Court File No. CV15-10961-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT* ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

FACTUM OF THE APPLICANTS

(Comeback Hearing returnable May 29, 2015)

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick LSUC#: 35165K
rchadwick@goodmans.ca
Caroline Descours LSUC#: 58251A
cdescours@goodmans.ca
Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants

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PART I – INTRODUCTION

A. OVERVIEW

1. Nelson Education Ltd. ("**Nelson Education**" or the "**Company**") is Canada's leading education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country.[1]

> Nordal Affidavit at para. 1; Application Record of the Applicants (the "**Application Record**"), Tab 2.

2. On May 12, 2015, Nelson Education and its parent company, Nelson Education Holdings Ltd. ("**Holdings**", and together with Nelson Education, the "**Applicants**") sought and obtained an initial order pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**").

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[1] Any capitalized terms that are not defined herein shall have the meanings ascribed to them in the Affidavit of Greg Nordal sworn on May 11, 2015 (the "**Nordal Affidavit**"). All dollar amounts expressed herein, unless otherwise noted, are in Canadian currency.

Initial Order granted May 12, 2015, Court File No. CV15-10961-00CL (Ont. Sup. Ct. J. [Commercial List]) (the "**Initial Order**").

3. The Applicants are not seeking to amend or vary the Initial Order as granted on May 12, 2015. The Initial Order was settled at the hearing for the Applicants' CCAA application among counsel to the Applicants, counsel to the Monitor, counsel to the First Lien Agent and the First Lien Steering Committee, and counsel to Royal Bank of Canada ("**RBC**"), subject to the comeback hearing. The Company, the Monitor and the First Lien Steering Committee support the terms of the Initial Order. RBC is the only party that has raised any matters relating to the Initial Order.

Pre-Filing Report of the Proposed Monitor dated May 11, 2015 (the "**Pre-Filing Report**") at para. 1.5.

4. Having regard to the financial circumstances of the Company, the Applicants determined that it was necessary to seek protection under the CCAA in order to preserve enterprise value with minimal disruption to the Nelson Business and continue as a going concern while seeking to implement the Transaction (as described in further detail below and in the Nordal Affidavit). The Company maintains the ability under the Transaction to complete a sale transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full prior to the closing of the Transaction.

Nordal Affidavit at paras. 14, 115 and 179; Application Record, Tab 2.

5. The principal objectives of these proceedings are to ensure the ongoing operations of the Applicants for the benefit of their many stakeholders and to complete the sale and transfer of Nelson Education's business to a newly incorporated entity (the "**Purchaser**") to be owned indirectly by the Company's First Lien Lenders pursuant to the Transaction. The Transaction will significantly reduce the debt levels of the Company, establish a stronger financial foundation for Nelson Education, create stability for the business, and strengthen the Company's position as Canada's leading educational publisher.

Nordal Affidavit at para. 3; Application Record, Tab 2.

6. As further discussed below, the Company currently has, in the aggregate, over US$430 million (or over $544 million in Canadian dollars[2]) of secured first and second lien debt (including accrued interest) outstanding under its Credit Agreements, resulting in an unsustainable leverage ratio of debt to EBITDA, net of pre-publication expenditures, of approximately 17:1 for the fiscal year ending March 31, 2015.

Nordal Affidavit at para. 6; Application Record, Tab 2.

7. In addition, Nelson Education's First Lien Credit Agreement matured on July 3, 2014 and has not been repaid, and the Company is in default under both the First Lien Credit Agreement and Second Lien Credit Agreement.

Nordal Affidavit at para. 6; Application Record, Tab 2.

8. The Intercreditor Agreement among the lenders provides that the First Lien Lenders' liens on the assets and property of the Company, including its cash, are senior and prior in all respects to any liens of the Second Lien Lenders.

Intercreditor Agreement dated July 5, 2007 at s. 2.1(a), Exhibit "F" to Nordal Affidavit; Application Record, Tab 2F.

B. DISCUSSIONS WITH STAKEHOLDERS AND POTENTIAL ALTERNATIVES

9. In March 2013, Nelson Education engaged Alvarez and Marsal Canada Securities ULC ("**A&M Securities**") as its financial advisor to assist the Company in reviewing and considering potential strategic alternatives, including a refinancing and/or restructuring of its Credit Agreements.

Nordal Affidavit at para. 85; Application Record, Tab 2.

10. The Second Lien Agent also engaged a financial advisor in March 2013 and the First Lien Steering Committee engaged a financial advisor in June 2013. The First Lien Steering Committee's U.S. legal counsel, Canadian legal counsel and financial advisor,

[2] Based on the exchange rate of $1.00 to US$0.7895 as at March 31, 2015.

the Second Lien Agent's U.S. legal counsel, Canadian legal counsel and financial advisor, and the Company's advisors, Goodmans LLP and A&M Securities, have all been involved in these matters for approximately two years.

Nordal Affidavit at para. 86; Application Record, Tab 2.

11. Over the past two years, the Company has paid a substantial amount of professional fees on behalf of its lenders as part of attempting to find a consensual restructuring solution. The Company has paid the legal and financial advisory fees of the First Lien Agent and First Lien Steering Committee. In addition the Company has paid the legal and financial advisory fees of the Second Lien Agent from approximately March 2013 to approximately July 2014, as further discussed below.

Responses to Written Questions on Affidavit of Greg Nordal sworn May 11, 2015, dated May 25, 2015 (the "**Responses to Nordal Questions**") at paras. 24-26; Compendium of the Applicants (the "**Compendium**"), Tab 7.

12. Commencing in April 2013, Nelson Education, with the assistance of its financial and legal advisors, entered into discussions with a number of stakeholders, including the Second Lien Agent, the First Lien Steering Committee, and their respective advisors, in connection with potential alternatives to address the Company's debt obligations for the benefit of the Company and its stakeholders. Nelson Education and its advisors engaged in continued dialogue and sought continuous feedback in respect of potential consensual transaction alternatives, including the exchange of a number of without prejudice and confidential proposed transaction term sheets between August 2013 and September 2014, and provided information and updates about the Company and its business to the First Lien Steering Committee, the Second Lien Agent, and their respective advisors. Members of the Company's management and its advisors attended several in-person meetings with the First Lien Steering Committee and its advisors, and with the Second Lien Agent and its advisors, and diligently pursued a consensual solution. In all, the Company has spent over two years to date engaging with its lenders and exploring potential consensual transactions.

Nordal Affidavit at para. 87; Application Record, Tab 2.

13. In late March 2014, the Company's advisors engaged in discussions with the Second Lien Agent's advisors in connection with the second lien interest payment due on March 31, 2014 (the "**March Interest Payment**") under the Second Lien Credit Agreement. The Company did not make the March Interest Payment on March 31, 2014 while the Company's advisors were advancing such discussions with the Second Lien Agent's advisors, and on April 9, 2014, Nelson Education, Holdings, the Second Lien Agent and the Second Lien Lenders entered into a Grace Period Extension Agreement (the "**Grace Period Extension Agreement**") pursuant to which, among other things, the Second Lien Agent and the Second Lien Lenders agreed to extend the cure period under the Second Lien Credit Agreement from seven business days to the earlier to occur of (i) May 9, 2014, and (ii) the date of the occurrence of any Termination Date (as defined in the Grace Period Extension Agreement). Pursuant to the Grace Period Extension Agreement, the parties agreed that Nelson Education would pay a partial payment of the March Interest Payment in the amount of US$350,000, which amount was applied to reduce the outstanding amount of the March Interest Payment. The remaining portion of the March Interest Payment is referred to herein as the "**Remaining March Interest Payment**".

Responses to Nordal Questions at paras. 9-16; Compendium, Tab 7.

14. Nelson Education, Holdings, the Second Lien Agent and the Second Lien Lenders also entered into a Second Grace Period Extension Agreement dated as of April 30, 2014 (the "**Second Grace Period Extension Agreement**", together with the Grace Period Extension Agreement, the "**Second Lien Extensions**") pursuant to which, among other things, the Second Lien Agent and the Second Lien Lenders agreed to further extend the cure period under the Second Lien Credit Agreement to the earlier to occur of (i) May 30, 2014, and (ii) the date of the occurrence of any Termination Date (as defined in the Second Grace Period Extension Agreement).

Responses to Nordal Questions at para. 17; Compendium, Tab 7.

15. In connection with the Second Lien Extensions, the Company paid amounts in respect of the professional advisors of the Second Lien Agent and provided certain information (including various financial information), pursuant to the terms of such agreements.

