler aux parties les lacunes de la preuve ou de la procédure et les autoriser à les combler.

268. At any time before judgment, the court may draw the parties' attention to any gap in the proof or procedural defect and permit the parties to remedy it, subject to the conditions it determines.

[28] The mere fact that the amended conclusions contain orders that ServiceNow qualifies as being of an injunctive nature does not result in an entirely new application. The objective of the original application was an order to terminate the sealing orders so that TLI might access the documents. That is similar in nature to the orders sought by the amendment, whether a conclusion in injunction is added or not. But that is not really the point.

[29] The issue in the original application is access to court exhibits. The amendment deals with access to the same documents. There is clearly a connection between the two. The fact that a type of injunctive order might be sought, although the amended conclusions seem to be more in the nature of instructions than injunctions, does not propel the proceeding into an entirely new domain foreign to the original application.

[30] The amendment is permitted.

[31] Accordingly, for these reasons, Exhibit R-1 must be filed into the record at this time, and the Court will order that it be produced and protected.

[32] Since Exhibit R-1 is the only document made enforceable by the Final Judgment, the other Contested Exhibits do not have the same status. Their fate is sealed by the ruling in QMI, with the result that TLI's motion in their regard will be refused. They need not be filed into the court record at this time, which makes the issue of the sealing order moot as far as they are concerned.

THE RIGHT TO A SEALING ORDER

[33] That said, this only partly settles the question with respect to Exhibit R-1. There remains to be determined whether the confidentiality order with respect to it should stand. On that, Article 11 of the Code of Civil Procedure edicts that "(c)ivil justice administered by the courts is public. Anyone may … have access to court records and entries in the registers of the courts. It is article 12 that is of interest for present purposes and it sets the bar at public order for justifying exceptions to the general rule, giving as examples "the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests"[7].

[34] The Supreme Court has rendered a number of decisions exploring the possibility of permitting exceptions to the general rule of openness, starting with *Dagenais*[8] and *Mentuck*[9]

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12. Le tribunal peut faire exception au principe de la publicité s'il considère que l'ordre public, notamment la protection de la dignité des personnes concernées par une demande, ou la protection d'intérêts légitimes importants exige que l'audience se tienne à huis clos, que soit interdit ou restreint l'accès à un document ou la divulgation ou la diffusion des renseignements et des documents qu'il indique ou que soit assuré l'anonymat des personnes concernées.	**12.** The court may make an exception to the principle of open proceedings if, in its opinion, public order, in particular the preservation of the dignity of the persons involved or the protection of substantial and legitimate interests, requires that the hearing be held in camera, that access to a document or the disclosure or circulation of information or documents specified by the court be prohibited or restricted, or that the anonymity of the persons involved be protected.

8 *Dagenais c. Société Radio-Canada* [1994] 3 SCR 835 ("**Dagenais**").

9 *R. c. Mentuck* [2001] 3 SCR 442 ("**Mentuck**").

in criminal matters, later adapted to civil/commercial matters in *Sierra Club*[10], and quite recently reconsidered in *Sherman*[11].

[35] In *Sierra Club*, Iacobucci J., for the court, took guidance from Binnie J.'s earlier statement to the effect that "the open court rule only yields 'where the public interest in confidentiality outweighs the public interest in openness'"[12]. Referring to *Dagenais* and indirectly to *Mentuck*, he saw a two-stage test for deciding whether a confidentiality order should be granted:

> (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and
>
> (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.[13]

[36] He goes on to qualify the term "important commercial interest" in the following terms: "the interest in question cannot merely be specific to the party requesting the order; the interest must be one which can be expressed in terms of a public interest in confidentiality … Simply put, if there is no general principle at stake, there can be no "important commercial interest" for the purposes of this test".[14]

[37] Reminding us that a confidentiality order involves an infringement on freedom of expression, he reiterates the importance of the open court rule and of seeking reasonably alternative measures to the order and of restricting it as much as is reasonably possible while preserving the commercial interest in question[15].

[38] Quite recently, in *Sherman*, the Supreme Court again underlined the importance of protecting "the open court principle"[16] and went on to redefine, but not intrinsically alter, the *Sierra Club* test. Justice Kasirer, writing for a unanimous court, stated:

> [38] The test for discretionary limits on presumptive court openness has been expressed as a two-step inquiry involving the necessity and proportionality of the proposed order (*Sierra Club*, at para. 53). Upon examination, however, this test rests upon three core prerequisites that a person seeking such a limit must show. Recasting the test around these three prerequisites, without altering its essence, helps to clarify the burden on an applicant seeking an exception to the open court principle. In order to succeed, the person asking a court to exercise discretion in a way that limits the open court presumption must establish that:
>
> (1) court openness poses a serious risk to an important public interest;

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10 *Sierra Club du Canada c. Canada (Ministre des Finances)* [2002] 2 S.C.R. 522 ("**Sierra Club**").
11 *Sherman* v. *Donovan*, 2021 SCC 25, rendered on June 11, 2021.
12 *F.N. (Re)*, [2000] 1 S.C.R. 880, 2000 SCC 35, at par. 10.
13 *Op. cit.*, Note 10, par. 53.
14 *Op. cit.*, Note 10, par. 55.
15 *Op. cit.*, Note 10, pars. 56 and 57.
16 *Op. cit.*. Note 11, par. 39.

