

**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.**

**FACTUM OF THE FIRST LIEN HOLDERS
(Motions Returnable August 13, 2015)**

August 11, 2015

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PART I: OVERVIEW

1. The First Lien Holders¹ file this factum in support of the Applicants' sale approval motion and in opposition to The Royal Bank of Canada's ("**RBC's**") motion seeking a distribution on account of amounts owing to RBC and other Second Lien Lenders, in priority to prior ranking secured debts owing to the First Lien Lenders (capitalized terms as defined below). RBC has advised that it does not oppose the Applicants' sale approval motion.²

2. Nelson Education Ltd. ("**Nelson Education**", "**Nelson**" or the "**Company**") is Canada's leading education publishing company.³ It is an operational business with more than 350 employees,⁴ and annual Post-Plate EBITDA of approximately \$31.7 million.⁵ Nelson Education also has over US\$430 million in secured debt, including accrued interest (or approximately CAD\$565 million at prevailing exchange rates), which is unsustainable.⁶

3. The transaction proposed by the Applicants' in their sale approval motion – the result of over two years of negotiations amongst Nelson Education and its First Lien Lenders and Second Lien Lenders – would significantly reduce Nelson Education's debt levels, enable the Company to retain all of its employees, and allow it to continue as a going concern.⁷

4. RBC's motion is premised on three propositions, each of which is entirely contradicted by the evidence before the court and applicable law: (1) that Nelson Education has sufficient value

¹ Wilmington Trust, National Association, as the First Lien Agent, Cortland Capital Market Services LLC, as the Supplemental Agent, and the First Lien Steering Committee in these proceedings (collectively, the "**First Lien Holders**").

² Cross-examination of Les Vowell on August 5, 2015 at questions 31-33, pp. 11-12, Transcript Brief, Vol. II, Tab V.1.

³ Affidavit of Greg Nordal sworn May 11, 2015 at para. 16, Application Record, Tab 2, p. 24.

⁴ Affidavit of Greg Nordal sworn May 11, 2015 at para. 17, Application Record, Tab 2, p. 24.

⁵ Affidavit of Greg Nordal sworn May 11, 2015 at para. 19, Application Record, Tab 2, p. 25 (net of pre-publication expenditures for the fiscal year ending March 31, 2015).

⁶ Affidavit of Greg Nordal sworn May 11, 2015 at para. 19, Application Record, Tab 2, p. 25.

⁷ Affidavit of Greg Nordal sworn May 11, 2015 at para. 116, Application Record, Tab 2, p. 36.

to satisfy debts beyond the claims of the First Lien Lenders; (2) that, in the context of this insolvency proceeding, the Second Lien Lenders are entitled to have any of their claims paid in priority to the First Lien Lenders; and (3) that Nelson Education is obligated to pay RBC a consent fee in respect of an agreement RBC never entered into.

5. *Insufficient Value.* The Second Report of the Monitor, prepared by FTI Consulting Canada Inc. ("**FTI**"), squarely addresses and rejects RBC's various value and other concerns. FTI's Second Report validates the integrity of the sale process leading to the present credit bid and that there is no remaining value for the Second Lien Lenders.

6. Moreover, in the April 15, 2015 credit report, RBC's affiant calculated Nelson's enterprise value using three metrics, debt trading levels, discounted cash flow and comparable EBITDA multiples. Depending on the scenario used, the shortfall in the First Lien debt ranged from US\$33 million to US\$51 million to US\$88 million. Based on this analysis, RBC (which itself holds approximately 12% of the First Lien debt) wrote down a portion of its First Lien debt, after writing off *all* of its Second Lien debt in 2014. By RBC's own admission, the Second Lien Lenders are out of the money and have no economic interest in Nelson's assets.

7. *No Distribution to Subordinated Creditors.* Canadian courts have authorized distributions where the distribution is in accordance with legal rights and would not prejudice other creditors. Distributions to first-ranking secured creditors have been approved on the basis that the subordinated creditors are "out of the money", and have no realistic prospect of recovery.