Responses to Nordal Questions at para. 24; Compendium, Tab 7.

16. The cure period in respect of the March Interest Payment under the Second Lien Credit Agreement was not extended beyond May 30, 2014 and the Remaining March Interest Payment was not paid. Further interest payments subsequent to the March Interest Payment have also not been paid.

Responses to Nordal Questions at para. 18; Compendium, Tab 7.

17. During, and following the expiry of, the extended cure period under the Second Lien Extensions, the Company and its advisors advanced restructuring term sheets to address the Company's obligations under the First Lien Credit Agreement and the Second Lien Credit Agreement, and provided various draft restructuring term sheets to the Second Lien Agent and its advisors, and to the First Lien Steering Committee and its advisors.

Responses to Nordal Questions at para. 19; Compendium, Tab 7.

Nordal Affidavit at para. 87; Application Record, Tab 2.

18. On July 3, 2014, the First Lien Credit Agreement matured and the Company was unable to repay the obligations thereunder. The Company was in default under its First Lien Credit Agreement. The Second Lien Lenders had the ability at any time to provide new financing to repay the obligations outstanding under the First Lien Credit Agreement. There has been no refinancing or repayment of the obligations outstanding under the First Lien Credit Agreement.

Nordal Affidavit at para. 20; Application Record, Tab 2.

19. On July 7, 2014, Nelson Education commenced a consent solicitation process (the "**July Consent Solicitation Process**") to solicit the consent of the First Lien Lenders to the amendment and extension of the First Lien Credit Agreement (the "**July Proposed Extension**") in order to address the July 3, 2014 maturity under the First Lien Credit Agreement. First Lien Lenders were asked to provide their consent to the July Proposed

Extension on or prior to the early consent date in respect of the July Proposed Extension, which consent date had last been extended to September 10, 2014.

Nordal Affidavit at para. 89; Application Record, Tab 2.

20. The July Proposed Extension provided for the extension of the maturity under the First Lien Credit Agreement and certain other terms. The Company sought the consent of 100% of the First Lien Lenders under the July Consent Solicitation Process as the First Lien Credit Agreement requires consent of 100% of the lenders to extend the maturity date.

Schedule "D" to Responses to Nordal Questions; Compendium, Tab 7D.

21. On July 17, 2014, pursuant to the July Consent Solicitation Process, RBC executed the Company's Consent and Support Agreement dated as of July 7, 2014, agreeing to the Term Sheet attached thereto as Schedule "A" which included, among other things, a condition that the indebtedness under the Second Lien Credit Agreement be resolved in a manner involving no cash payment of interest to lenders under the Second Lien Credit Agreement.

Responses to Nordal Questions at para. 21; Compendium, Tab 7.

22. The July Proposed Extension did not ultimately receive the support of the First Lien Lenders.

Nordal Affidavit at para. 89; Application Record, Tab 2.

23. Following the announcement of the July Proposed Extension, the Company and its advisors continued to have discussions and meetings with the First Lien Steering Committee and its advisors, and with the Second Lien Agent and its advisors, with the aim of achieving a consensual solution that would be supported by Nelson Education's lenders.

Nordal Affidavit at para. 89; Application Record, Tab 2.

24. From approximately March 2013 to July 2014, while the Company was engaged in discussions with the Second Lien Agent to advance a consensual solution with the Second Lien Lenders to address the Credit Agreements and until it became apparent to the Company that the July Proposed Extension did not have the support of its lenders, the Company continued to pay a substantial amount of professional fees of the Second Lien Agent.

25. In early 2014, A&M Securities had discussions with the financial advisor of the Second Lien Agent, CDG Group ("**CDG**"), in connection with changing its fee structure to be based on an hourly rate charged for work completed rather than the existing set monthly fee, which was declined by CDG.

Responses to Nordal Questions at para. 29; Compendium, Tab 7.

26. At the August 5, 2014 meeting of the Board of Directors, the Board discussed, among other things, the advisory fees of the Second Lien Agent and agreed that without further progress, a reduction in the monthly fees paid to CDG would likely be imposed and delegated authority to management to discuss a reduction of the CDG advisory fees. The decision to defer or stop payment of CDG's monthly fees was made by the Company in August 2014.

Responses to Nordal Questions at para. 27; Compendium, Tab 7.

27. Based on the July 3, 2014 maturity under the First Lien Credit Agreement, and the lack of consent achieved in respect of the July Proposed Extension, the Company did not pay further invoices of U.S. counsel to the Second Lien Agent, Canadian counsel to the Second Lien Agent or the financial advisor of the Second Lien Agent following July 2014.

Responses to Nordal Questions at paras. 25 and 26; Compendium, Tab 7.

28. On September 10, 2014, pursuant to the First Lien Support Agreement (as defined and described in further detail below) Nelson Education and Holdings agreed not to make further payments in connection with the Second Lien Credit Agreement, including any

payment for fees, costs or expenses to any legal, financial or other advisor to the Second Lien Agent, without the consent of the Majority Initial Consenting First Lien Lenders (as defined in the First Lien Support Agreement).

Responses to Nordal Questions at para. 22; Compendium, Tab 7.

29. RBC is a well-represented party with two sets of legal advisors and a financial advisor who were paid by the Company for approximately 16 months. RBC is a sophisticated lender that has been involved and had access to the Company for multiple years. RBC was both the First Lien Agent and the Second Lien Agent at the time of the original 2007 Acquisition (as defined below) and was the First Lien Agent until January 2014 when Wilmington Trust, National Association replaced RBC as First Lien Agent under the First Lien Credit Agreement. RBC remained as the Second Lien Agent under the Second Lien Credit Agreement, and is a First Lien Lender and a Second Lien Lender holding the largest share of principal amounts outstanding under the Second Lien Credit Agreement with access to information of the Company that is and has been available to such lenders over the years.

C. FIRST LIEN TERM SHEET AND FIRST LIEN SUPPORT AGREEMENT

30. On September 10, 2014, the Company announced to the First Lien Lenders the Company's proposed transaction framework on the terms set out in the First Lien Term Sheet dated September 10, 2014 (the "**First Lien Term Sheet**") for a sale or restructuring of the business, as discussed in greater detail below, and sought the support of all of its First Lien Lenders.

Nordal Affidavit at paras. 8 and 91; Application Record, Tab 2.

31. In connection with the First Lien Term Sheet, Nelson Education and Holdings entered into a support agreement (the "**First Lien Support Agreement**") with First Lien Lenders representing approximately 88% of the principal amounts outstanding under the First Lien Credit Agreement (the "**Consenting First Lien Lenders**"). The Consenting First Lien Lenders comprise 21 of the 22 First Lien Lenders, or approximately 95% of all of

the First Lien Lenders. The only First Lien Lender that is not a Consenting First Lien Lender is RBC, who is also a Second Lien Lender.

Nordal Affidavit at para. 8; Application Record, Tab 2.

32. On September 19, 2014, Goodmans provided to the Second Lien Agent's legal counsel a copy of the First Lien Support Agreement (which attached a copy of the First Lien Term Sheet and a copy of the SISP (as defined below), including all applicable milestones for the upcoming process) and a copy of the Company's presentation to the First Lien Lenders dated September 10, 2014 relating to the Transaction.

Letter from Goodmans to Paul Hastings dated September 19, 2014, Exhibit "A" to the Affidavit of Shevaun McGrath sworn May 22, 2015 ("**Exhibit "A" to the McGrath Affidavit**"); Compendium, Tab 5A.

33. In its correspondence on September 19, 2014, Goodmans advised the Second Lien Agent's legal counsel, among other things, that "[t]he Company believes that the Transaction announced on September 10, 2014 is in the best interests of the Company as the Transaction, among other things, protects value, provides stability for the Nelson business, including its employees, customers, lenders and other key stakeholders, preserves the priority waterfall among the Company's lenders, and includes a comprehensive and open sale process to identify potential sale transactions."

Exhibit "A" to the McGrath Affidavit; Compendium, Tab 5A.

34. The September 19, 2014 letter also noted that "[t]he Company has worked with RBC and its advisors cooperatively to advance a consensual solution that could be accepted by the parties," that "[t]he Second Lien Agent has a significant amount of information relating to the Company as well as its refinancing efforts," and that "[t]he Company has also paid the Second Lien Agent's advisors' fees and expenses in a significant amount since March 2013."

Exhibit "A" to the McGrath Affidavit; Compendium, Tab 5A.

