

**IN THE MATTER OF THE *SECURITIES ACT*,
R.S.O. 1990, c. S.5, as amended**

- and -

**IN THE MATTER OF
ROYSTER-CLARK LTD. AND ROYSTER-CLARK ULC**

- and -

**IN THE MATTER OF
AGRIUM INC. AND AGRIUM ACQUISITIONS INC.**

**ROYSTER-CLARK SUBMISSIONS
(Rights Plan Hearing)**

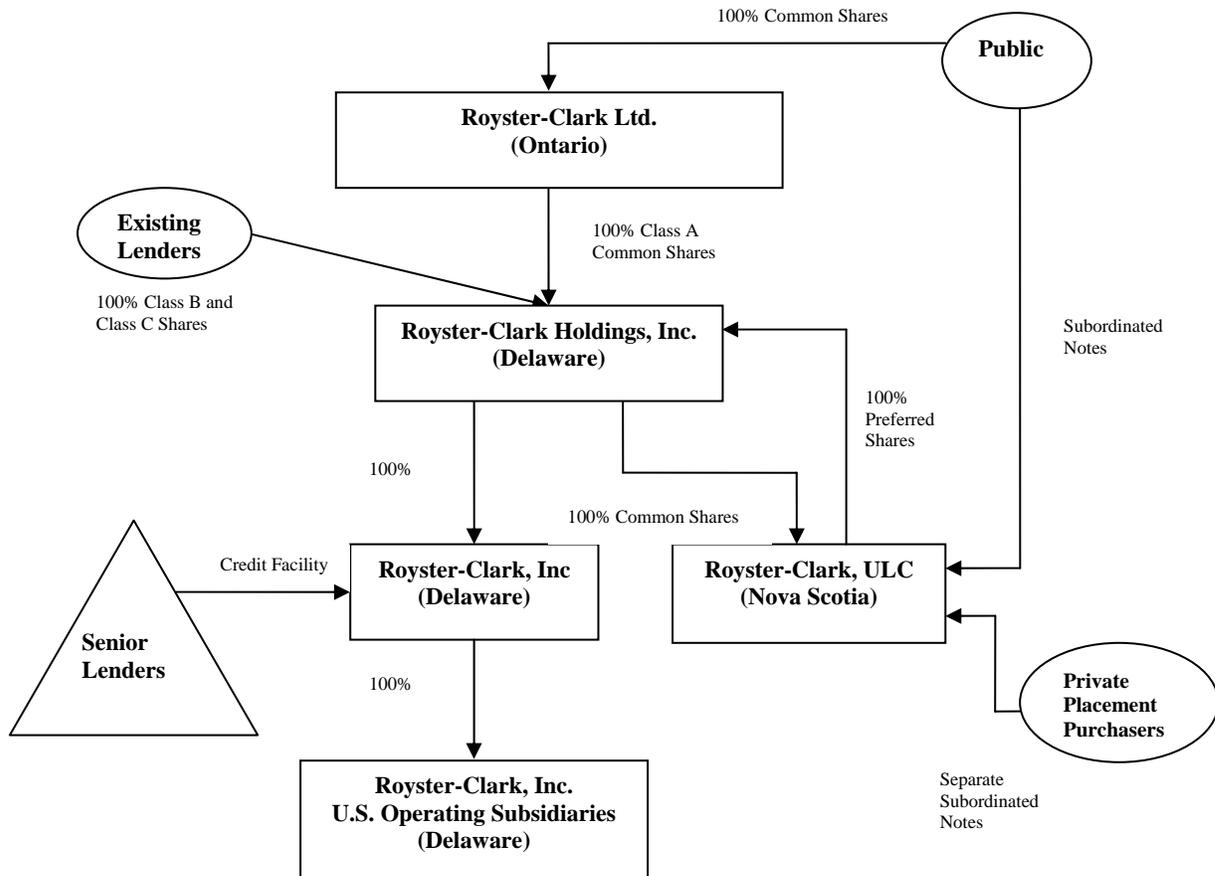
PART I –OVERVIEW

1. Royster-Clark Ltd. (“RC”) and Royster-Clark ULC (“RC ULC”) (collectively, “Royster-Clark”) submit that the Commission should dismiss the application of Agrium Acquisitions Inc. (“Agrium”) to cease trade the limited duration shareholder rights plan (the “Plan”) instituted by RC on December 7, 2005.
2. Royster-Clark does not dispute that the Plan is a so-called “tactical pill” that was implemented in the face of the unsolicited take-over bid by Agrium dated November 8, 2005 (the “Agrium Offer”). However, Royster-Clark submits that the implementation of the Plan and the continued deployment of the Plan were and are justified in the circumstances of this case having regard, among other things, to:
 - (a) the unfair and coercive character of the Agrium Offer; and
 - (b) the real and substantial possibility that, given a reasonable period of further time, RC’s Board of Directors will be able to find an alternative bid or transaction that would be better for securityholders than the current Agrium Offer.
3. In these circumstances, the Commission should allow the Plan to function for a further period so as to allow RC management and directors to continue to fulfill their fiduciary duties.

PART II – FACTS

4. This Part II is organized under the following headings:
 - A. *Royster-Clark*: we describe by way of background the business of the Royster-Clark group of companies and the corporate structure of the group.
 - B. *Income Deposit Securities*: we explain the income deposit security structure generally and the key features of such securities; and we describe the income deposit securities (the “IDSs”) that have been issued by Royster-Clark and that are the subject of the Agrium Offer.
 - C. *The Agrium Offer*: we describe the Agrium Offer, its unique features, and its coercive effect.
 - D. *Evaluation of the Agrium Offer*: we summarize the RC Board’s efforts to evaluate the Agrium Offer and the Board’s conclusions and recommendation to IDS holders.