8. First Lien Lenders are entitled to have their claims paid in priority to those of the Second Lien Lenders. The law on this point is in addition to the contractual provisions of the Intercreditor Agreement between the First and Second Lien Lenders, which explicitly confirms

that First Lien Lenders get paid first, and the Second Lien Lenders get paid second, and only to the extent that there is value beyond the First Lien debt.

9. Consistent with this, RBC's internal documents show that it never expected the Second Lien Lenders to be paid anything until after the First Lien debt (including principal, interest and fees) was paid in full.

10. A distribution to a subordinated creditor, prior to the discharge of the senior-ranking security, is without precedent, and contrary to principles governing distributions.

11. *Consent Fee.* Nelson agreed to pay a consent fee to consenting First Lien Holders who consented to the support agreement. RBC did not consent. Instead, RBC actively opposed the sale transaction until after the Monitor it saw appointed confirmed that there is no value available to Second Lien Holders. Even now, RBC seeks to be paid on account of its Second Lien debt in priority to First Lien Holders.

12. As Judge Gropper confirms in his expert report, consent fees are not uncommon. What is uncommon is for a claimant to demand a consent fee when the claimant has not, in fact, consented.

13. The Applicants' sale approval motion should be granted on the terms that the Applicants and First Lien Holders have proposed, without further delay and without prior preferential payment of any amounts allegedly owing to RBC or other Second Lien Lenders. The court should not permit Nelson Education, its employees, suppliers and customers to continue being held hostage to the demands of an out of the money creditor with no economic interest in the proceeding.

PART II: FACTS

A. The First and Second Lien Loans

14. In connection with the purchase of its business and assets in July 2007, Nelson Education obtained the following financing:

- (a) first lien debt in the initial aggregate principal of US\$311,438,278.60,⁸ pursuant to a credit agreement dated as of July 5, 2007 among Nelson Education, Nelson Holdings Ltd. ("**Nelson Holdings**"), RBC (as administrative agent and collateral agent (the "**First Lien Agent**")) and the lenders from time to time party thereto (the "**First Lien Lenders**") (the "**First Lien Credit Agreement**");⁹ and
- (b) second lien debt in an initial aggregate amount of US\$171,291,053.23,¹⁰ pursuant to a credit agreement dated as of July 5, 2007 among Nelson Education, Nelson Holdings, RBC (as administrative agent and collateral agent (the "**Second Lien Agent**")) and the lenders from time to time party thereto (the "**Second Lien Lenders**") (the "**Second Lien Credit Agreement**").¹¹

15. Wilmington Trust, National Association succeeded RBC as the First Lien Agent in January 2014.¹²

16. The First and Second Lien Credit Agreements are both secured credits.¹³ The security held by the First Lien Lenders ranks first, and the security held by the Second Lien Lenders ranks second. An intercreditor agreement among Nelson Education, Nelson Holdings, the First

⁸ Affidavit of Greg Nordal sworn May 11, 2015 at para. 5, Application Record, Tab 2, pp. 19-20.

⁹ Exhibit "D" to the Affidavit of Greg Nordal sworn May 11, 2015, Application Record, Tab 2D, pp. 136-312.

¹⁰ Affidavit of Greg Nordal sworn May 11, 2015 at para. 5, Application Record, Tab 2, pp. 19-20.

¹¹ Exhibit "E" to the Affidavit of Greg Nordal sworn May 11, 2015, Application Record, Tab 2E, pp. 315-457.

¹² Affidavit of Greg Nordal sworn May 11, 2015 at para. 58, Application Record, Tab 2, p. 35.

¹³ Affidavit of Greg Nordal sworn May 11, 2015 at paras. 61, 65, Application Record, Tab 2, pp. 35-36.

Lien Agent and the Second Lien Agent, dated July 5, 2007 (the "**Intercreditor Agreement**") addresses various aspects of the relationship between the First and Second Lenders in detail.¹⁴

17. Intercreditor agreements are a common financing tool, and the Intercreditor Agreement among the First and Second Lien Lenders is typical in its terms.¹⁵ Such agreements create added certainty among creditors, by confirming their respective rights and priorities in various contingencies.¹⁶ In short, the Intercreditor Agreement confirms that the First Lien Lenders are "first" and the Second Lien Lenders are "second".