> (2) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (3) as a matter of proportionality, the benefits of the order outweigh its negative effects.
>
> Only where all three of these prerequisites have been met can a discretionary limit on openness — for example, a sealing order, a publication ban, an order excluding the public from a hearing, or a redaction order — properly be ordered. This test applies to all discretionary limits on court openness, subject only to valid legislative enactments (reference omitted).[17]

[39] The *Sierra Club* concept of "important commercial interest", which incorporates the notion of a public interest, appears undisturbed and maintains its relevance.

[40] In practice, where there is no contestation on the point, judges often accede to requests for sealing orders without undertaking a detailed analysis of the criteria applicable. In this instance, everything indicates that this was the case with respect to both the interim order and the Final Judgment. We note, however, that in both cases the judges tempered their orders by clarifying that the sealed documents "shall only be opened upon further Order (sic) of the Court". We thus see no impediment to our ruling on the issue at this time.

[41] Remembering that it was Element AI's burden in first instance, there is no evidence in the record to justify a sealing order. Moreover, it would have been a difficult burden to satisfy, whether under the *Sierra Club* or the *Sherman* test.

[42] Applying *Sherman*, the Court can see no public interest at risk, much less an important public interest. This is confirmed by the only allegation in the originating application (the "**Originating Application**") relevant to the issue, which reads:

> 72. In light of fact that the Company is and **<u>will remain a private company</u>**, and in light of **<u>the sensitive nature of the private commercial information communicated in certain exhibits</u>** hereto, the Company hereby seeks an order that Exhibits R-1, R-2, R-5, R-6 and R-8, to the Application, produced under seal of confidentiality, shall be sealed, kept confidential and not form part of the public record, but rather shall be placed, separate and apart from all other contents of the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order and shall only be opened upon further Order of the Court.
>
> (The Court's emphasis)

[43] It is thus admitted that the transaction in question is one between private parties. With nothing further alleged, there is thus no indication of a higher public concern being involved. The empty allegation that the "private commercial information communicated" is of a "sensitive nature", even had it been supported by evidence, falls far short of establishing a risk to an important public interest.

[44] As for reasonable alternative measures, Element AI's attorney ably argues that the Originating Application contains sufficient information about the transaction to satisfy normal curiosity. She cites paragraphs 40 and 41 thereof, which we reproduce in Appendix A to the present judgment.

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[17] *Ibid.*, par. 38.

[45] The Court does not deny that those paragraphs provide a general roadmap of the arrangement, but to understand where that road leads, it is necessary to refer to the Arrangement Agreement and the Plan of Arrangement for the actual details[18]. As such, paragraphs 40 and 41 do not say all that much and do not represent a reasonable alternative to an open court record.

[46] Finally, can it be said that the benefits of a confidentiality order here outweigh its negative effects on the openness of court proceedings? Hardly, especially in light of the fact that Exhibit R-1, the Arrangement Agreement and, presumably, the Plan of Arrangement[19], provide the actual content of the Final Judgment. As we note above, by hiding its terms, one decapitates the judgment.

[47] It is also relevant to point out that it is exceptional for a corporation to have to seek approval from the Superior Court for a contemplated transaction. Under section 192(3) of the *Canada Business Corporations Act*[20], this is done through a plan of arrangement, "(w)here it is not practicable for a corporation that is not insolvent to effect a fundamental change in the nature of an arrangement under any other provision of this Act". The parties in the Originating Application thus admit that they required the Superior Court's assistance in a public forum in order to proceed. That comes with certain consequences.

[48] For all these reasons, we shall lift the veil covering Exhibit R-1.

BASED ON THESE REASONS, THE COURT:

[49] **GRANTS in part** Petitioner's Motion to Terminate Sealing Orders;

[50] **DISMISSES** Petitioner's Motion to Terminate Sealing Orders with respect to all the exhibits there mentioned, except Exhibit R-1, being the Arrangement Agreement and the Plan of Arrangement;

[51] **ORDERS** the Respondent and the Impleaded Parties to produce a paper copy of Exhibit R-1 into the record of the present file and not to remove it;

[52] **ORDERS** that the sealing order issued in the final judgment in the present file is terminated for all legal purposes with respect to Exhibit R-1;

[53] **THE WHOLE,** with legal costs in favour of Intervenor/Petitioner, The Logic Inc.

Brian Riordan

Signature numérique de Brian Riordan
Date : 2021.07.21 13:20:00 -04'00'

BRIAN RIORDAN, J.S.C.

Mtre. Geneviève Gagnon
Attorney for Petitioner/Intervenor

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18 See paragraphs 41(a) through (h) of the Originating Application.
19 See footnote 3, above.
20 R.S.C., 1985, c. C-44, s. 192.