 - E. *Efforts to Maximize Value*: we summarize the RC Board’s efforts to identify alternatives to the Agrium Offer to maximize value to holders of IDSs.
 - F. *The Rights Plan*: we explain the RC Board’s decision to implement the Plan.
- A. **Royster-Clark**
5. **RC**. RC is an OBCA corporation with its head office in Toronto, Ontario.
6. **RC ULC**. RC ULC is an unlimited liability company under the laws of Nova Scotia with its head office in Toronto, Ontario
7. **The business**. Royster-Clark, through various direct and indirect subsidiaries, is a retail distributor of agricultural fertilizer, seed and crop protection products; it provides agronomic services such as product application and technical consulting services to farmers in the United States; and it distributes crop production inputs, principally fertilizer, on a wholesale level.

8. **Ownership structure.** The ownership structure of Royster-Clark and related corporations is highly complex. The corporate chart that was included in the prospectus for the Royster-Clark initial public offering is set out below.



B. The Income Deposit Securities

9. In their July 2005 IPO, RC and RC ULC jointly issued 32,500,000 IDSs at a price of \$10.00 per IDS. Each IDS represents ownership of one Common Share of RC (“Common Share”) and \$6.08 principal amount of subordinated notes of RC ULC (the “Notes”).¹

10. **Nature of an income deposit security.** The income deposit security structure evolved from the cross-border income trust structure during 2003. It was developed initially for the U.S.

¹ The prospectus is attached to the Anderson Affidavit at Tab A. The chart is at p. 10 of the prospectus.

market and in significant part was intended to address certain accounting and U.S. tax challenges that had arisen with respect to cross-border income trusts. At the heart of the accounting and U.S. tax concerns was the requirement to ensure that the subordinated debt in the structure constitutes “debt” for U.S. tax purposes so that the interest payments on the subordinated debt would be tax deductible. One of the keys to achieving this in the income deposit security structure is to have the common shares and subordinated debt held directly as separate instruments by public investors with the IDS receipt used as a mechanism to facilitate trading.