35. The September 19, 2014 letter further explained that "[t]he Company has until mid-November 2014 to determine a process for implementing the Transaction," that "the Company intends to continue to work cooperatively with the Second Lien Agent and seek its views with respect to any such process," and that "[i]f the Company does not obtain the support of the Second Lien Agent for such a process, the Company may require a court process to implement the Transaction."

Exhibit "A" to the McGrath Affidavit; Compendium, Tab 5A.

D. TRANSACTION

36. Pursuant to the terms of the First Lien Term Sheet and the First Lien Support Agreement, the Company, with the assistance of its financial advisor, A&M Securities, commenced on September 22, 2014, a sale and investment solicitation process (the "**SISP**") to identify one or more potential purchasers of, or investors in, the Nelson Business, which process was conducted over a period of several months. The Company and A&M Securities conducted a thorough canvassing of the market (as discussed in further detail in the Nordal Affidavit) and are satisfied that all alternatives and expressions of interest were properly and thoroughly pursued.

Nordal Affidavit at paras. 9 and 100-104; Application Record, Tab 2.

37. The SISP ultimately did not result in an executable transaction that would result in proceeds to repay the obligations under the First Lien Credit Agreement in full or would otherwise be acceptable to the First Lien Lenders holding at least 66 2/3% of the outstanding obligations under the First Lien Credit Agreement. Accordingly, pursuant to the First Lien Support Agreement and consistent with the Company's view that the Transaction is the best option available to Nelson Education, the Company is proceeding at this time with the Transaction pursuant to which the First Lien Lenders will exchange and release all of the indebtedness owing under the First Lien Credit Agreement for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the Purchaser to which substantially all of the Company's assets

would be transferred, and (ii) the obligations under a new US$200 million first lien term facility to be entered into by the Purchaser.

Nordal Affidavit at para.10; Application Record, Tab 2.

38. As further discussed in the Nordal Affidavit, the Transaction includes, among other things:

(a) the transfer of substantially all of the Company's assets to the Purchaser;

(b) the assumption by the Purchaser of substantially all of the Company's trade payables, contractual obligations (other than certain obligations in respect of former employees, obligations relating to matters in respect of the Second Lien Credit Agreement, and the Nelson Education Promissory Note) and employment obligations incurred in the ordinary course and as reflected in the Company's balance sheet; and

(c) an offer of employment by the Purchaser to all of the Company's employees.

Nordal Affidavit at para. 10; Application Record, Tab 2.

39. Under the Transaction, with the exception of the obligations under the Second Lien Credit Agreement and intercompany amounts, substantially all of the liabilities of the Company are being paid in full in the ordinary course or are otherwise being assumed by the Purchaser. The Purchaser will not assume the Company's obligations to the Second Lien Agent or the Second Lien Lenders under the Second Lien Credit Agreement and certain limited liabilities, as further discussed in the Nordal Affidavit. Under no other third party transaction would the obligations under the Second Lien Credit Agreement be assumed by a purchaser.

Nordal Affidavit at paras. 11 and 108-109; Application Record, Tab 2.

40. The Company maintains the ability under the Transaction to complete a sale transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full prior to the closing of the Transaction.

Nordal Affidavit at para. 115; Application Record, Tab 2.

41. Having regard to the financial circumstances of the Company, the Applicants determined that it was necessary to seek protection under the CCAA in order to preserve enterprise value and continue as a going concern while seeking to implement the Transaction. There is no value available to the Second Lien Lenders and the CCAA proceedings are required to transfer the assets and property of the Company in satisfaction of the indebtedness owing to the First Lien Lenders free and clear of the obligations under the Second Lien Credit Agreement.

Nordal Affidavit at para. 14; Application Record, Tab 2.

42. In connection with the Transaction, the Applicants intend to bring a motion to be heard in June 2015 to approve the Transaction.

Nordal Affidavit at para. 15; Application Record, Tab 2.

PART II – THE FACTS

A. THE APPLICANTS ARE DEBTOR COMPANIES

43. Nelson Education is Canada's leading education publishing company, providing learning solutions to universities, colleges, students, teachers, professors, libraries, government agencies, schools, professionals and corporations across the country. Nelson Education has a deep line of products focused across the various segments of the education market. It is also a leading developer of digital educational resources.

Nordal Affidavit at para. 16; Application Record, Tab 2.

44. As discussed in greater detail in the Nordal Affidavit, in July 2007 the business and assets of Nelson Education were acquired by entities owned by OMERS Administration Corporation and certain funds of APAX Partners from The Thomson Corporation together with the U.S. business and assets of Thomson Learning for a combined total

value of approximately US$7.75 billion, of which approximately $550 million was attributed to the Canadian business (the "**2007 Acquisition**").

Nordal Affidavit at para. 4; Application Record, Tab 2.

45. In connection with the 2007 Acquisition, the Company was financed by way of (i) first lien debt in the initial aggregate principal amount of US$311,438,278.60 and a revolver facility[3] in an initial aggregate principal amount of $50 million pursuant to a First Lien Credit Agreement dated as of July 5, 2007 among Nelson Education, Holdings, the First Lien Agent and the First Lien Lenders; and (ii) second lien debt in an initial aggregate principal amount of US$171,291,053.23 pursuant to a Second Lien Credit Agreement dated as of July 5, 2007 among Nelson Education, Holdings, the Second Lien Agent and the Second Lien Lenders.

Nordal Affidavit at para. 5; Application Record, Tab 2.

46. At the time of the 2007 Acquisition, the value of the Canadian dollar relative to the U.S. dollar was approximately $1.00 to US$0.9463.

Nordal Affidavit at para. 5; Application Record, Tab 2.

47. As at the date hereof, Nelson Education is indebted in the aggregate principal amount of US$268,753,930, plus accrued interest, under the First Lien Credit Agreement. The maturity date under the First Lien Credit Agreement was July 3, 2014. The outstanding principal amount due under the First Lien Credit Agreement was not paid on maturity and Nelson Education is in default under the First Lien Credit Agreement.

Nordal Affidavit at para. 59; Application Record, Tab 2.

48. As at the date hereof, Nelson Education is indebted in the aggregate principal amount of US$153,218,764, plus accrued interest, under the Second Lien Credit Agreement. The maturity date under the Second Lien Credit Agreement is July 3, 2015.

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[3] The revolving facility under the First Lien Credit Agreement matured in July 2013.

Nordal Affidavit at para. 63; Application Record, Tab 2.

49. Nelson Education is in default under the Second Lien Credit Agreement and has not paid in full the interest payment due under the Second Lien Credit Agreement on March 31, 2014 and has not paid the interest payments due under the Second Lien Credit Agreement on June 30, 2014, September 30, 2014, December 31, 2014 or March 31, 2015.

Nordal Affidavit at para. 64; Application Record, Tab 2.

50. Holdings guaranteed the obligations of Nelson Education under each of the Credit Agreements. As security for the repayment of the amounts owed under the Credit Agreements, each of Nelson Education and Holdings has granted:

(a) in respect of the First Lien Credit Agreement, first-priority security over all or substantially all of its respective assets, including a pledge of shares of Nelson Education by Holdings; and

(b) in respect of the Second Lien Credit Agreement, second-priority security over all or substantially all of its respective assets.

Nordal Affidavit at paras. 61 and 65; Application Record, Tab 2.

51. Although the Nelson Business is generating positive EBITDA, Nelson Education does not currently have sufficient funds to repay its obligations under the First Lien Credit Agreement. Holdings is likewise unable to satisfy its guarantee obligations under the Credit Agreements. Despite comprehensive efforts over the past two years to address their financial difficulties, the Applicants have been unable to find an out-of-court solution that would enable them to repay or refinance the amounts owing under the Credit Agreements.

Nordal Affidavit at paras. 125-126; Application Record, Tab 2.

B. STAY OF PROCEEDINGS

52. The Applicants are concerned that in light of the Applicants' financial circumstances, there could be an erosion of value to the detriment of all stakeholders. In particular, the Applicants are concerned about the following risks:

(a) the First Lien Lenders enforcing on their security in respect of the obligations under the First Lien Credit Agreement;

(b) potential termination of contracts by key suppliers and content providers; and

(c) potential termination of contracts by customers.

Nordal Affidavit at para. 130; Application Record, Tab 2.

C. PAYMENTS DURING THE CCAA PROCEEDINGS

53. During the course of these CCAA proceedings, the Applicants intend to make payments for goods, content and services supplied pre-filing and post-filing in the ordinary course as permitted by the Initial Order. It is also contemplated that all employee obligations owing to employees will be paid in the ordinary course, whether such obligations are incurred pre-filing or post-filing. Paragraph 4 of the Initial Order provides the Applicants with the ability to pay expenses and satisfy obligations whether incurred prior to, on or after the making of the Initial Order, in the ordinary course of business.

