

SUPERIOR COURT

(Commercial Division)

(Sitting as a court designated pursuant to the *Companies' Creditors Arrangement Act*,
R.S.C. 1985, c. C-36)

C A N A D A
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL
Court No: 500-11-041305-117

IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF:

HOMBURG INVEST INC.
HOMBURG SHARECO INC.
CHURCHILL ESTATES DEVELOPMENT LTD.
INVERNESS ESTATES DEVELOPMENT LTD.
CP DEVELOPMENT LTD.

Debtors

and

SAMSON BÉLAIR/DELOITTE & TOUCHE INC.

Monitor/Petitioner

and

HOMCO REALTY FUND (52) LIMITED PARTNERSHIP
HOMCO REALTY FUND (88) LIMITED PARTNERSHIP
HOMCO REALTY FUND (89) LIMITED PARTNERSHIP
HOMCO REALTY FUND (92) LIMITED PARTNERSHIP
HOMCO REALTY FUND (94) LIMITED PARTNERSHIP
HOMCO REALTY FUND (105) LIMITED PARTNERSHIP
HOMCO REALTY FUND (121) LIMITED PARTNERSHIP
HOMCO REALTY FUND (122) LIMITED PARTNERSHIP
HOMCO REALTY FUND (142) LIMITED PARTNERSHIP
HOMCO REALTY FUND (199) LIMITED PARTNERSHIP

Mis-en-cause

and

CANMARC REAL ESTATE INVESTMENT TRUST (FORMERLY HOMBURG CANADA REAL ESTATE INVESTMENT TRUST), a real estate investment trust established under the laws of Quebec, having its head office at 1 Place Alexis Nihon, Suite 1010, in the City of Montreal, Province of Quebec, H3Z 3B8;

Respondent

**MOTION FOR DIRECTIONS IN RELATION TO SECURITY GRANTED IN FAVOUR OF
CANMARC REAL ESTATE INVESTMENT TRUST**

TO THE HONOURABLE LOUIS J. GOUIN J.S.C. OR TO ONE OF THE HONOURABLE JUDGES OF THE SUPERIOR COURT, SITTING IN COMMERCIAL DIVISION, IN AND FOR THE JUDICIAL DISTRICT OF MONTREAL:

I. **INTRODUCTION**

1. By the present Motion for directions in relation to security granted in favour of Canmarc Real Estate Investment Trust (formerly Homburg Canada Real Estate Investment Trust) ("**Canmarc REIT**") (the "**Motion for Directions**"), Samson Bélair / Deloitte & Touche Inc. in its capacity as court-appointed monitor (the "**Monitor**") under the *Companies' Creditors Arrangement Act* (the "**CCAA**") hereby requests directions of this honourable Court relating to a certain security granted by the Mis-en-cause Homco Realty Fund (199) Limited Partnership ("**Homco 199**") in favour of Canmarc REIT and, more particularly, with respect to certain funds being held in trust by Osler, Hoskin & Harcourt LLP ("**Osler**") relating to said security.

II. **THE RELEVANT AGREEMENTS AND DOCUMENTATION**

2. On May 25, 2010, in the context of the initial public offering of Canmarc REIT (then Homburg Canada Real Estate Investment Trust), a Master Purchase Agreement was entered into between Homburg Canada Real Estate Investment Trust Limited Partnership ("**Homburg REIT LP**"), as purchaser, and certain Partnerships, including in particular the Mis-en-cause Homco Realty Fund (199) Limited Partnership ("**Homco 199**"), as vendors, and HII, as guarantor to certain obligations of the vendors (the "**Master Purchase Agreement**"), as appears from a copy of said Master Purchase Agreement filed herewith as **Exhibit R-1**.
3. On May 25, 2010, the following three head leases were entered into by HII, as tenant:
 - (a) a head lease with Fitzroy Development Inc. ("**Fitzroy**"), as landlord, for the lease of premises in the Fitzroy Building in Prince Edward Island (the "**Fitzroy Head Lease**"), as appears from a copy of said Fitzroy Head Lease filed herewith as **Exhibit R-2**;
 - (b) a head lease with Dyne Holdings Limited ("**Dyne**"), as landlord, for the lease of premises in the Centre Court Building in Prince Edward Island (the "**Centre Court Head Lease**"), as appears from a copy of said Centre Court Head Lease filed herewith as **Exhibit R-3**; and
 - (c) a head lease with Homco Realty Fund (130) Limited Partnership (together with Fitzroy and Dyne, the "**Landlords**"), as landlord, for the lease of premises in the CN Building in Montreal, Quebec (together with the Fitzroy Head Lease and the Centre Court Head Lease, the "**Head Leases**"), as appears from a copy of said CN Building Head Lease filed herewith as **Exhibit R-4**.
4. Also on May 25, 2010, a movable hypothec agreement was entered into whereby Homco 199, as grantor, hypothecated and pledged in favour of Canmarc REIT, as secured creditor, certain of its units of Canmarc REIT (the "**Movable Hypothec**"), as follows:

