

39 O.S.C.B. 9054
Ontario Securities Commission

Discovery Air Inc., Re

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**In the Matter of the Securities Legislation of Ontario (the "Jurisdiction")
and In the Matter of the Process for Exemptive Relief Applications in
Multiple Jurisdictions and In the Matter of Discovery Air Inc. (the "Filer")**

Naizam Kanji

Date: October 7, 2016

Reference: None

Subject: Securities

Headnote

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National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions and Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions -- exemption from the requirement to obtain separate minority approval from each class of affected securities in connection with a proposed related party transaction so that minority approval would be obtained from the affected classes of securities of the issuer voting together as a single class -- issuer is subject to the Canada Transportation Act and its dual-class share structure has been established solely to ensure that it is compliant with the foreign voting control restrictions in such legislation -- with the exception that one class may be beneficially owned and controlled, directly or indirectly, only by persons who are Canadians and the other class may be beneficially owned and controlled, directly or indirectly, only by persons who are not Canadians, the issuer's two classes of shares are the same in all other respects -- no difference in interest between the holders of each class of shares in connection with the proposed related party transaction -- requiring a class-by-class vote could give a *de facto* veto right to a very small group of shareholders -- exemption sought granted, subject to conditions, including that the issuer will otherwise comply with all of the requirements of MI 61-101 applicable to the proposed transaction.

Table of Authorities

Applicable Legislative Provisions

Multilateral Instrument, 61-101

8.1(1)

9.1(2)

Background

The principal regulator in the Jurisdiction has received an application from the Filer for a decision under the securities legislation of the principal regulator (the "*Legislation*") for an exemption from the requirement to obtain separate

minority approval from each class of affected securities of the Filer, as set out in Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* ("MI 61-101"), in respect of the Proposed Transaction (as defined below), which transaction constitutes a "related party transaction" for purposes of MI 61-101 (the "*Exemption Sought*").

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

- (a) the Ontario Securities Commission is the principal regulator for this application; and
- (b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* ("MI 11-102") is intended to be relied upon in Québec.

Interpretation

Terms defined in National Instrument 14-101 *Definitions*, MI 11-102, and MI 61-101 have the same meaning if used in this decision, unless otherwise defined. For the purpose of this decision, the following terms have the meaning ascribed to them hereinafter:

"CTA" shall mean *Canada Transportation Act*; and

"TSX" shall mean the Toronto Stock Exchange.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is governed by the *Canada Business Corporations Act*.
2. The Filer's head office is located at 170 Attwell Drive, Suite 370, Toronto, Ontario, M9W 5Z5.
3. The Filer is a reporting issuer in all of the provinces and territories of Canada. The Filer is not in default of its obligations under the securities legislation in any of the jurisdictions of Canada.
4. The Filer operates primarily in the aviation industry and is subject to the CTA, which requires that holders of licences to operate a domestic air service be "Canadian" within the meaning of the CTA. In order to ensure that the Filer is able to maintain its Canadian status under the CTA, the Filer has two classes of common shares: Class A common voting shares (the "*Class A Shares*") and Class B common voting shares (the "*Class B Shares*", and together with the Class A Shares, the "*Common Shares*"). This dual-class share structure has been established solely to ensure that the Filer is compliant with foreign voting control restrictions in the CTA.
5. Class A Shares may be beneficially owned and controlled, directly or indirectly, only by persons who are Canadians, and Class B Shares may be beneficially owned or controlled, directly or indirectly, only by persons who are not Canadians. With the exception of this distinction, Class A Shares and Class B Shares of the Filer are the same in all other respects, including the right to receive dividends, if any, the right to vote, and the right to receive the property and assets of the Filer in the event of dissolution, liquidation, or winding-up of the Filer.
6. An investor does not control or choose which class of Common Shares it acquires and holds. There are no unique features of either class of Common Shares which an existing or potential investor can choose to acquire, exercise or dispose of. The class of Common Shares that an investor can acquire ultimately depends only on the investor's Canadian or non-Canadian status. Moreover, if after having acquired Common Shares a holder's Canadian or non-Canadian status changes, the Common Shares will convert accordingly and automatically, without formality or regard to any other consideration.