Nordal Affidavit at paras. 148-149; Application Record, Tab 2.

Initial Order at para. 4.

54. Nelson Education relies on the supply of products and services from its suppliers and service providers and content from its numerous content providers in connection with the ongoing creation, development and/or adaptation of its products and materials as an integral part of the Nelson Business. Nelson Education intends to continue to rely on those suppliers, service providers and content providers with which it has contracts or arrangements that were entered into prior to the date of the filing. The Applicants must

ensure continued good relations with suppliers, service providers and content providers for the benefit of the ongoing Nelson Business.

Nordal Affidavit at paras. 150-154; Application Record, Tab 2.

55. The Applicants have several customer programs in place pursuant to existing contracts or arrangements with certain of their customers, including refunds, returns, rebates, warranties and similar programs. In order to maintain customer relationships as part of the Company's going concern business, the Applicants sought and received approval of the Court to continue providing existing customer programs in compliance with the contracts and arrangements in place with customers and to pay ordinary course amounts owing or allow the customer application of credits in accordance with customer programs.

Nordal Affidavit at paras. 155-157; Application Record, Tab 2.

D. MONITOR

56. Alvarez & Marsal Canada Inc., an affiliate of A&M Securities, was retained to, among other things, act as Monitor in potential CCAA proceedings. A&M Securities has been engaged as Nelson Education's financial advisor to assist the Company since March 2013, and to assist with the SISP since September 2014.

Nordal Affidavit at para. 133; Application Record, Tab 2.

57. The A&M Securities personnel that worked on the prior engagements specialize in corporate finance and investment banking assignments and not restructuring/insolvency engagements. Except for Mr. Dean Mullett, A&M Securities personnel are not Chartered Insolvency and Restructuring Professionals ("**CIRP**") or licensed Trustees in Bankruptcy ("**Trustees**"). Mr. Mullett is the Head of Corporate Finance and Investment Banking for A&M Securities and while Mr. Mullett holds the CIRP and Trustee designations, he does not practice in the area of insolvency. A&M Securities and Alvarez & Marsal Canada Inc. (the entity that holds the corporate trustee license) are affiliates.

Supplementary Report to the Pre-Filing Report of the Monitor dated May 26, 2015 (the "**Supplementary Report**") at para. 3.14.

58. Alvarez & Marsal Canada Inc. consented to act as the Monitor of the Applicants in the within proceedings and was appointed as Monitor by the Court pursuant to the Initial Order.

Nordal Affidavit at para. 134; Application Record, Tab 2.

Initial Order at para. 15.

59. Alvarez & Marsal Canada Inc. is very familiar with the business and operations of the Company, its personnel, and the key issues and stakeholders in the CCAA proceedings. The senior professional personnel of Alvarez & Marsal Canada Inc. with carriage of this matter include experienced insolvency and restructuring practitioners who are Chartered Professional Accountants, CIRPs and licensed Trustees and whom have acted in CCAA matters of a similar nature.

Pre-Filing Report at paras. 3.2-3.3.

E. DIRECTORS' CHARGE

60. The directors of the Applicants have been actively involved in the attempts to address the Applicants' current financial circumstances and difficulties, including through the exploration of alternatives, communicating with the principal secured lenders, implementation of the SISP, and the commencement of the within CCAA proceedings.

Nordal Affidavit at para. 162; Application Record, Tab 2.

61. The directors and officers of the Applicants have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities. In order to complete a successful restructuring, including the Transaction, the Applicants require the active and committed involvement of their directors and officers.

Nordal Affidavit at para. 171; Application Record, Tab 2.

62. Nelson Education maintains a Director and Officer Insurance Policy (the "**D&O Policy**") with AIG Insurance Company of Canada for the directors and officers of the Applicants which expires on June 30, 2015. The D&O Policy contains several exclusions and limitations to the coverage provided by such policy, and there is a potential for there to be insufficient coverage in respect of the potential directors' liabilities for which the directors and/or officers may be found to be responsible.

Nordal Affidavit at paras. 168-170; Application Record, Tab 2.

63. On May 12, 2015, pursuant to the Initial Order, the Court granted a charge (the "**Directors' Charge**") on the assets, undertakings and properties of the Applicants not to exceed $2.2 million in favour of the directors and officers of the Applicants as security for the indemnities provided under paragraph 12 of the Initial Order.

Initial Order at paras. 13 and 22.

64. Pursuant to the Initial Order, the Directors' Charge is a first priority charge ranking in priority to all other Encumbrances (as defined in the Initial Order) in favour of any person except for any validly perfected security interest in favour of a "secured creditor" as defined in the CCAA existing as at the date of the Initial Order, other than any validly perfected security interest in favour of the First Lien Agent or the First Lien Lenders. The Applicants are entitled under the Initial Order to seek priority of the Directors' Charge ahead of all or certain of the other Encumbrances on a subsequent motion on notice to those parties likely to be affected thereby.

Initial Order at paras. 22-24.

F. FURTHER BACKGROUND FACTS

65. The facts relating to the Applicants, the Nelson Business and the relief sought under the Initial Order are more fully set out in the Nordal Affidavit and the Pre-Filing Report.

PART III – ISSUES AND THE LAW

A. EACH OF THE APPLICANTS IS A "DEBTOR COMPANY" TO WHICH THE CCAA APPLIES

66. The CCAA applies in respect of a "debtor company" or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies exceeds $5 million.

> CCAA, Section 3(1).

67. The Applicants are eligible for protection under the CCAA because each is a "debtor company" and the total of the claims against the Applicants exceeds $5 million.

(1) The Applicants are Debtor Companies

68. The term "debtor company" is defined in Section 2 of the CCAA as follows:

> "debtor company" means any company that:
>
> (a) is bankrupt or insolvent;
>
> (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;
>
> (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
>
> (d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.
>
> CCAA, Section 2 ("debtor company").

69. For the reasons described below, each of the Applicants is a "debtor company" within the meaning of this definition.

(a) Each of the Applicants is a "Company"

70. The term "company" is defined in Section 2 of the CCAA as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies.

CCAA, Section 2 ("company").

71. Nelson Education is a "company" within the meaning of the CCAA because it is a corporation incorporated under the laws of Canada. It also has assets in Canada and conducts its business from its head office in Scarborough, Ontario.

Nordal Affidavit at paras. 47-48; Application Record, Tab 2.

72. Holdings is a "company" within the meaning of the CCAA because it is a corporation incorporated under the laws of Canada. It also has assets in Canada.

Nordal Affidavit at paras. 53 and 56; Application Record, Tab 2.

(b) The Applicants are Insolvent

73. The CCAA does not define insolvency. Accordingly, in interpreting the meaning of "insolvent", courts have taken guidance from the definition of "insolvent person" in Section 2 of the *Bankruptcy and Insolvency Act* (the "**BIA**"), which defines an "insolvent person" as a person (i) who is not bankrupt; (ii) who resides, carries on business or has property in Canada; (iii) whose liabilities to creditors provable as claims under the BIA amount to one thousand dollars; and (iv) who is "insolvent" under one of the following tests:

(a) is for any reason unable to meet his obligations as they generally become due;

(b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or

(c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 ("insolvent person").

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 at paras. 21 and 22, 129 A.C.W.S. (3d) 1065 (Ont. Sup. Ct. J. [Commercial List]); leave to appeal to CA refused [2004] O.J. No. 1903; leave to appeal to SCC refused [2004] S.C.C.A. No. 336 [*Stelco 2004*]; Book of Authorities, Tab A.

74. These tests for insolvency are disjunctive. A company satisfying any one of these tests is considered insolvent for the purposes of the CCAA.

Stelco 2004, supra at paras. 26 and 28; Book of Authorities, Tab A.

75. A company is also insolvent for the purposes of the CCAA if, at the time of filing, there is a reasonably foreseeable expectation that there is a looming liquidity condition or crisis that would result in the company being unable to pay its debts as they generally become due if a stay of proceedings and ancillary protection are not granted by the court.

Stelco 2004, supra at para. 40; Book of Authorities, Tab A.

76. The Applicants meet both the test for insolvency under the BIA and the test for insolvency based on a looming liquidity condition given:

(a) the Applicants currently have, in the aggregate, over US$430 million (or over $544 million in Canadian dollars[4]) of secured first and second lien debt outstanding under the Credit Agreements;

[4] Based on the exchange rate of $1.00 to US$0.7895 as at March 31, 2015.