- (a) 600,000 units to secure HII's obligations under the Head Leases (the "**Head Leases Obligations**") and the tax indemnity obligations of HII under Section 5.1(d) of the Master Purchase Agreement (the "**Tax Indemnity Obligations**"), for the principal sum of \$6,000,000, bearing interest at the rate of 25% per annum (the "**600,000 Canmarc REIT Secured Units**"); and
- (b) 400,000 units to secure HII's "Remediation Costs" obligations under the Master Purchase Obligations (the "**Remediation Obligations**") and the Tax Indemnity Obligations, for the principal sum of \$4,000,000, bearing interest at the rate of 25% per annum (the "**400,000 Canmarc REIT Secured Units**").

the whole as appears from a copy of said Movable Hypothec filed herewith as **Exhibit R-5**.

- 5. On August 28, 2011, the Movable Hypothec was amended and restated such that Homco 199 (through its new general partner) and Canmarc REIT entered into an amended and restated movable hypothec pursuant to which Homco 199 hypothecated and pledged respectively the 600,000 Canmarc REIT Secured Units 600,000 and the 400,000 Canmarc REIT Secured Units (collectively, the "**Canmarc REIT Secured Units**") to secure, respectively, the Head Leases Obligations and the Tax Indemnity Obligations and the Remediation Obligations and the Tax Indemnity Obligations, as appears from a copy of said amended and restated Movable Hypothec (the "**Hypothec**") filed herewith as **Exhibit R-6**.
- 6. The Monitor is informed that the Canmarc REIT Secured Units were remitted to Osler, to be held in trust by the latter in its capacity as custodian under the terms of the Hypothec.

III. THE CCAA FILING AND SALE OF THE CANMARC REIT UNITS HELD BY HOMCO 199

- 7. On September 9, 2011, this Court issued an initial order pursuant to the CCAA in respect of HII and certain related Debtors and Mis-en-cause, including Homco 199, and said initial order was amended and extended from time to time, as appears from the Court record.
- 8. Pursuant to the initial order, Samson Bélair/Deloitte & Touche Inc. was appointed as Monitor.
- 9. On January 20, 2012, following a bid by Cominar Real Estate Investment Trust to acquire all of the issued and outstanding units of Canmarc REIT (as amended, the "**Cominar Bid**"), this Court granted an order authorizing the disposition of the Canmarc REIT units held by Homco 199, including the Canmarc Secured REIT Units, at a minimum price of \$16.50 per unit and ordered that the net cash proceeds relating to the Canmarc REIT Secured Units be segregated and deposited in trust with Osler (the "**Canmarc REIT Units Sale Order**"), as appears from the Court record.
- 10. In the days following the Canmarc REIT Units Sale Order, Homco 199 sold its Canmarc REIT Units in the open market or tendered them under the Cominar Bid for a cash consideration between \$16.50 and \$16.51 per unit, as further elaborated in the Seventh Monitor's Report filed with this Court.

