

39 O.S.C.B. 9057  
Ontario Securities Commission

Chorus Aviation Inc., Re

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**In the Matter of the Securities Legislation of Nova Scotia and Ontario (the Jurisdictions) and In the Matter of the Process for Exemptive Relief Applications in Multiple Jurisdictions and In the Matter of Chorus Aviation Inc. (the Filer)**

Paul E. Radford, Shirley P. Lee

Date: October 14, 2016

Reference: None

Subject: Securities

**Headnote**

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National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions -- Dual application -- Application for relief from take-over bid and early warning requirements so that the applicable thresholds be triggered on a combined basis rather than on a per class basis -- Relief to address foreign investment concerns -- Dual class structure implemented solely for compliance with foreign ownership requirements in the aviation industry -- Both classes of securities are freely tradable, have identical economic attributes and are automatically and mandatorily inter-convertible based on the holder's Canadian or non-Canadian status.

**Table of Authorities**

**Applicable Legislative Provisions**

*National Instrument*, 51-102

*National Instrument*, 62-103

*National Instrument*, 62-104

**Background**

The securities regulatory authority or regulator in each of the Jurisdictions (each a *Decision Maker*) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the *Legislation*) that:

- (a) an offeror that makes an offer to acquire outstanding Class A Variable Voting Shares of the Filer (*Variable Voting Shares*) or outstanding Class B Voting Shares of the Filer (*Voting Shares*, and collectively with the Variable Voting Shares, the *Shares*), which would constitute a take-over bid under the Legislation as a result of the securities subject to the offer to acquire, together with the offeror's securities of that class, constituting in the aggregate 20% or more of the outstanding Variable Voting Shares or Voting Shares, as the case may be, at the date of the offer to

acquire, be exempted under Section 6.1 of National Instrument 62-104 *Take-Over Bids and Issuer Bids (NI 62-104)* from the take-over bid requirements contained in NI 62-104 (the TOB Rules) (the *TOB Relief*);

(b) an acquiror who acquires beneficial ownership of, or the power to exercise control or direction over, Variable Voting Shares or Voting Shares, or securities convertible into such shares, that, together with the acquiror's securities of that class, would constitute 10% or more of the outstanding Variable Voting Shares or Voting Shares, as the case may be, be exempted from the early warning requirements contained in the Legislation (the *Early Warning Relief*);

(c) an acquiror who acquires, during a take-over bid or an issuer bid, beneficial ownership of, or the power to exercise control or direction over, Variable Voting Shares or Voting Shares, or securities convertible into such shares, that, together with the acquiror's securities of that class, would constitute 5% or more of the outstanding Variable Voting Shares or Voting Shares, as the case may be, be exempted from the requirement to issue and file a news release set out in section 5.4 of NI 62-104 (the *News Release Relief*);

(d) an eligible institutional investor subject to the early warning requirements of the Legislation be entitled to rely on alternative eligibility criteria from those set forth in section 4.5 of National Instrument 62-103 *The Early Warning System and Related Take-Over Bid and Insider Reporting Issues (NI 62-103)* in order to benefit from the exemption contained in section 4.1 of NI 62-103 (the *Alternative Monthly Reporting Criteria*); and

(e) the Filer be entitled to rely on alternative disclosure requirements from those set forth in Item 6.5 of Form 51-102F5 *Information Circular (Form 51-102F5)* of National Instrument 51-102 *Continuous Disclosure Obligations (NI 51-102)* (the *Alternative Disclosure Requirements* and, collectively with the TOB Relief, the Early Warning Relief, the News Release Relief and the Alternative Monthly Reporting Criteria, the *Exemption Sought*).

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

(a) the Nova Scotia Securities Commission is the principal regulator for this Application,

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System (MI 11-102)* is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, Yukon and Nunavut, and

(c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

## Interpretation

Terms defined in National Instrument 14-101 *Definitions*, NI 62-103, NI 62-104 or MI 11-102, including without limitation, "offeror", "offeror's securities", "offer to acquire", "acquiror", "acquiror's securities", "early warning requirements", "eligible institutional investor", and "securityholding percentage", have the same meaning if used in this decision, unless otherwise defined herein. For the purpose of this decision, the following terms have the meaning ascribed to them hereinafter:

"CTA" means *Canada Transportation Act*; and

"TSX" means the Toronto Stock Exchange.

## Representations

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

1. The Filer is a corporation governed by the *Canada Business Corporations Act*.
2. The chief executive office of the Filer is located at 3 Spectacle Lake Drive, Dartmouth, Nova Scotia, B3B 1W8.