(b) Nelson Education does not currently have sufficient funds to repay its obligations under the First Lien Credit Agreement, which matured on July 3, 2014, and is in default under the First Lien Credit Agreement;

(c) Nelson Education is in default under the Second Lien Credit Agreement and has not paid in full the interest payment due under the Second Lien Credit Agreement on March 31, 2014 and has not paid the interest payments due on June 30, 2014, September 30, 2014, December 31, 2014 or March 31, 2015;

(d) despite their comprehensive efforts for over two years to address their financial difficulties, the Applicants have been unable to find an out-of-court solution that would enable them to repay or refinance the amounts owing under the Credit Agreements;

(e) Holdings is likewise unable to satisfy its guarantee obligations under the Credit Agreements;

(f) the Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;

(g) in light of the financial circumstances of the Applicants, it is not possible to obtain additional financing that could be utilized to repay the amounts owing under the First Lien Credit Agreement let alone both Credit Agreements;

(h) there is no reasonable expectation that the Applicants' financial condition will improve absent these restructuring proceedings; and

(i) the value of the Applicants' assets, property and undertaking, taken at fair value, is not sufficient to enable the Applicants to pay all of their obligations under the Credit Agreements, as evidenced by the results of the SISP.

Nordal Affidavit at paras. 6, 10 and 125-128; Application Record, Tab 2.

(2) The Applicants have claims outstanding in excess of $5 million

77. The Applicants have total claims exceeding the $5 million threshold amount under the CCAA. In particular, as at December 31, 2014, Nelson Education had liabilities of approximately $657.6 million, and Holdings had liabilities of approximately $123.4 million. Holdings is also a guarantor under each of the Credit Agreements. Thus total claims against each of the Applicants far exceed the $5 million threshold amount under the CCAA.

Nordal Affidavit at paras. 52, 57, 61 and 65; Application Record, Tab 2.

78. Given the foregoing factors, the CCAA applies to the Applicants as "debtor companies" in accordance with Section 3(1) of the CCAA.

B. DEFERENCE OUGHT TO BE ACCORDED TO THE BUSINESS JUDGEMENT OF THE DEBTOR COMPANY

79. The Ontario Court of Appeal has stated that the proper interpretation of Section 11 of the CCAA is one that honours "the historical reluctance of courts to intervene in [corporate governance] matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation."

Re Stelco Inc., 196 O.A.C. 142 at para. 42, [2005] O.J. No. 1171 [*Stelco 2005*]; Book of Authorities, Tab B.

CCAA, Section 11.

80. The Court of Appeal made clear that a judge supervising a CCAA proceeding is not "catapulted into the shoes of the board" when acting in its supervisory role. Rather, the business judgment rule applies to a debtor in a CCAA proceeding, and judges will be very hesitant to second-guess the business decisions of the board and management.

Stelco 2005, supra at paras. 65 and 68; Book of Authorities, Tab B.

Re Crystallex International Corp., 2012 ONSC 2125 at para. 33 (Commercial List) [*Crystallex*]; Book of Authorities, Tab C.

81. It is appropriate for the business judgment rule to protect the business judgment of the boards of directors of the Applicants in connection with the commencement of these proceedings and the relief sought by the Applicants. In the present case, the board of directors of each of the Applicants thoroughly considered the circumstances and the alternatives available to the Applicants in the present circumstances. In exercise of their business judgment and with the assistance of their legal and financial advisors, they determined that it is in the best interest of the Applicants and their stakeholders for the Applicants to file for protection under the CCAA. The boards' business judgment was in each case considered, informed, made honestly, in good faith and with the assistance of advisors, with a view to the best interests of the Company and its stakeholders.

Crystallex, supra at paras. 112-14; Book of Authorities, Tab C.

Nordal Affidavit at para. 130; Application Record, Tab 2.

C. THE RELIEF SOUGHT IS AVAILABLE UNDER THE CCAA AND CONSISTENT WITH THE PURPOSE AND POLICY OF THE CCAA

(1) The CCAA is Flexible, Remedial Legislation

82. The CCAA is remedial legislation, intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy. In particular, during periods of financial hardship, debtors turn to the Court so that the Court may apply the CCAA in a flexible manner in order to accomplish the statute's goals. The Court should give the CCAA a broad and liberal interpretation so as to encourage and facilitate successful restructuring whenever possible.

Elan Corporation v. Comiskey (Trustee of), 1 O.R. (3d) 289, [1990] O.J. No. 2180 paras. 22 and 56-60 (C.A.) [cited to O.J.]; Book of Authorities, Tab D.

Re Lehndorff General Partners Ltd. (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 at para. 5 (Ont. Gen. Div.); Book of Authorities, Tab E.

83. Section 11 of the CCAA provides the courts with a broad and liberal power, which is at their disposal in order to achieve the overall objective of the CCAA. Accordingly, an interpretation of the CCAA that facilitates restructurings accords with its purpose.

Re Sulphur Corporation of Canada Ltd., 2002 ABQB 682 at para. 28; Book of Authorities, Tab F.

84. Given the nature and purpose of the CCAA, this Court has the authority and jurisdiction to depart from the Model Order as is reasonable and necessary in order to achieve a successful restructuring.

(2) Entitlement to Make Pre-Filing Payments

85. To ensure the continued operation of the Nelson Business, limit any disruption and preserve the value of the Nelson Business as part of the transition to the Purchaser, which is expected to occur in June 2015, subject to approval of the Court, and in the interests of the Applicants' stakeholders, the Applicants sought and obtained authorization to make pre-filing and post-filing payments in the ordinary course of business. The Consenting First Lien Lenders agreed to and the Monitor is supportive of such relief.

Initial Order at para. 4.

Nordal Affidavit at paras. 151-152 and 155; Application Record, Tab 2.

86. The Court has jurisdiction to permit payment of pre-filing obligations to persons whose services are critical to the ongoing operations of the debtor companies. The Court's jurisdiction is not limited by Section 11.4 of the CCAA, which codifies the Court's authority to declare a person to be a critical supplier and to grant a charge on the debtor's property in favour of such critical supplier. As noted by Pepall J. in *Canwest Global*, the amendments made in 2009, including Section 11.4, do not detract from the inherently flexible nature of the CCAA or the Court's broad and inherent jurisdiction to make such orders that will facilitate the debtor's restructuring of its business as a going concern.

Re Canwest Global Communications Corp., 59 C.B.R. (5th) 72, [2009] O.J. No. 4286 at paras. 41 and 43 (Sup. Ct. J. [Commercial List]) [*Canwest Global*]; Book of Authorities, Tab G.

87. There have been many instances since the 2009 amendments in which courts have authorized applicants to pay certain pre-filing amounts where the applicants were not

seeking a charge in respect of critical suppliers. In granting this authority, the courts have considered a number of factors, including:

(a) whether the goods and services were integral to the business of the applicants;

(b) the applicants' need for the uninterrupted supply of the goods or services;

(c) the fact that no payments would be made without the consent of the Monitor;

(d) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate;

(e) whether the applicants had sufficient inventory of the goods on hand to meet their needs; and

(f) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Re Cinram International Inc., 2012 ONSC 3767 at para. 37 and Sch. C. paras. 66-71 (Commercial List); Book of Authorities, Tab H.

Re SkyLink Aviation Inc., 2013 ONSC 1500 at para. 26 (Commercial List) [*SkyLink*]; Book of Authorities, Tab I.

Re Armtec Infrastructure Inc., 2015 ONSC 2791 at paras. 50-51 (Commercial List); Book of Authorities, Tab J.

88. The Court has authorized the payment of all pre-filing trade obligations of a debtor company where necessary to avoid disruption to the debtor's operations and its trade relationships, and where the debtor believes that the value of the business will be maximized if it is able to make such pre-filing payments.

Re Eddie Bauer of Canada Inc. (2009), 55 C.B.R. (5th) 33 at para. 22, 179 A.C.W.S. (3d) 47 (Ont. Sup. Ct. J. [Commercial List]); Book of Authorities, Tab K.

Re Maax Corporation et al., Initial Order granted June 12, 2008, Court File No. 500-11-033561-081 (Que. Sup. Ct. [Commercial List]) at para. 21 [*Maax Initial Order*]; Book of Authorities, Tab L.