18. In addition to being a Second Lien Lender and the Second Lien Agent, RBC is also a First Lien Lender, holding approximately 12% of the principal amount outstanding under the First Lien Credit Agreement.¹⁷

19. The maturity date under the First Lien Credit Agreement was July 3, 2014 and the maturity date under the Second Lien Credit Agreement was July 3, 2015. Nelson Education has not paid the principal balances owing under either loan. As of the filing date, Nelson Education was indebted in the aggregate principal amounts of:

- (a) US\$268,753,930, plus accrued interest, costs and fees, under the First Lien Credit Agreement;¹⁸ and
- (b) US\$153,218,764, plus accrued interest, costs and fees, under the Second Lien Credit Agreement.¹⁹

¹⁴ Exhibit "F" to the Affidavit of Greg Nordal sworn May 11, 2015, Application Record, Tab 2F, pp. 460-496.

¹⁵ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at p. 2, First Lien Holders' Responding Motion Record, Tab 3, p. 6.

¹⁶ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at p. 2, First Lien Holders' Responding Motion Record, Tab 3, p. 6.

¹⁷ Affidavit of Greg Nordal sworn July 22, 2015 at para. 3(a), Applicants' Responding Motion Record, Tab 1.

¹⁸ Affidavit of Greg Nordal sworn May 11, 2015 at para. 59, Application Record, Tab 2, p. 35.

20. Because the First Lien and Second Lien loans are denominated in U.S. dollars, the recent decline in the Canadian dollar against the United States dollar has significantly increased the Canadian dollar balance of the loans.²⁰ This is significant because Nelson Education generates substantially all of its revenue in Canadian dollars and is not hedged against currency fluctuations. Based on an exchange rate of CAD/USD of 1.313, as of August 10, 2015, the Canadian dollar principal balances under the First and Second Lien Credit Agreements are \$352,873,910 and \$201,176,237, respectively.

B. The long road leading to this proceeding

21. In April 2013, with the First and Second Lien loan maturities looming on the horizon, Nelson Education commenced discussions with its stakeholders regarding potential alternatives for addressing the Company's debt obligations, including significant discussions with RBC as Second Lien Agent.²¹

22. In connection with a grace period extension agreement among Nelson Education, RBC and the Second Lien Lenders dated as of April 9, 2014 (the "**Grace Period Extension Agreement**"),²² Nelson Education paid only part of the interest payment due on March 31, 2014 under the Second Lien Credit Agreement.²³ The Company has not made any payments towards interest coming due after that date (payments being due on a quarterly basis).²⁴ Nelson Education

¹⁹ Affidavit of Greg Nordal sworn May 11, 2015 at para. 63, Application Record, Tab 2, p. 36.

²⁰ Cross-examination of Les Vowell on August 5, 2015 at questions 523-525, pp. 150-151, Transcript Brief, Vol. II, Tab V.1.

²¹ Affidavit of Greg Nordal sworn May 11, 2015 at paras. 87, 90, Application Record, Tab 2, pp. 42-43; Affidavit of Les Vowell sworn July 21, 2015 at para. 4, Applicants' Responding Motion Record, Tab 1.

²² Responses to written questions of RBC on the Affidavit of Greg Nordal sworn May 11, 2015 at Schedule "B", Transcript Brief, Vol. I, Tab IV.B.

²³ Cross-examination of Les Vowell on August 5, 2015, questions 476-480, 490, pp. 137-138, 141, Transcript Brief, Vol. II, Tab V.1.

²⁴ Affidavit of Greg Nordal sworn May 11, 2015 at para. 64, Application Record, Tab 2, p. 36.

has also declined to reimburse the professional fees invoiced by the Second Lien Agent subsequent to the maturity date under the First Lien Credit Agreement (i.e. July 3, 2014).²⁵

23. RBC's internal documents reveal that RBC knew prior to March 31, 2014 that the Company could not continue making interest payments under the Second Lien Credit Agreement, and that RBC ultimately settled for "squeeze[ing] out one last payment" of \$350,000 from the Company, in connection with the Grace Period Extension Agreement.²⁶ Despite receiving no further interest payments under the Second Lien Credit Agreement, RBC remained supportive of the Company's efforts to find a consensual resolution, and took no steps to enforce the Second Lien Lenders' rights under the Second Lien Credit Agreement, in the manner contemplated by the Intercreditor Agreement or at all.²⁷

24. The decision not to pay interest and professional fees to the Second Lien Lenders was a business decision of Nelson Education, made after considering a variety of alternatives.²⁸ The First Lien Lenders were not involved in the decision.²⁹ Vowell's suggestion that the Company was under pressure from the First Lien Lenders³⁰ is double-hearsay and is contradictory to the evidence of the Company's affiant, who has first-hand knowledge of the relevant facts and events.