11. Key elements which reflect the separate nature of the underlying common shares and subordinated debt in the income deposit security structure include:

- (a) income deposit security holders have the ability to separate their income deposit security and hold directly the common shares and subordinated debt any time shortly following the initial public offering;
- (b) income deposit security holders receive dividends on their common shares and interest on their subordinated debt, which distributions are taxed according to their character;
- (c) a significant principal amount of separate subordinated debt identical to the debt forming a component of the income deposit securities must be issued to persons who do not intend also to hold common shares;
- (d) the common shares are separately listed for trading on an exchange and the underwriters typically undertake to “make a market” in the subordinated debt; and
- (e) prospectuses for income deposit security offerings describe both components (the common shares and debt) separately in great detail.

12. Accordingly, an income deposit security merely comprises two separate securities that are held together but are separable at any time shortly following their IPO. An income deposit security has no value or legal characteristics independent of its two constituent securities: only the common shares have voting rights, not the income deposit securities; only the common shares and debt carry a right to distributions (dividends and interest, respectively), not the income deposit securities.

13. ***The Royster-Clark IDSs.*** In the case of Royster-Clark, the fact that the IDSs are merely a receipt is reflected in the corporate chart that was included in the prospectus for the initial public offering² (see above at paragraph 8): the IDSs themselves do not appear in the chart, only the constituent securities.

14. The IDSs are currently listed and traded on the TSX. The Common Shares are separately listed on the TSX and will be posted for trading on the TSX when RC provides the TSX with evidence that there exists a sufficient public distribution of Common Shares that are held separately from Notes. The Notes are not separately listed but may be traded on an “over-the-counter” basis.

15. Investors purchase IDSs primarily for the anticipated cash distributions to be generated by the dividend payments on the Common Shares and interest payments on the Notes. The Board of Directors of RC has adopted a policy to distribute available cash to the maximum extent possible, subject to applicable law, by way of equal monthly dividends on the Common Shares, after satisfying debt service obligations and other expense obligations. Interest is paid on the RC ULC Notes on a monthly basis.

16. In connection with the initial public offering of IDSs, RC ULC also issued, on a private placement basis, \$24.2 million principal amount of Subordinated Notes (the “Separate Subordinated Notes”) that do not comprise part of the IDSs. The Separate Subordinated Notes were issued to and continue to be held by sophisticated institutional investors.

C. The Agrium Offer

17. Under the Agrium Offer dated November 8, 2005, Agrium is offering \$10.00 per IDS. The Agrium Offer was amended on December 13, 2005 by a Notice of Extension and Variation (the “Amendment”). The Agrium Offer, as amended, expires on December 23, 2005. The purpose of the Agrium Offer, according to Agrium in its take-over bid circular (the “Agrium

² The prospectus under which the IDSs were issued is attached to the Anderson Affidavit at Tab A.

Circular”),³ is to enable Agrium “to acquire all of the IDSs or the Common Shares and Subordinated Notes that comprise the IDSs”.

18. **Key features.** The key features of the Agrium Offer include the following:

- (a) *the Agrium Offer is for IDS only.* Despite what the Agrium Circular describes as the purpose of the Agrium Offer, the Agrium Offer is expressed to be for IDSs only, not for the constituent securities. Accordingly, an IDS holder cannot tender Common Shares or Notes held otherwise than in the form of IDS to the Agrium Offer;
- (b) *the allocation of the Offer price between the Common Shares and the Notes differs materially from the allocation in the July 2005 IPO of the IDSs.* For the purpose of the Agrium Offer, the purchase price of \$10.00 per IDS is allocated as to \$2.00 for each Common Share and as to \$8.00 for each \$6.08 principal amount of Notes forming part of each IDS. This is to be compared to the allocation of \$3.92 and \$6.08 to the Common Share and the Notes, respectively, per IDS at the time of Royster-Clark’s IPO in July 2005;
- (c) *Agrium intends to squeeze out all remaining Common Shares, including those forming part of IDSs not tendered to the Agrium Offer and any that are separate from the IDSs (and that were therefore not the subject of the Agrium Offer).* Agrium intends to accomplish this squeeze-out through the compulsory acquisition provision of the OBCA or through a subsequent acquisition transaction in which remaining Common Shareholders would be offered \$2.00 per Common Share, and Common Shares acquired pursuant to the Agrium Offer would be treated as part of the minority for the purpose of any majority of the minority voting;
- (d) *Agrium intends to make an offer to all remaining holders of Notes forming part of IDSs not tendered to the Agrium Offer.* Pursuant to the Amendment, Agrium has indicated an intention, should it squeeze out the remaining holders of Common Shares, to make a standing offer following the squeeze-out for the remaining