Re Armtec Infrastructure Inc., Initial Order granted April 29, 2015, Court File

No. CV15-10950-00CL at para. 6 (Ont. Sup. Ct. J. [Commercial List]) [*Armtec Initial Order*]; Book of Authorities, Tab N.

89. Nelson Education relies on the supply of products and services from its suppliers and service providers and content from its numerous content providers in connection with the ongoing creation, development and/or adaptation of its products and materials as an integral part of the Nelson Business. The Company operates in a highly competitive environment where the ongoing creation of products and materials and the timely provision of its products and materials is essential in order for the Company to remain a successful player in the industry and to ensure the continuation of the Nelson Business. The Applicants believe that such persons should be paid in the ordinary course, including in respect of pre-filing amounts, in order to avoid disruption to the Nelson Business during the CCAA proceedings.

Nordal Affidavit at paras. 150-153; Application Record, Tab 2.

90. In addition, in order to maintain customer relationships as part of the Company's going concern business, it is important for the Company to continue providing existing customer programs in compliance with the contracts and arrangements in place with customers, paying certain ordinary course amounts owing and allowing customer application of credits in accordance with existing customer programs.

Nordal Affidavit at para. 156; Application Record, Tab 2.

91. Payment of the Company's pre-filing and post-filing trade obligations, including pursuant to existing customer programs, will assist in preserving stability for the Nelson Business and maintaining strong key relationships the Company's has developed over many years with its vendors, service providers, content providers and customers, with a view to maximizing value of the Nelson Business for the benefit of the Company and its stakeholders.

(3) The Appointment of Alvarez and Marsal Canada Inc. as Monitor is Appropriate

92. The Applicants submit that Alvarez & Marsal Canada Inc. is an appropriate party to monitor the business and financial affairs of the Applicants.

(a) The CCAA does not preclude Alvarez & Marsal Canada Inc. from Acting as Monitor of the Applicants

93. Section 11.7(2) specifies those parties that may not be appointed monitor, absent the permission of the Court:

> 11.7(2) *Restrictions on who may be monitor*
>
> Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company
>
> (a) if the trustee is or, at any time during the two preceding years, was
>
> (i) a director, an officer or an employee of the company;
>
> (ii) related to the company or to any director or officer of the company, or
>
> (iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or
>
> (b) if the trustee is
>
> (i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or
>
> (ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

CCAA, Section 11.7(2).

94. None of the restrictions set forth in Section 11.7(2) above apply in respect of Alvarez & Marsal Canada Inc. in these circumstances.

Pre-Filing Report at para. 3.2.

95. Although this matter is being raised by RBC at a comeback hearing, the Applicants note that there have been no reported cases where a Monitor has been removed pursuant to Section 11.7(3) of the CCAA.

(b) It is Appropriate to Appoint Alvarez & Marsal Canada Inc. as the Monitor of the Applicants

96. The appointment by the Courts of a monitor that previously acted as the debtor's financial advisor is normal course in CCAA jurisprudence and such appointments have been made in numerous cases.

Re Allen Vanguard Corporation, Initial Order granted December 9, 2009, Court File No. CV-09-00008502-00CL (Ont. Sup. Ct. [Commercial List]) at para. 20; Book of Authorities, Tab O. See also *Re Allen Vanguard Corporation,* Proposed Monitor's First Report To Court, dated December 8, 2009 at para. 5; Book of Authorities, Tab P.

Re Cinram International Inc. et al., Initial Order granted June 25, 2012, Court File No. CV12-9767-00CL at para. 40 (Ont. Sup. Ct. J. [Commercial List]) [*Cinram Initial Order*]; Book of Authorities, Tab Q. See also *Re Cinram International Inc. et al.,* Report of FTI Consulting Canada Inc., in its capacity as Proposed Monitor of Cinram International Inc., Cinram International Income Fund, CII Trust and the Companies Listed in Schedule "A", dated June 23, 2012 at para. 7; Book of Authorities, Tab R.

Maax Initial Order, supra at para. 42; Book of Authorities, Tab L. See also *Re Maax Corporation et al.,* First Report of the Monitor dated June 25, 2008 at paras. 31-32 (Que. Sup. Ct. [Commercial Division]); Book of Authorities, Tab M.

Re Cline Mining Corporation et al., Initial Order granted December 3, 2014, Court File No. CV14-10781-00CL at para. 23 (Ont. Sup. Ct. [Commercial List]); Book of Authorities, Tab S. See also *Re Cline Mining Corporation et al.*, Pre-Filing Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Proposed Monitor, dated December 2, 2014 at para. 27; Book of Authorities, Tab T.

Re Angiotech Pharmaceuticals, Inc. et al., Initial Order granted January 28, 2011, Court File No. S-110587 (B.C. Sup. Ct.) at para. 33; Book of Authorities, Tab U. See also *Re Angiotech Pharmaceuticals, Inc. et al.*, Pre-Filing Report of the Proposed Monitor Alvarez & Marsal Canada Inc., dated January 28, 2011 at para. 3.1; Book of Authorities, Tab V.

97. In its statutory review of the CCAA, Industry Canada noted that the appointment of a debtor's financial advisor as the monitor can facilitate a successful restructuring and a

reduction in costs because the monitor has prior knowledge of the debtor's financial circumstances. Industry Canada has recognized that risks of conflict are mitigated because monitors are professionals subject to oversight, such as professional codes of conduct, appointment restrictions under section 11.7(2)(a)(iii) of the CCAA and oversight by the Office of the Superintendent of Bankruptcy and the Court.

> Industry Canada, Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2014) at p. 21; Book of Authorities, Tab W.

98. Upon appointment by the Court, the Monitor is an officer of the Court and has an obligation to carry out its role in an independent way and to consider the interests of the debtor company and its creditors.

> *Re United Used Auto & Truck Parts Ltd.*, [1999] B.C.J. No. 2754 at para. 20, affirmed 2000 BCCA 146, leave to appeal granted [2000] S.C.C.A. No. 142 [*United Used Auto*]; Book of Authorities, Tab X.

99. There is no evidence to indicate that Alvarez & Marsal Canada Inc. could not or would not carry out its role as the Monitor of the Applicants in an independent way and consider the interests of the Applicants and their creditors.

100. Alvarez & Marsal Canada Inc. is also governed by professional bodies, namely the Chartered Professional Accountants of Ontario and the Canadian Association of Insolvency and Restructuring Professionals, each of which administers rules of professional conduct. The Rules of Professional Conduct in respect of Chartered Professional Accountants include the following rule specific to maintaining independence in insolvency engagements:

> 204.8 – *Independence: Insolvency Engagements*
>
> A member or firm who engages or participates in an engagement to act in any aspect of insolvency practice, including as a trustee in bankruptcy, a liquidator, a receiver or a receiver-manager, shall be and remain independent such that the member, firm and members of the firm shall be and shall remain free of any influence, interest or relationship which, in respect of the engagement, impairs the professional judgment or objectivity of the member, firm or member of the firm or which, in the

> view of a reasonable observer, would impair the professional judgment or objectivity of the member, firm or member of the firm.
>
> Rules of Professional Conduct, Chartered Professional Accountants of Ontario, r. 204.8.
>
> *Winalta Inc., Re,* 2011 ABQB 399 at para. 76; Book of Authorities, Tab Y.

101. The party requesting the replacement of the Monitor must satisfy the Court that the Monitor is not independent in its role.

> *United Used Auto, supra* at para. 20; Book of Authorities, Tab X.
>
> *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 957 at paras. 37-38; Book of Authorities, Tab Z.

102. A perception of a conflict of interest is insufficient to displace a court-appointed officer without evidence of an actual conflict.

> *A. Farber & Partners Inc. v. Penta TMR Inc.*, 2007 CarswellOnt 10041 at para. 7 (Sup. Ct. J.); Book of Authorities, Tab AA.

103. In *Smurfit-Stone*, the Court noted that:

> If one were to insist on independent counsel and an independent court officer for every instance of perceived conflict of interest, restructuring proceedings of corporate groups would become completely unwieldy and unproductive. On the other hand, there may be instances of conflicts of interest that should be addressed. The court should adopt a case by case analysis to ascertain whether there is a conflict of interest that merits the granting of relief.
>
> *Re Smurfit-Stone Container Canada Inc.* (2009), 61 C.B.R. (5th) 92 at para. 21, 181 A.C.W.S. (3d) 854 (Ont. Sup. Ct. J. [Commercial List]) [*Smurfit-Stone*]; Book of Authorities, Tab BB.