3. The Filer is a reporting issuer in all of the provinces and territories of Canada and is not in default of any requirement of the securities legislation in any of these jurisdictions.
4. The Filer is a holding company with various aviation interests, including its wholly-owned subsidiaries, Jazz Aviation LP (*Jazz*) and Voyageur Aviation Corp. (*Voyageur*).
5. As licensed carriers, the Filer's wholly-owned subsidiaries, Jazz and Voyageur, are subject to the requirements of the CTA. The CTA requires that air carriers which provide domestic services be controlled in fact by Canadians (as defined in the CTA), and that non-Canadians cannot hold or control more than 25% of the voting interests in a licensed domestic carrier.
6. The Government of Canada's Bill C-10, the *Budget Implementation Act 2009*, contains provisions whereby the restrictions relating to voting securities in the CTA would be amended to provide the Governor in Council with flexibility to increase the foreign voting interest ownership limit from the existing 25% level to a maximum of 49%. These provisions will come into force on a date to be fixed by order of the Governor in Council.
7. The authorized share capital of the Filer is comprised of: an unlimited number of Variable Voting Shares and an unlimited number of Voting Shares. As of April 4, 2016, the most recent date such information was available, 8,025,026 Variable Voting Shares and 114,206,571 Voting Shares were outstanding. In addition, as of August 30, 2016, the Filer had 2,201,729 restricted share units outstanding, each of which when vested entitles the holder to one Variable Voting Share or one Voting Share (110,304 of which Shares are issuable by the Filer and the remainder of which must be purchased over the market) and 6,250,000 options outstanding, each of which entitles its holder to purchase one Variable Voting Share or one Voting Share.
8. The Voting Shares may only be held, beneficially owned and controlled, directly or indirectly, by Canadians (as defined in the CTA). An outstanding Voting Share is converted into one Variable Voting Share, automatically and without any further act of the Filer or the holder, if such Voting Share becomes held, beneficially owned or controlled, directly or indirectly, otherwise than by way of security only, by a person who is not a Canadian.
9. The Variable Voting Shares may only be held, beneficially owned or controlled, directly or indirectly, by persons who are not Canadians. An outstanding Variable Voting Share is converted into one Voting Share, automatically and without any further act of the Filer or the holder, if such Variable Voting Share becomes held, beneficially owned and controlled, directly or indirectly, otherwise than by way of security only, by a Canadian.
10. Each Voting Share confers the right to one vote. Each Variable Voting Share confers the right to one vote unless: (i) the number of Variable Voting Shares outstanding, as a percentage of the total number of all Shares of the Filer outstanding exceeds 25% (or any higher percentage that the Governor in Council may by regulation specify), or (ii) the total number of votes cast by or on behalf of holders of Variable Voting Shares at any meeting exceeds 25% (or any higher percentage that the Governor in Council may by regulation specify) of the total number of votes that may be cast at such meeting. If either of the above noted thresholds would otherwise be surpassed at any time, the vote attached to each Variable Voting Share decreases proportionately such that: (i) the Variable Voting Shares as a class do not carry more than 25% (or any higher percentage that the Governor in Council may by regulation specify) of the aggregate votes attached to all outstanding Shares of the Filer and (ii) the total number of votes cast by or on behalf of holders of Variable Voting Shares at any meeting do not exceed 25% (or any higher percentage that the Governor in Council may by regulation specify) of the total number of votes that may be cast at such meeting.
11. Aside from the differences in voting rights stated above, the Variable Voting Shares and Voting Shares are similar in all other respects, including the right to receive dividends if any, and the right to receive the property and assets of the Filer in the event of dissolution, liquidation, or winding up of the Filer.

12. The articles of the Filer contain coattail provisions pursuant to which Variable Voting Shares may be converted into Voting Shares in the event an offer is made to purchase Voting Shares and the offer is one which is required to be made to all or substantially all the holders of Voting Shares. Similar coattail provisions are contained in the terms of the Voting Shares and provide for the conversion of Voting Shares into Variable Voting Shares in the event an offer is made to purchase Variable Voting Shares and the offer is one which is required to be made to all or substantially all the holders of Variable Voting Shares. Since these coattail provisions, in their existing form, do not specify the threshold at which the offer is required to be made to all the holders of a class of Shares, they do not need to be amended as a result of the decision to grant the Exemption Sought.

13. Both classes of Shares of the Filer have, since May 24, 2016, been listed on the TSX under the same ticker symbol: "CHR". Prior to that date, both classes of Shares of the Filer were listed under separate ticker symbols, but historically traded at the same price or within a narrow price range, demonstrating that the market essentially assigns the same value to Variable Voting Shares and Voting Shares.