³ The Agrium take-over bid circular is attached to the Anderson Affidavit at Tab D.

Notes at the \$8.00 amount allocated under the Agrium Offer to each Note per IDS; and

- (e) *the Agrium Offer is highly conditional.* The Agrium Offer contains 16 conditions, several of which include numerous sub-conditions, which must be satisfied or waived before Agrium is obligated to take up and pay under the offer. Those conditions include at least 90% of the IDSs being tendered.

19. *Unfair and coercive effect.* Agrium is offering \$10.00 per IDS with \$2.00 allocated to the Common Share component and \$8.00 allocated to the Note component. That allocation was determined by starting with the overall price per IDS that Agrium was prepared to offer for Royster-Clark; the Note component was then valued based on a yield analysis; and the difference, without any separate valuation analysis, was allocated to the Common Share component.

20. *No market validation of the amounts allocated to the constituent securities.* The effect of the Agrium Offer being structured as an offer for IDSs is that the relative amounts allocated by Agrium to the Common Shares and the Notes will not be subject to the usual test of the market. Holders of the IDSs who agree with the amount allocated to the Common Shares but not the amount allocated to the Notes, or *vice versa*, do not have the option of tendering only one of the constituent securities but not the other.

21. *Remaining Common Shares may be expropriated at a value that has not been validated by the market.* Under the Agrium Offer, an IDS holder does not have the option of simply declining to tender and continuing to hold his IDSs. Agrium, having structured its offer as an offer for the IDS, not the constituent securities, has indicated an intention to do a second stage squeeze-out in which the securities subject to the squeeze-out will not be the IDSs which were the subject of the Agrium Offer, but rather, the Common Shares. The price at which that squeeze-out will be done will be the amount that Agrium allocated to the Common Shares for the purpose of the Agrium Offer, which amount was not based on any valuation analysis of the Common Shares and will not have received the market testing and validation on which the compulsory acquisition squeeze-out mechanic is premised.

22. This is an unprecedented feature of what Agrium is proposing that results from its structuring of its offer as an offer for IDSs rather than for the constituent securities.

23. *Remaining Notes may be illiquid and stripped of material protections.* Not only is an IDS holder who chooses not to tender faced with the prospect of having his Common Shares expropriated at a price that has not been validated by the market, but he will then be left with his Notes in what would be a disadvantageous position for the holder. The position would be disadvantageous in two key respects.

24. *First*, while investment bankers can debate the extent of the liquidity of the market that would remain for the Notes, there is no question that it will be less liquid than the IDS market. The Notes, unlike the IDSs, will only trade on the “over-the-counter” bond market which is primarily institutional and in which small retail holders are not protected in the way they are in respect of securities listed on the TSX (for example, over-the-counter trading is not subject to the transparency requirements or best price and timing rules governing TSX trading).

25. *Secondly*, under the Note indenture, there are material protective covenants that could be removed unilaterally by Agrium as the majority holder of the Notes. Those covenants subject to removal based on majority approval (see section 9.02(a) of the indenture⁴) include:

- restrictions on incurring indebtedness and issuing preferred stock (section 4.02);
- restrictions on dividends and other payments affecting subsidiaries (section 4.04);
- restrictions on asset sales (section 4.05);
- restrictions on transactions with affiliates (section 4.06);
- restrictions on incurring liens (section 4.07); and
- requirements in the event of change of control (section 4.08).