104. There are no factors or evidence that RBC has filed with respect to the role, conduct or actions of A&M Securities or Alvarez & Marsal Canada Inc. at any time between March 2013 and the Applicants' CCAA filing date, notwithstanding that RBC and its advisors have been actively engaged with the Company and its advisors (including A&M Securities) for in excess of two years.

105. The fact that A&M Securities has acted as financial advisor for the Company since March 2013 and assisted the Company and engaged in discussions with the Company's stakeholders in connection with the Company's review of its strategic alternatives is not evidence of an actual conflict and does not indicate that Alvarez & Marsal Canada Inc. would not act independently as the Monitor of the Applicants.

Pre-Filing Report at para. 3.4.

106. A&M Securities' role and conduct were constructive, productive and of great assistance to the Company and its stakeholders. A&M Securities assisted the Company in its attempts to achieve a consensual arrangement with the First Lien Lenders and the Second Lien Lenders, but, among other things:

(a) did not provide a recommendation with respect to the March Interest Payment;

(b) was not involved in the Company's decision to stop paying advisory fees of the Second Lien Agent; and

(c) did not negotiate or provide a recommendation with respect to the First Lien Support Agreement.

107. Neither of A&M Securities' engagement letters with the Company provide for a success fee in the event that the proposed Transaction is completed, and Alvarez & Marsal Canada Inc. does not have an engagement letter with the Company with respect to its role as the Monitor. Rather, the Initial Order granted by the Court governs its appointment as Monitor of the Applicants.

Supplemental Report at para. 3.10.

108. The replacement of the Monitor serves no valid purpose in these circumstances. Based on the facts, circumstances and context of the Applicants' CCAA proceedings, A&M Securities' prior engagement as financial advisor cannot reasonably be seen as affecting, directly or indirectly, Alvarez & Marsal Canada Inc.'s independence as Court-appointed

Monitor. The Applicants, their respective Boards of Directors and the First Lien Steering Committee all support Alvarez & Marsal Canada Inc. as the Monitor of the Applicants.

109. As noted above, Alvarez & Marsal Canada Inc. is very familiar with the business and operations of the Company, its personnel, and the key issues and stakeholders in the CCAA proceedings.

Pre-Filing Report at para. 3.2.

110. Appointment of a new monitor over the Applicants in the proceedings without knowledge of the Applicants, the Nelson Business and the circumstances surrounding the Company and its financial challenges would duplicate expenses and cause considerable delay in bringing a new monitor up to speed regarding the proceedings. As discussed, the Company has over the last two years already expended substantial amounts on professional fees on behalf of the First Lien Steering Committee and the Second Lien Agent. The duplication of expenses that would result from the appointment of a new monitor would be not be of benefit to the Company or its stakeholders.

111. At the time of and since the date of the Initial Order, Alvarez & Marsal Canada Inc. was and continues to be in a position to immediately assist the Applicants with their restructuring process, and is the appropriate party to act as Monitor.

Nordal Affidavit at para. 134.

(4) The Directors' Charge is Appropriate

112. On May 12, 2015, the Applicants sought and obtained approval of the Directors' Charge in an amount of $2.2 million over the assets and property of the Applicants to indemnify the directors and officers of the Applicants in respect of liabilities they may incur in such capacities from and after the commencement of these proceedings. The Initial Order provides that the Directors' Charge shall rank in priority to all other Encumbrances (as defined in the Initial Order) in favour of any person, notwithstanding the order of perfection or attachment, except for any validly perfected security interest in favour of a "secured creditor" as defined in the CCAA other than any validly perfected security

interest in favour of the First Lien Agent or the First Lien Lenders. The Applicants are entitled under the Initial Order to seek priority of the Directors' Charge ahead of all or certain of the other Encumbrances on a subsequent motion on notice to those parties likely to be affected thereby.

Initial Order at paras. 13, 22 and 24.

113. Section 11.51 of the CCAA affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

> 11.51(1) *Security or charge relating to director's indemnification.* – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) *Priority.* – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> 11.51(3) *Restriction – indemnification insurance.* – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault.* – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

CCAA, Section 11.51.

114. The Court has granted director and officer charges pursuant to Section 11.51 in a number of cases. In *Canwest Global*, the Court outlined the test for granting such a charge:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the

commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

Canwest Global, supra at paras. 46-48; Book of Authorities, Tab G.

Re Canwest Publishing Inc., 2010 ONSC 222 at paras. 56-57 (Commercial List); Book of Authorities, Tab CC.

Cinram Initial Order, supra at para. 38; Book of Authorities, Tab Q.

SkyLink, supra at para. 27; Book of Authorities, Tab I.

Armtec Initial Order, supra at para. 21; Book of Authorities, Tab N.

115. The Applicants submit that the Directors' Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge given that:

(a) it is possible for the directors and officers of the Applicants to be held personally liable in connection with these CCAA proceedings and they have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;

(b) the Applicants' D&O Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage in respect of the potential directors' liabilities for which the directors and/or officers may be found to be responsible;

(c) the Directors' Charge applies only to claims or liabilities for which the directors and officers do not have coverage under the D&O Policy;

(d) the Directors' Charge would only cover obligations and liabilities that the directors and officers, as applicable, may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;

(e) the Applicants' directors and officers have been actively involved in the attempts to address the Applicants' current financial circumstances and difficulties, including through the exploration of alternatives, communicating

with the principal secured lenders, implementation of the SISP, and the commencement of the within CCAA proceedings;

(f) the Applicants require the continued active and committed involvement of the directors and officers;

(g) the amount of the Directors' Charge has been calculated based on the estimated exposure of the directors and officers of the Applicants and has been reviewed by the proposed Monitor;

(h) the secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and

(i) the Consenting First Lien Lenders have agreed to and the proposed Monitor is supportive of the Directors' Charge.

Nordal Affidavit at paras. 167-174; Application Record, Tab 2.

PART IV– RELIEF REQUESTED

116. The Applicants currently have unsustainable debt levels when compared to their annual revenue and EBITDA. In addition, the Applicants' First Lien Credit Agreement matured in July 2014 and remains unpaid, and the Applicants are also in default under their Second Lien Credit Agreement, which matures on July 3, 2015.

117. The Company and its advisors have spent over two years advancing all potential options, exploring all potential transactions and strategic alternatives and engaging in discussions and negotiations with its First Lien Lenders and Second Lien Lenders with a view to achieving a consensual transaction for the benefit of all stakeholders, including RBC.

118. The Company hired experienced legal and financial advisors at an early stage and advanced and exchanged numerous restructuring term sheets over a period of approximately 14 months. The Company also hired an operational consultant.

119. The Company has expended significant amounts in paying the professional fees of the Canadian and U.S. legal advisors and financial advisors for both the First Lien Steering Committee and the Second Lien Agent, and provided access and information to the First Lien Lenders and the Second Lien Lenders. The Company conducted calls and provided presentations to review operational and financial results with the First Lien Lenders and the Second Lien Lenders.

120. The Company with the assistance of its advisors focused on improving and advancing its business, actively promoted finding a consensual solution among the First Lien Lenders and the Second Lien Lenders, advanced various potential transaction structures and options (including pursuant to the CBCA) with the First Lien Lenders and the Second Lien Lenders, entered into the Second Lien Extensions with the Second Lien Lenders extending the cure period in respect of the March Interest Payment and providing additional time for the Company to continue to explore alternatives, conducted the July Consent Solicitation Process over a period of approximately two months to seek an extension of the maturity under its First Lien Credit Agreement which did not ultimately result in the support of the First Lien Lenders, entered into the First Lien Support Agreement with 21 out of 22 of its First Lien Lenders, delayed the repayment of the obligations under the First Lien Credit Agreement for nearly a year past the maturity to continue to advance and explore all potential options and alternatives, provided RBC and the Second Lien Lenders with the tools and the opportunity over two years to repay the obligations under the First Lien Credit Agreement, and conducted the comprehensive SISP over several months which did not result in an executable transaction that would result in proceeds to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders. The Company has remained constructive and open with the First Lien Lenders and the Second Lien Lenders through the process.

121. There is no value available to the Second Lien Lenders and the within CCAA proceedings are necessary to preserve the value of the Nelson Business with minimal disruption while the Applicants pursue the completion of the Transaction and the transfer of the assets and property of the Company in satisfaction of the indebtedness owing to the

First Lien Lenders free and clear of the obligations under the Second Lien Credit Agreement.

122. The Transaction is the only executable transaction in the circumstances and will significantly reduce the debt levels of the Company, establish a stronger financial foundation for Nelson Education, create stability for the business and strengthen the Company's position as Canada's leading education publisher for the benefit of the Company's many stakeholders.