11. The aggregate net proceeds held in trust with Osler in replacement of the Canmarc REIT Secured Units total, after deduction of the pro rata payment of the advisory fees, \$16,396,205 excluding interest (the "**Trust Proceeds**"), which Trust Proceeds have been segregated in two trust accounts, the first in the amount of \$9,844,600 (in replacement of the 600,000 Canmarc REIT Secured Units) and the second in the amount of \$6,563,100 (in replacement of the 400,000 Canmarc REIT Secured Units).
12. On May 29, 2012, HII, with the prior approval of the Monitor, sent to the Landlords notices to disclaim the Head Leases, as appears from a copy of said notices filed herewith *en liasse* as **Exhibit R-7**.
13. It is in the context of the disclaimer of the Head Leases that the Monitor mandated its counsel to review the Canmarc REIT Security, which review of the Canmarc REIT Security by the Monitor's counsel have led to the present Motion for Directions.

IV. THE OBLIGATIONS SECURED BY THE HYPOTHEC

A. HEAD LEASES OBLIGATIONS

14. The Head Leases Obligations are obligations of HII towards the respective Landlords under the respective Head Leases.
15. The Monitor has not been provided with any document which provides for any obligation of HII towards Canmarc REIT under the Head Leases or establishing that Canmarc REIT would have any claim in relation to the Head Leases.
16. As such, Canmarc REIT, the holder of the Hypothec, is not the beneficiary of the Head Leases Obligations which are contemplated to be secured by the Hypothec and, accordingly, has no basis to assert any claim against HII or Homco 199 pursuant to the Head Leases.

B. TAX INDEMNITY OBLIGATIONS AND REMEDIATION OBLIGATIONS

17. HII, is the guarantor of the vendors' obligations under section 5 of the Master Purchase Agreement towards Homburg REIT LP.
18. The Monitor has not been provided with any document which provides for any obligation of HII towards Canmarc REIT under the Master Purchase Agreement or establishing that Canmarc REIT would have any right in the Master Purchase Agreement.
19. As such, Canmarc REIT, the holder of the Hypothec, is not the beneficiary of the Tax Indemnity Obligations and Remediation Obligations which are contemplated to be secured by the Hypothec and, accordingly, has no claim basis to any against HII or Homco 199 relating to the Tax and Remediation Obligations.

V. DIRECTIONS SOUGHT FROM THE COURT

20. In order to have a real right under a security, the secured party must be the beneficiary of the obligation which is the object of the security, which can only be the accessory to such obligation.

21. In light of the apparent defects to the Canmarc REIT Security described hereinabove, the Monitor seeks directions from this Court to:
- (a) declare that the Hypothec does not constitute a valid security to secure the Head Leases Obligations, the Tax Indemnity Obligations and the Remediation Obligations; and
 - (b) order that the Trust Proceeds currently held by Osler in replacement of the Canmarc REIT Pledged Units be released and remitted to Homco 199.


FOR THESE REASONS, MAY IT PLEASE THE COURT TO:

DECLARE that the movable hypothec agreement between Homco Realty Fund (199) Limited Partnership ("**Homco 199**") and Canmarc Real Estate Investment Trust (formerly Homburg Canada Real Estate Investment Trust) dated May 25, 2010 (as amended and restated on August 18, 2011) (the "**Hypothec**") does not constitute a valid security to secure the Head Leases Obligations, the Tax Indemnity Obligations and the Remediation Obligations (as same are defined in the Motion for Directions);

ORDER that the proceeds currently held in trust by Osler Hoskin & Harcourt LLP in replacement of the Canmarc REIT units secured under the Hypothec be released and remitted to Homco 199;

THE WHOLE without cost save and except in case of contestation.

MONTREAL, May 30, 2012


McCARTHY TÉTRAULT LLP
Attorneys for the Monitor

SUPERIOR COURT

(Commercial Division)

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Debtors

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Mis-en-cause

and

CANMARC REAL ESTATE INVESTMENT TRUST (FORMERLY HOMBURG CANADA REAL ESTATE INVESTMENT TRUST)

Respondent

AFFIDAVIT

I, the undersigned, Pierre Laporte, President of Samson Bélair/Deloitte & Touche Inc., domiciled and residing for the purpose hereof at 1 Place Ville Marie, suite 3000, Montréal, Québec, H3B 4T9, solemnly declare the following:

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1. I am a duly authorized representative of Samson Bélair/Deloitte & Touche Inc. in its capacity of Monitor to Homburg Invest Inc. et als.;
2. All the facts alleged in the Motion for Directions in relation to security granted in favour of Canmarc Real Estate Investment Trust are true.