26. Restrictions of the foregoing kind are key to the covenant pattern in any high yield notes; the potential for Agrium to remove those restrictions unilaterally would be a material factor negatively affecting the liquidity and value of the Subordinated Notes.

⁴ The Subordinated Notes Indenture is attached to the Anderson Affidavit at Tab B.

27. *The effect of the Amendment.* The Amendment does not address the fundamental problem faced by an IDS holder who believes the Agrium Offer is inadequate: the alternative to accepting what Agrium is offering is to be expropriated as a Common Shareholder at a price that has not been market validated; and to be left with Notes that are less liquid and potentially less protected by restrictive covenants.

D. Evaluation of the Agrium Offer

28. *Steps taken by the RC Board.* On learning of the Agrium Offer on November 8, 2005, the RC Board took the following steps with a view to evaluating the Offer;

- *November 8 and 9, 2005:* the Board met to consider the circumstances surrounding the Agrium Offer and to receive advice concerning the Board's responsibilities;
- *November 10, 2005:* the Board formed a special committee of three independent directors to review the Agrium Offer and, with the assistance of financial and legal advisors, to make recommendations to the full Board and develop alternatives;
- *November 10 - 14, 2005:* the Special Committee retained Stikeman Elliott LLP as its independent counsel and hired financial advisors, CIBC World Markets Inc. and Credit Suisse First Boston LLC (the "Financial Advisors");
- *November 14 - 21, 2005:* the Special Committee had numerous meetings and discussions with management and advisors concerning their assessment of the Agrium Offer. In this connection, the Special Committee received on November 21, 2005 opinions from the Financial Advisors that the Agrium Offer was inadequate from a financial point of view to the holders of the IDSs;
- *November 22, 2005:* the Special Committee reported to the full Board that they had concluded that the Agrium Offer was inadequate and neither in the best interests of Royster-Clark nor fair to the holders of IDSs. The Special Committee unanimously recommended to the Board that it recommend to holders of IDSs that they reject the Agrium Offer and not tender their IDSs to it.

29. ***The RC Board's rejection of the Agrium Offer.*** The full Board accepted and adopted the Special Committee's recommendation and unanimously recommended in its Directors' Circular dated November 22, 2005⁵ that IDS holders reject the Agrium Offer.

30. The principal reasons for the rejection were as follows:

- (a) *The Agrium Offer is opportunistic and inadequate.* The consideration offered by Agrium does not reflect the underlying value of Royster-Clark's assets and business, as confirmed by the financial inadequacy opinions of the Financial Advisors. The timing of the offer was opportunistic, taking advantage of temporarily adverse market conditions. Since the date of the Agrium Offer, almost 60% of outstanding IDSs have traded at or above \$10.00 per IDS, reflecting the judgment of investors that the offer price is inadequate;
- (b) *The Agrium Offer is unfair and coercive.* As discussed above, Agrium's take-over bid structure has the effect of coercing investors to tender their IDSs, despite the inadequacy of the \$10.00 offer price, in order to avoid being left with Notes which are less liquid and potentially stripped of important Note indenture protections;
- (c) *Superior proposals may emerge.* The Board believed, in recommending rejection of the Agrium Offer, that there was a substantial possibility of superior offers emerging as a result of the efforts being made by the Board and the Financial Advisors.

E. Efforts to Maximize Value

31. Immediately following being retained, the Financial Advisors began to develop a list of potential strategic buyers and financial buyers for Royster-Clark. They developed a 'teaser' memo targeting the potential buyers and began systematically contacting potential buyers on November 23, 2005.

⁵ The Royster-Clark Directors' Circular is attached to the Anderson Affidavit at Tab H.

32. By November 23, 2005, the Financial Advisors were engaged in preliminary discussions with a number of third parties who had expressed an interest in considering alternative transactions involving Royster-Clark.