123. RBC, as a sophisticated lender holding a junior position, has recognized the reality of the current situation. RBC twice extended the cure period in respect of the March Interest Payment, has not elected to refinance the obligations under the First Lien Credit Agreement, consented to the July Proposed Extension pursuant to the July Consent Solicitation Process agreeing to extend the maturity of the First Lien Credit Agreement and the non-payment of interest on the Second Lien Credit Agreement, voluntary forbore from declaring a default or taking steps since March 2014 and allowed the Company and its advisors to advance and explore a sale process to see if a transaction with a value above the amounts outstanding under the First Lien Credit Agreement could be achieved. Moreover, with respect to the comeback hearing, RBC has only filed one letter (which was responded to by the Company) despite being involved with the Company and its restructuring efforts for in excess of two years. The Court should not accept the position being advanced by RBC for the comeback hearing.

124. The Applicants submit that they meet all of the qualifications required to obtain the requested relief under the CCAA.

125. The Applicants submit that appointment of Alvarez & Marsal Canada Inc. as the Monitor of the Applicants is appropriate in the circumstances. The replacement of the Monitor would serve no valid purpose here.

126. For the reasons set out above, the Applicants believe that the Initial Order granted on May 12, 2015 by the Court is appropriate in the circumstances and ought not to be amended or varied.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 28, 2015

Robert J. Chadwick

Caroline Descours

SCHEDULE A – LIST OF AUTHORITIES

A. *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299, 129 A.C.W.S. (3d) 1065 (Ont. Sup. Ct. J. [Commercial List]); leave to appeal to CA refused [2004] O.J. No. 1903; leave to appeal to SCC refused [2004] S.C.C.A. No. 336

B. *Re Stelco Inc.*, 196 O.A.C. 142, [2005] O.J. No. 1171

C. *Re Crystallex International Corp.*, 2012 ONSC 2125 (Commercial List)

D. *Elan Corporation v. Comiskey (Trustee of)*, 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.)

E. *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div.)

F. *Re Sulphur Corporation of Canada Ltd.*, 2002 ABQB 682

G. *Re Canwest Global Communications Corp.*, 59 C.B.R. (5th) 72, [2009] O.J. No. 4286 (Sup. Ct. J. [Commercial List])

H. *Re Cinram International Inc.*, 2012 ONSC 3767 (Commercial List)

I. *Re SkyLink Aviation Inc.*, 2013 ONSC 1500 (Commercial List)

J. *Re Armtec Infrastructure Inc.*, 2015 ONSC 2791 (Commercial List)

K. *Re Eddie Bauer of Canada Inc.* (2009), 55 C.B.R. (5th) 33, 179 A.C.W.S. (3d) 47 (Ont. Sup. Ct. J. [Commercial List])

L. *Re Maax Corporation et al.*, Initial Order granted June 12, 2008, Court File No. 500-11-033561-081 (Que. Sup. Ct. [Commercial List])

M. *Re Maax Corporation et al.*, First Report of the Monitor dated June 25, 2008 (Que. Sup. Ct. [Commercial Division])

N. *Re Armtec Infrastructure Inc.*, Initial Order granted April 29, 2015, Court File No. CV15-10950-00CL (Ont. Sup. Ct. J. [Commercial List])

O. *Re Allen Vanguard Corporation,* Initial Order granted December 9, 2009, Court File No. CV-09-00008502-00CL (Ont. Sup. Ct. [Commercial List])

P. *Re Allen Vanguard Corporation,* Proposed Monitor's First Report To Court, dated December 8, 2009

Q. *Re Cinram International Inc. et al.*, Initial Order granted June 25, 2012, Court File No. CV12-9767-00CL (Ont. Sup. Ct. J. [Commercial List])

R. *Re Cinram International Inc. et al.*, Report of FTI Consulting Canada Inc., in its capacity as Proposed Monitor of Cinram International Inc., Cinram International Income Fund, CII Trust and the Companies Listed in Schedule "A", dated June 23, 2012

S. *Re Cline Mining Corporation et al.*, Initial Order granted December 3, 2014, Court File

No. CV14-10781-00CL (Ont. Sup. Ct. [Commercial List])

T. *Re Cline Mining Corporation et al.*, Pre-Filing Report to the Court Submitted by FTI Consulting Canada Inc., in its Capacity as Proposed Monitor, dated December 2, 2014

U. *Re Angiotech Pharmaceuticals, Inc. et al.*, Initial Order granted January 28, 2011, Court File No. S-110587 (B.C. Sup. Ct.)

V. *Re Angiotech Pharmaceuticals, Inc. et al.*, Pre-Filing Report of the Proposed Monitor Alvarez & Marsal Canada Inc., dated January 28, 2011

W. Industry Canada, Statutory Review of the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act (2014)

X. *Re United Used Auto & Truck Parts Ltd.,* [1999] B.C.J. No. 2754, affirmed 2000 BCCA 146, leave to appeal granted [2000] S.C.C.A. No. 142

Y. *Winalta Inc., Re,* 2011 ABQB 399

Z. *HSBC Bank Canada v. Bear Mountain Master Partnership*, 2010 BCSC 957

AA. *A. Farber & Partners Inc. v. Penta TMR Inc.*, 2007 CarswellOnt 10041 (Sup. Ct. J.)

BB. *Re Smurfit-Stone Container Canada Inc.* (2009), 61 C.B.R. (5th) 92, 181 A.C.W.S. (3d) 854 (Ont. Sup. Ct. J. [Commercial List])

CC. *Re Canwest Publishing Inc.*, 2010 ONSC 222 (Commercial List)

SCHEDULE B – STATUTORY REFERENCES

COMPANIES' CREDITORS ARRANGEMENT ACT
RSC 1985, c C-36, as amended

s. 2 ("company")

"company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the Bank Act, railway or telegraph companies, insurance companies and companies to which the Trust and Loan Companies Act applies.

s. 2 ("debtor company")

"debtor company" means any company that

a) is bankrupt or insolvent,

b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,

c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or

d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent.

s. 3(1)

Application - This Act applies in respect of a debtor company or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies, determined in accordance with section 20, is more than $5,000,000 or any other amount that is prescribed.

s. 11

General power of court – Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances

s. 11.51(1)

Security or charge relating to director's indemnification – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all of part of the property of the company is subject to a security or charge -- in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

s. 11.51(2)

Priority – The court may order that the security or charge rank in priority over the claim of any secured creditors of the company

s. 11.51(3)

Restriction – indemnification insurance – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

s. 11.51(4)

Negligence, misconduct or fault – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

s. 11.7(2)

Restrictions on who may be monitor – Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

a) if the trustee is or, at any time during the two preceding years, was

    (i) a director, an officer or an employee of the company,

    (ii) related to the company or to any director or officer of the company, or

    (iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

b) if the trustee is

    (i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act

constituting a hypothec within the meaning of the Civil Code of Quebec that is granted by the company or any person related to the company, or

(A) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

BANKRUPTCY AND INSOLVENCY ACT
RSC 1985, c B-3, as amended

s. 2 ("insolvent person")

"insolvent person" means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and

a) who is for any reason unable to meet his obligations as they generally become due,

b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or

c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

RULES OF PROFESSIONAL CONDUCT
CHARTERED PROFESSIONAL ACCOUNTANTS OF ONTARIO

R. 204.8

Independence: Insolvency Engagements – A member or firm who engages or participates in an engagement to act in any aspect of insolvency practice, including as a trustee in bankruptcy, a liquidator, a receiver or a receiver-manager, shall be and remain independent such that the member, firm and members of the firm shall be and shall remain free of any influence, interest or relationship which, in respect of the engagement, impairs the professional judgment or objectivity of the member, firm or member of the firm or which, in the view of a reasonable observer, would impair the professional judgment or objectivity of the member, firm or member of the firm.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT* ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF NELSON EDUCATION LTD. AND NELSON EDUCATION HOLDINGS LTD.

Applicants

Court File No: CV15-10961-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE-COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF THE APPLICANTS
(Comeback Hearing returnable May 29, 2015)

GOODMANS LLP
Barristers & Solicitors
333 Bay Street, Suite 3400
Toronto, Canada M5H 2S7

Robert J. Chadwick LSUC#: 35165K
rchadwick@goodmans.ca
Caroline Descours LSUC#: 58251A
cdescours@goodmans.ca
Tel: (416) 979-2211
Fax: (416) 979-1234

Lawyers for the Applicants

6456342