14. The Filer's dual class structure was implemented solely to ensure compliance with the requirements of the CTA.

15. An investor does not control or choose which class of Shares it acquires and holds. There are no unique features of either class of Shares which an existing or potential investor can choose to acquire, exercise or dispose of. The class of Shares ultimately available to an investor is a function of the investor's Canadian or non-Canadian status only. Moreover, if after having acquired Shares, a holder's Canadian or non-Canadian status changes, the Shares will convert accordingly and automatically, without formality or regard to any other consideration.

16. The Variable Voting Shares are not considered "restricted voting securities" for the purposes of the Legislation.

17. The TOB Rules and early warning requirements apply to the acquisition of securities of a class. Because of the current significantly smaller public float of Variable Voting Shares (compared to the public float of Voting Shares), it is more difficult for non-Canadian investors to acquire Shares in the ordinary course without the apprehension of inadvertently triggering the TOB Rules and early warning requirements, thus restricting the interest of non-Canadian investors in the Shares for reasons unrelated to their investment objectives. As a result, although the Filer has a flexible capital structure that is designed to permit non-Canadian investors to become shareholders of the Filer, the relatively small number of outstanding Variable Voting Shares appears to have limited the investment interest of non-Canadian investors. Therefore, aggregating Variable Voting Shares and Voting Shares for the purpose of the TOB Rules and early warning requirements would facilitate investment in Variable Voting Shares.

18. To the extent that the Variable Voting Shares and Voting Shares are aggregated for purposes of the TOB Rules, the early warning requirements and alternative monthly reporting requirements, the Filer should not be required to disclose the number of Variable Voting Shares and Voting Shares on a per-class basis in its management information circular.

## Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that:

- (a) the Filer shall publicly disclose the terms of the Exemption Sought in a news release filed on SEDAR promptly following the issuance of this decision document;
- (b) the Filer shall disclose the terms and conditions of the Exemption Sought in all of its annual information forms and management proxy circulars filed on SEDAR following the issuance of this decision document;

(c) with respect only to the TOB Relief, the Variable Voting Shares or Voting Shares, as the case may be, subject to the offer to acquire of an offeror, together with the Variable Voting Shares and Voting Shares beneficially owned, or over which control or direction is exercised, on the date of the offer to acquire, by the offeror or by any person acting jointly or in concert with the offeror, would not constitute, at the date of the offer to acquire, in the aggregate 20% or more of the outstanding Variable Voting Shares and Voting Shares on a combined basis;

(d) with respect only to the Early Warning Relief, the Variable Voting Shares or Voting Shares, or securities convertible into such shares, as the case may be, over which the acquiror acquires beneficial ownership of, or the power to exercise control or direction over, together with the securities of the Filer beneficially owned, or over which control or direction is exercised, by the acquirer or any person acting jointly or on concert with the acquiror, would not constitute 10% or more of the outstanding Variable Voting Shares and Voting Shares on a combined basis;

(e) with respect only to the News Release Relief, the Variable Voting Shares or Voting Shares, or securities convertible into such shares, as the case may be, over which the acquiror acquires beneficial ownership of, or the power to exercise control or direction over, together with the securities of the Filer beneficially owned, or over which control or direction is exercised, by the acquirer or any person acting jointly or on concert with the acquiror, would not constitute 5% or more of the outstanding Variable Voting Shares and Voting Shares on a combined basis;

(f) with respect only to the Alternative Monthly Reporting Criteria, the eligible institutional investor will meet any of the eligibility criteria contained in section 4.5 of NI 62-103 by calculating its securityholding percentage using (i) a denominator comprised of all of the outstanding Variable Voting Shares and Voting Shares on a combined basis, and (ii) a numerator including all of the Variable Voting Shares and Voting Shares, as the case may be, beneficially owned or over which control or direction is exercised by the eligible institutional investor; and

(g) with respect only to the Alternative Disclosure Requirements, the Filer will meet the disclosure requirements contained in Item 6.5 of Form 51-102F5 by calculating the securityholding percentage using (i) a denominator comprised of all of the outstanding Variable Voting Shares and Voting Shares on a combined basis; and (ii) a numerator including all of the Variable Voting Shares and Voting Shares, as the case may be, beneficially owned, or over which control or direction is exercised, directly or indirectly, by any person who, to the knowledge of the Filer's directors or executive officers, beneficially owns, controls or directs, directly or indirectly, voting securities carrying 10% or more of the voting rights attached to the outstanding Variable Voting Shares and Voting Shares on a combined basis.

"Paul E. Radford"

Chair

Nova Scotia Securities Commission

"Shirley P. Lee"

Vice-chair

Nova Scotia Securities Commission