Mtre. Mélanie Martel
Attorney for Respondent

Hearing Dates: May 18, with final written arguments on June 23, 2021

APPENDIX A

B. Arrangement

40. Prior to the Effective Date, in connection with the Arrangement, the events described below will occur in the order set forth below:

    (a) as soon as reasonably practicable, the Applicant shall apply to the Court for the Interim Order providing for, among other things, the calling and holding of the Company Meeting pursuant to Section 192(4) of the CBCA in a manner and form acceptable to the Company and Acquiror, acting reasonably, and thereafter proceed with such application and diligently pursue obtaining the Interim Order;

    (b) convene and hold the Company Meeting for the purpose of considering the Arrangement Resolution (and for any other proper purpose as may be set out in the notice for such meeting), included as Appendix A of the Circular (**R-2**). To be effective, the Arrangement Resolution must be approved by at least 75% of the votes cast by Shareholders present in person or represented by proxy at the Company Meeting and entitled to vote thereat, holding each of the following classes of Shares, voting both together as a single class and separately as separate classes in the following proportions: (i) at least 50% of the votes cast by holders of Common Shares, (ii) at least 50% of the votes cast by holders of Class A Preferred Shares, (iii) at least 50% of the votes cast by holders of Class B Preferred Shares, (iv) at least 70% of Series B-1 Preferred Shares, and (v) at least 70% of Preferred Shares; and

    (c) subject to obtaining such approvals as are required by the Interim Order, as soon as reasonably practicable after the Company Meeting and, in any event, not later than two Business Days thereafter, the Applicant shall apply to the Court for the Final Order pursuant to Section 192(3) of the CBCA in a manner and form reasonably acceptable to the Company and Acquiror, acting reasonably and thereafter proceed with such application and diligently pursue obtaining the Final Order.

41. If the Final Order is obtained, subject to the satisfaction or waiver of the conditions set forth in the Arrangement Agreement (R-1), as soon as reasonably practicable thereafter, on the Effective Date, in connection with the Arrangement, the events described below will occur and shall be deemed to occur in the following sequence, in five-minute intervals, without any further actor formality, starting at the Effective Time:

    (a) the share capital of the Company will be amended in the way described in Schedule 1 of the Plan of Arrangement (Appendix C to the Circular, **R-2**);

    (b) the Terminated Agreements (as defined in the Plan of Arrangement, Appendix C to the Circular, **R-2**) will be terminated and will be of no further force or effect;

    (c) concurrently:

        (i) there shall be a number of exchanges of Preferred Shares of the Company occurring simultaneously;

(ii) the stated capital attached to such exchanged Shares shall be modified in accordance with formulas provided for in the Plan of Arrangement (Appendix C to the Circular, **R-2**);

(d) concurrently, the stated capital attached to certain Preferred Shares shall be modified in accordance with formulas provided for in the Plan of Arrangement (Appendix C to the Circular, **R-2**);

(e) concurrently, each Option or Convertible Note outstanding immediately prior to the Effective Time will be cancelled and extinguished for no consideration;

(f) concurrently, all outstanding Warrants will be deemed exercised for 99,574 Series B-3 Preferred Shares in the aggregate and each Warrant holder will be made an Indemnifying Party under the Arrangement Agreement (**R-1**);

(g) concurrently, all outstanding Shares will be transferred to the Acquiror, and each holder of Shares will be made an Indemnifying Party under the Arrangement Agreement (**R-1**);

(h) each New Restricted Share Unit held by a Continuing Party that is unexpired and outstanding as of the Effective Time is assumed by Parent, subject to certain conditions provided in the Plan of Arrangement (Appendix C to the Circular, **R-2**);

(i) an interest-free loan payable on demand is made by the Acquiror to the Company in an amount equal to the Special Bonus Amount;

(j) the Key Persons are entitled to receive the Special Bonus Amount from the Company, less applicable Taxes and other required deductions at source that are required to be withheld by the Company under Applicable Laws in respect of such payments;

(k) the stated capital in respect of all of the classes of shares of the Company shall be reduced to $1.00 in the aggregate without any repayment of capital in respect thereof;

(l) the Company and Acquiror are amalgamated and continued as one corporation ("**Amalco**") under Section 184(1) of the CBCA and from and after the effective time of the amalgamation in accordance with the following:

(i) Amalco will continue to be liable for all of the liabilities and obligations of Company and Acquiror;

(ii) all rights, contracts, permits and interests of Company and Acquiror will continue as rights, contracts, permits and interests of Amalco as if Company and Acquiror continued;

(iii) any existing cause of action, claim or liability prosecution will be unaffected;

(iv) Amalco will own and hold all property of Company and Acquiror and, without limiting the provisions hereof, all rights of creditors or others will be unimpaired by such amalgamation, and all liabilities and obligations of Company and

Acquiror, whether arising by contract or otherwise, may be enforced against Amalco to the same extent as if such obligations had been incurred or contracted by it; and

(v) the Articles of Arrangement filed to give effect to the Arrangement shall be deemed to be the articles of amalgamation of Amalco and the Certificate of Arrangement issued in respect of such Articles of Arrangement by the Director under the CBCA shall be deemed to be the certificate of amalgamation of Amalco.