²⁵ Affidavit of Greg Nordal sworn July 22, 2015 at para. 20, Applicants' Responding Motion Record, Tab 1, p. 7.

²⁶ Cross-examination of Les Vowell on August 5, 2015, questions 476-485, pp. 137-140, Transcript Brief, Vol. II, Tab V.1; Exhibit "1" to the Cross-examination of Les Vowell on August 5, 2015 at Tab E, Transcript Brief, Vol. II, Tab V.1.E.

²⁷ Affidavit of Les Vowell sworn July 21, 2015 at para. 4, RBC's Responding Motion Record, Tab 1; Cross-examination of Les Vowell on August 5, 2015, questions 186-188, 194-195, pp. 55-56, 59, Transcript Brief, Vol. II, Tab V.1.

²⁸ Affidavit of Greg Nordal sworn July 22, 2015 at paras. 3, 9, 24, Applicants' Responding Motion Record, Tab 1, pp. 2, 4, 8-9.

²⁹ Affidavit of Greg Nordal sworn July 22, 2015 at para. 10, Applicants' Responding Motion Record, Tab 1, p. 5.

³⁰ Cross-examination of Les Vowell on August 5, 2015, questions 495, 592-594, pp. 141-142, 168, Transcript Brief, Vol. II, Tab V.1.

25. On September 10, 2014, Nelson Education announced a term sheet entered into with First Lien Lenders, pursuant to which Nelson Education would conduct an extensive and robust sale and investment solicitation process ("**SISP**") to identify potential sale and/or investment transactions that would generate sufficient sale or investment proceeds to pay the Company's outstanding obligations under the First Lien Credit Agreement or that was otherwise acceptable to the First Lien Lenders (the "**First Lien Term Sheet**").³¹ The First Lien Term Sheet provided that the First Lien Lenders would credit bid certain of the debt owing to them unless a superior offer was identified through the SISP.³²

26. All but one of the First Lien Lenders (i.e. 21/22) were supportive of the First Lien Term Sheet and entered into a support agreement,³³ pursuant to which the First Lien Lenders each agreed, amongst other things, to support the credit bid transaction set out in the First Lien Term Sheet and not to take any action inconsistent with the support agreement that would frustrate or hinder the restructuring and recapitalization contemplated by the First Lien Term Sheet (the "**First Lien Support Agreement**").³⁴ Since the date of the First Lien Support Agreement, one (1) holder has sold the entirety of its position to another First Lien Lender. Accordingly, there are currently 21 First Lien Lenders.

27. In exchange, the consenting First Lien Lenders received consent fees from Nelson Education, including an initial consent fee and an ongoing monthly consent fee.³⁵ Additionally, Nelson Education agreed to continue to operate in the ordinary course of business and to various operational restrictions, including that it would continue to refrain from making any payments to

³¹ Affidavit of Greg Nordal sworn May 11, 2015 at paras. 91-93, Application Record, Tab 2, p. 44.

³² Affidavit of Greg Nordal sworn May 11, 2015 at para. 92, Application Record, Tab 2, p. 44.

³³ Affidavit of Greg Nordal sworn May 11, 2015 at para. 94, Application Record, Tab 2, pp. 44-45.

³⁴ Exhibit "G" to the Affidavit of Greg Nordal sworn May 11, 2015, Application Record, Tab 2G, pp. 498-552; Affidavit of Greg Nordal sworn July 22, 2015 at para. 22, Applicants' Responding Motion Record, Tab 1, p. 8.