33. In anticipation of possible alternative transactions, Royster-Clark prepared a form of confidentiality agreement which was available by November 23, 2005 to be signed by prospective buyers. Any prospective buyer who executed a confidentiality agreement would be granted access to Royster-Clark's confidential information. The Financial Advisors also worked with Royster-Clark to set-up a virtual data room that was launched on November 29, 2005 to facilitate the due diligence process.

34. The timing of these efforts was hampered by the U.S. Thanksgiving holiday which effectively cost a week's delay due to potential buyers being unavailable because of the holiday.

35. **Potential financial buyers.** Royster-Clark held the first of a series of management meetings and presentations with potential financial buyers on December 1, 2005, with additional meetings and presentations taking place on December 5 and 6, 2005.

36. Six potential financial buyers have executed confidentiality agreements with Royster-Clark and have been provided access to the data room.

37. **Potential strategic buyers.** The Financial Advisors have contacted 24 potential strategic buyers. Royster-Clark held a management meeting and presentation with a potential strategic buyer on December 3, 2005. That potential strategic buyer has executed a confidentiality agreement with Royster-Clark and has been provided access to the data room. An additional two strategic buyers have advised that they may be interested in participating in the process, but have not yet signed a confidentiality agreement.

38. The Financial Advisors and Royster-Clark are currently in active discussions with at least five potential buyers.

39. Interested parties have indicated that the complexity of the Royster-Clark structure is a factor that leads them to need more time.

40. If Royster-Clark is able to continue its process to the end of January 2006 there is a real and substantial possibility that from among the five prospective buyers currently still in the process, a superior proposal to the Agrium Offer will emerge.

F. The Rights Plan

41. On December 7, 2005, on the recommendation of the Special Committee, the RC Board implemented the Plan. The Plan is a limited duration shareholder rights plan which will remain in effect for a period of 60 days from December 7, 2005 after which it will expire if the rights have not otherwise terminated in accordance with the Plan.

42. What prompted the implementation of the Plan on December 7 was the progress that was being made towards finding a better bid or transaction for Royster-Clark securityholders than the current Agrium Offer; the need for more time in light of the state of that process coupled with the looming December 15 expiry date under the Agrium Offer; and the coercive character of the Agrium Offer which might impel investors to tender despite the financial inadequacy of the Agrium Offer and the potential for a superior proposal if the Board had more time.

43. In implementing the Plan, the Board was well aware of its fiduciary obligations and was acting in good faith with a view to increasing the choices available to IDS holders and to maximize holder value.

PART III – SUBMISSIONS

44. The Commission should dismiss the application of Agrium to cease trade the Plan having regard, in particular, to:

- (a) the unfair and coercive character of the Agrium Offer;
- (b) the timing challenges that have been presented by (i) the complexity of the Royster-Clark corporate structure, and (ii) the concurrence of the bid period with the U.S. Thanksgiving holiday;
- (c) the real and substantial possibility that, given a reasonable period of further time, the RC Board can find an alternative bid or transaction that would be better for securityholders than the current Agrium Offer; and

- (d) the absence of any evidence that the Agrium Offer will not be extended if the Plan is not terminated.

45. In what follows we first summarize the applicable legal principles and then apply them to the facts of this case.

A. The Test For “When a Pill Must Go”

46. The Commission has identified two key principles that must be balanced in making the determination whether “it is time for a pill to go”:

- (a) the protection of the *bona fide* interests of target company shareholders, including their interest in having the opportunity to respond to a bid for their shares; and
- (b) the duty of target company directors to seek to maximize shareholder value.