AND I HAVE SIGNED

Pierre Laporte

SOLEMNLY DECLARED BEFORE ME
ON THE DAY OF MAY, 2012

COMMISSIONER OF OATHS FOR
THE PROVINCE OF QUÉBEC

SUPERIOR COURT

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Mis-en-cause

and

**CANMARC REAL ESTATE INVESTMENT TRUST (FORMERLY HOMBURG CANADA REAL
ESTATE INVESTMENT TRUST)**

Respondent

NOTICE OF PRESENTATION

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Q.C., ICD.D, Frank W
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Columbia, Maryland 21045
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Mr. William Fay
Default & Restructuring Account Manager
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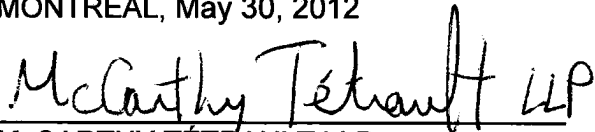
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CIBC Building
1809 Barrington St. Suite 501
Halifax, NS, B3J 3K8
Mrs. Stephanie Atkinson
Enforcement Counsel
email : atkinssj@gov.ns.ca

**Nova Scotia Securities
Commission**

TAKE NOTICE that the present Motion for directions in relation to security granted in favour of Canmarc Real Estate Investment Trust will be presented on a *pro forma* basis before Justice Louis J. Gouin of the Superior Court of Quebec, at the Montreal courthouse, located at 1 Notre-Dame Street East, Montreal, Quebec, H2Y 1B6, on May 31, 2012 at 9:15 a.m., in a room to be determined.

DO GOVERN YOURSELVES ACCORDINGLY.

MONTREAL, May 30, 2012


McCarthy Tétrault LLP
McCARTHY TÉTRAULT LLP
Counsel for the Monitor

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Mis-en-cause

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ESTATE INVESTMENT TRUST)**

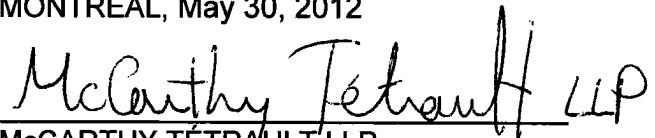
Respondent

LIST OF EXHIBITS

**(Motion for Directions in relation to security in favour of Canmarc Real Estate Investment
Trust)**

- Exhibit R-1: Copy of Master Purchase Agreement dated May 25, 2010, between Homburg Canada Real Estate Investment Trust Limited Partnership, as purchaser and Homco Realty Fund (199) Limited Partnership ("**Homco 199**") and other Partnerships, as vendors, and Homberg Invest Inc. ("**HII**") as guarantor;
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- Exhibit R-3: Copy of Head lease dated May 25, 2010 between with Dyne Holdings Limited and HII;
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- Exhibit R-6: Copy of Amended and restated Movable Hypothec dated August 28, 2011 between Canmarc REIT as secured creditor and Homco 199, as guarantor;
- Exhibit R-7: Notices to disclaim the Head Leases dated May 29, 2012;

MONTREAL, May 30, 2012


McCarthy Tétrault LLP
Counsel for the Monitor

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Monitor/Petitioner

and

HOMCO REALTY FUND (199) LIMITED PARTNERSHIP et al.
Mis-en-cause

and

CANMARC REAL ESTATE INVESTMENT TRUST

Respondent

**MOTION FOR DIRECTIONS IN RELATION TO SECURITY IN
FAVOUR OF CANMARC REAL ESTATE INVESTMENT
TRUST**

ORIGINAL

Mtre Mason Poplaw / Mtre Jocelyn Perreault
(514-397-4155 / 514-397-7092)
Our file : 783416-437027

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