³⁵ Affidavit of Greg Nordal sworn May 11, 2015 at para. 97, Application Record, Tab 2, p. 46.

the Second Lien Lenders (which, as noted above, and as demonstrated by the evidence, was a decision previously made Nelson Education without any influence by the First Lien Lenders), unless the First Lien Lenders consented to such payment.³⁶

28. As detailed in the Monitor's Second Report, and in the affidavit of Dean Mullet sworn May 11, 2015,³⁷ Nelson Education conducted the SISP with assistance from Alvarez & Marsal Canada Inc. ("**A&M**") commencing in September 2014. The best offer yielded by the SISP was non-binding and reflected a valuation of less than 55% of the debt owing under the First Lien Credit Agreement.³⁸ The Applicants and A&M concluded that the credit bid transaction contemplated by the First Lien Support Agreement represented the best offer and highest purchase price that could be obtained for Nelson Education and its assets.³⁹ As discussed below, the Monitor agrees with the Applicants' and A&M's conclusion.

29. Following the SISP, Nelson Education determined, in consultation with its advisors and the First Lien Steering Committee, that it would proceed with the credit bid transaction pursuant to the First Lien Support Agreement.⁴⁰ In the judgment of the Company's management, the transaction would eliminate uncertainty, significantly reduce the Company's debt levels and improve its balance sheet, provide stability to the business, result in a stronger financial foundation and enable Nelson Education to solidify its position as Canada's leading education publisher.⁴¹

³⁶ Affidavit of Greg Nordal sworn July 22, 2015 at para. 16, Applicants' Responding Motion Record, Tab 1, p. 6.

³⁷ Applicants' Motion Record, Tab 2, pp. 11-21.

³⁸ Monitor's Second Report at para. 42, p. 15.

³⁹ Affidavit of Dean Mullet sworn May 11, 2015 at para. 57, Applicants' Motion Record, Tab 2, p. 29; Affidavit of Greg Nordal sworn May 11, 2015 at para. 10, Application Record, Tab 2, p. 22.

⁴⁰ Affidavit of Dean Mullet sworn May 11, 2015 at paras. 14, 54, Applicants' Motion Record, Tab 2, pp. 8, 28.

⁴¹ Affidavit of Greg Nordal sworn May 11, 2015 at para. 116, Application Record, Tab 2, p. 53.

30. The transaction negotiated by Nelson Education also enables its customers, employees and suppliers to avoid the adverse consequences of the Company's insolvency by having the purchaser assume obligations owed to such parties by the Company, notwithstanding the substantial impairment being suffered by the First Lien Lenders.

31. The First Lien Credit Agreement and Intercreditor Agreement each permit, and indeed expressly contemplate, the use of an insolvency proceeding as the forum for exercising secured creditor remedies following an event of default.⁴² The Intercreditor Agreement expressly refers to a credit bid as a secured creditor remedy.⁴³

C. The Monitor's Second Report

32. RBC was the only First Lien Lender not to enter into the First Lien Support Agreement prior to the September 25, 2014 consent date.⁴⁴ This was a conscious strategic decision by RBC, driven in large part by the perceived lack of "upside" for Second Lien Lenders.⁴⁵ At the comeback hearing on May 29, 2015, RBC disputed A&M's conclusion that there was no value available for the Second Lien Lenders, and requested that a different monitor (FTI) be appointed to evaluate whether the SISP process had provided a reliable measure of Nelson Education's value.⁴⁶ The court granted RBC's request and appointed FTI as Monitor.

33. The Monitor has subsequently completed a thorough evaluation of the SISP. In conducting its review and analysis, the Monitor was fully (and repeatedly) apprised of RBC's

⁴² Exhibit "D" to the Affidavit of Greg Nordal sworn May 11, 2015 at ss. 8.02, 8.04, Application Record, Tab 2D, pp. 140-141; Exhibit "F" to the Affidavit of Greg Nordal sworn May 11, 2015 at s. 3.1, Application Record, Tab 2F, pp. 469-473.

⁴³ Exhibit "F" to the Affidavit of Greg Nordal sworn May 11, 2015 at s. 3.1(a)(1), Application Record, Tab 2F, p. 469.

⁴⁴ Affidavit of Les Vowell sworn July 21, 2015 at para. 3(a), RBC's Responding Motion Record, Tab 1.