Re Royal Host Real Estate Investment Trust (1999), 22 O.S.C.B. 7819 at 7828

47. In making this determination, and in finding the appropriate balance between these two key principles, all of the relevant factors in the particular case must be considered. The Commission has identified a number of factors that are frequently relevant. Those factors may be grouped as follows:

- (a) *the need for the rights plan:*
 - when the plan was adopted;
 - the nature of the bid, including whether it is coercive or unfair to the shareholders of the target company;
 - the size and complexity of the target company;
 - the length of time since the bid was announced and made;
- (b) *shareholder support for the rights plan:*
 - whether shareholder approval of the rights plan was obtained;
 - whether there is broad shareholder support for the continued operation of the plan;

- (c) *the potential for a better bid or transaction:*
 - the steps taken by the target company to find an alternative bid or transaction that would be better for the shareholders;
 - the likelihood that, if given further time, the target company will be able to find a better bid or transaction;

- (d) *the risk of shareholders losing the opportunity to respond to a bid:*
 - the likelihood that the bid will not be extended if the rights plan is not terminated; and

- (e) *the conduct of the target company:*
 - other defensive tactics implemented by the target company.

Royal Host, supra, at 7828

48. In the earlier “poison pill” jurisprudence, the Commission attempted to refine its approach by focusing on certain of these factors and using them to establish a comprehensive and conclusive test to be applied in determining whether it is time for the pill to go. In more recent cases, the Commission has abandoned the “fruitless search” for the “‘holy grail’ of a specific test, or series of tests, that can be applied in all circumstances”. Instead, the Commission considers all of the relevant factors on a case by case basis and exercises its discretion by having regard to the two key principles noted above and the public interest.

Royal Host, supra, at 7828

B. Application To This Case

49. In what follows we consider these factors that have been identified by the Commission as frequently relevant to its determination of “when a pill must go”. The factors, when considered as a whole, support the continuation of the Plan for a reasonable further period beyond the expiry of the Agrium Offer.

50. *The need for the Plan.* The Plan was adopted on December 7, 2005 on the recommendation of the Financial Advisors in the face of the Agrium Offer having regard to the financial inadequacy of the Agrium Offer; the coercive character of the Agrium Offer which

might impel investors to tender despite the inadequacy of the offer; and the need for more time in light of the progress that was being made in finding competing bidders and the looming December 15, 2005 expiry date of the Agrium Offer. The implementation of the Plan was clearly justified in these circumstances.

51. There is a continuing need for the Plan:

- (a) while the unfairness of the bid structure has been mitigated by the Amendment, the Agrium Offer continues to be coercive: the alternative to accepting what Agrium is offering is to be expropriated as a Common Shareholder at a price that has not been validated by the market; and to be left with Notes that are less liquid and potentially less protected by restrictive covenants;
- (b) the complexity of the Royster-Clark structure leads to more time being required for potential competing bidders to decide on whether to make a competing bid than would be the case with a target with a simpler structure; and
- (c) Royster-Clark has lost approximately a week in its efforts due to the U.S. Thanksgiving holiday and faces further delays due to the Christmas season.

52. ***Shareholder support for the Plan.*** Although shareholder approval of the Plan has not been possible in the circumstances, trading in the IDSs since the Agrium Offer reflects a market judgment that the Agrium Offer is inadequate and an expectation that a higher bid may be available.

53. ***The potential for a better bid or transaction.*** Royster-Clark has been diligent in its efforts to find an alternative bid or transaction that would be better for the shareholders. Based on the current status of discussions with potential competing bidders and the assessment of the Financial Advisors, there appears to be a real and substantial possibility of a competing bid if Royster-Clark is given a reasonable period of further time.

54. ***The risk of shareholders losing the opportunity to respond to the Agrium Offer.*** There is no evidence that suggests the Agrium Offer will not be extended if the Plan is not terminated.

55. *The conduct of Royster-Clark.* Royster-Clark has implemented no other defensive tactics. Its Board has independent counsel and has exhibited an understanding of its fiduciary duties. In these circumstances, the Commission should allow the Plan to function for a further period so as to allow the Royster-Clark Board to continue to fulfill its fiduciary duties.

PART IV – ORDER REQUESTED

56. Royster-Clark therefore respectfully requests that this application be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

JAMES C. TORY

Of counsel for Royster-Clark Ltd. and Royster-Clark
ULC