7. As at October 1, 2016, the Filer's outstanding share capital consisted of 79,286,721 Class A Shares (representing approximately 96.7% of all Common Shares) and 2,710,754 Class B Shares (representing approximately 3.3% of all Common Shares). The Class A Shares are listed for trading on the TSX.
8. The Filer entered into a definitive agreement (the "*Agreement*") with MAG DS Corp., MAG Holdings Canada Corp. and 2531599 Ontario Limited (together, the "*Buyers*" and each a "*Buyer*") to sell its wholly-owned subsidiary, Discovery Air Fire Services Inc., for consideration of approximately \$15.4 million (the "*Proposed Transaction*"). After the completion of the Proposed Transaction, the Filer will operate its business and remaining divisions in the ordinary course, and will continue its activities as a reporting issuer.
9. The Proposed Transaction will constitute a related party transaction because certain funds or co-investors of Clairvest Group Inc. (collectively, "*Clairvest*"), a related party of the Filer, are substantial direct or indirect shareholders in the Buyers.
10. As a related party transaction, the Filer must, *inter alia*, obtain a formal valuation of its wholly-owned subsidiary being sold pursuant to the Agreement and obtain minority approval for the Proposed Transaction.
11. Pursuant to subsection 8.1(1) of MI 61-101, the Proposed Transaction must be approved by a majority of the votes cast by the holders of Class A Shares and the Class B Shares, in each case voting separately as a class, excluding the votes attached to the Class A Shares and Class B Shares, respectively, by any party specified in subsection 8.1(2) of MI 61-101 (such excluded holders, each, an "*Interested Party*"). The only Interested Party in respect of the Proposed Transaction is Clairvest.
12. As at October 1, 2016, Clairvest owns, controls or directs, directly or indirectly, 64,539,293 Class A Shares and 1,883,313 Class B Shares, representing approximately 81.4% of the Class A Shares and approximately 69.5% of the Class B Shares (representing, together, approximately 81.0% of all voting rights attached to the issued and outstanding Common Shares).
13. As of October 1, 2016, the holders of Class B Shares (other than the Interested Party) held approximately 827,441 Class B Shares (representing approximately 1% of the votes attaching to the Common Shares). A separate vote for the holders of Class B Shares would have the effect of granting disproportionate importance to a small group of holders of Common Shares, as holders of approximately 413,721 Class B Shares (representing approximately 0.5% of all voting rights attached to the Common Shares, and approximately 2.7% of all voting rights attached to the Common Shares (excluding those Common Shares held by the Interested Party)) could have the power to "veto" the Proposed Transaction.
14. The Proposed Transaction does not terminate the interests of holders of Class A Shares and/or Class B Shares, nor does it affect the holders of Class A Shares and Class B Shares in any different manner.
15. The Proposed Transaction is subject to a number of mechanisms to ensure that the interests of all holders of Common Shares are protected, including:
 - (i) the creation of a special committee of three independent directors (the "*Special Committee*") by the Filer in order to negotiate and review the terms and conditions of the Proposed Transaction with their advisors and to make a recommendation to the Filer's board of directors. The Special Committee met ten times prior to the Filer entering into the Agreement and, following an extensive negotiation and review process, unanimously recommended that holders of Common Shares approve the Proposed Transaction, which recommendation was unanimously approved by the Filer's board of directors;
 - (ii) the calling and holding of a special meeting of all holders of Common Shares in order to consider and, if deemed advisable, approve the Proposed Transaction by a majority of votes cast by holders of Common

Shares (excluding the votes attached to the Common Shares held by the Interested Party), voting together as single class;

(iii) the preparation and delivery of a management information circular prepared in accordance with applicable securities law requirements, including section 5.3 of MI 61-101, in order to provide shareholders with sufficient information to enable them to make an informed decision in respect of the Proposed Transaction;

(iv) the preparation and delivery of a fairness opinion and formal valuation in accordance with section 5.4 of MI 61-101; and

(v) that other than the requirement to obtain minority approval from the holders of Class A Shares and the holders of Class B Shares, each voting separately as a class, the Filer will comply with all of the requirements of MI 61-101 applicable to the Proposed Transaction

(together, the "*Safeguard Measures*").

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that all the Safeguard Measures (as defined in paragraph 15 of this Decision) are implemented and remain in place as described herein.

"Naizam Kanji"

Director, Office of Mergers & Acquisitions

Ontario Securities Commission