⁴⁵ Cross-examination of Les Vowell on August 5, 2015, questions 294-296, pp. 88-89, Transcript Brief, Vol. II, Tab V.1.

⁴⁶ *Re Nelson Education Limited*, 2015 ONSC 3580 at paras. 2, 45, First Lien Holders' Book of Authorities, Tab 1.

various concerns.⁴⁷ The Monitor's Second Report squarely addresses these concerns, and ultimately concludes:

- (a) the design of the SISP was typical of such marketing processes and was consistent with processes that have been approved by the courts in many CCAA proceedings;
- (b) the SISP allowed interested parties adequate opportunity to conduct due diligence, both A&M and management appear to have been responsive to all requests from potentially interested parties and the timelines provided for in the SISP were reasonable in the circumstances;
- (c) the activities undertaken by A&M were consistent with the activities that any investment banker or sale advisor engaged to assist in the sale of a business would be expected to undertake;
- (d) the selection of A&M as investment banker would not have had a detrimental effect on the SISP or the value of offers;
- (e) both key senior management and A&M were incentivized to achieve the best value available and there was no impediment to doing so;
- (f) the SISP was undertaken in a thorough and professional manner;
- (g) the results of the SISP clearly demonstrate that none of the interested parties would, or would be likely to, offer a price for the Nelson business that would be

⁴⁷ Affidavit of Les Vowell sworn July 21, 2015 at paras. 10-16, RBC's Responding Motion Record, Tab 1; Cross-examination of Les Vowell on August 5, 2015, questions 342-346, pp. 102-103, Transcript Brief, Vol. II, Tab V.1.

sufficient to repay the amounts owing to the First Lien Lenders under the First Lien Credit Agreement

- (h) the SISP was a thorough market test and can be relied on to establish that there is no value beyond the First Lien Debt.⁴⁸

34. The Monitor also concluded that the SISP provides a "true indication" of the value of Nelson Education's business, and is more relevant in the circumstances of this case than a theoretical valuation (such as a discounted cash flow or EBITDA multiple).⁴⁹

D. RBC's conflicting valuation evidence

35. In its motion record responding to the sale, RBC's affiant Vowell attached as an exhibit a recent "summary valuation analysis" prepared by RBC's financial advisor, CDG Group.⁵⁰ Using only EBITDA multiples as a valuation methodology, under various scenarios the document suggests that there may be value in the Second Lien Loan.

36. In advance of this hearing, RBC disclosed its credit report files in relation to the debtor, and Vowell was examined on those files. The credit reports conflict with the CDG valuation analysis. In a credit report authored by Vowell dated March 31, 2014 – approximately 3 months prior to the maturity of the First Lien Credit Agreement and approximately 14 months prior to the CCAA filing - Vowell recommended (and RBC agreed) to write-down the entirety of the Second Lien debt.⁵¹

⁴⁸ Monitor's Second Report at paras. 14, 78-79, pp. 5-6, 25-26.

⁴⁹ Monitor's Second Report at para. 80, p. 26.

⁵⁰ Exhibit "G" to the Affidavit of Les Vowell sworn July 21, 2015, RBC's Responding Motion Record, Tab 1G;

⁵¹ Exhibit "1" to the Cross-examination of Les Vowell on August 5, 2015 at Tab E, p. 5, Transcript Brief, Vol. II, Tab V.1.E..

37. In the April 15, 2015 credit report, Vowell calculated Nelson's enterprise value using three metrics, debt trading levels, discounted cash flow and comparable EBITDA multiples.⁵² Under each of the three scenarios, there was insufficient enterprise value to satisfy the First Lien debt. According to Vowell's report:

- (a) debt trading levels implied an enterprise value of US\$212 million, resulting in US\$51 million shortfall in the First Lien debt;
- (b) discounted cash flow implied an enterprise value of US\$230 million, resulting in US\$33 million shortfall in the First Lien debt; and
- (c) EBITDA multiples (using different comparable, and lower multiple than in the CDG Group document) implied an enterprise value of US\$175 million, resulting in US\$88 million shortfall in the First Lien debt.

38. On the basis of his analysis, Vowell recommended to his superiors at RBC that a provision of US\$4 million (i.e. approximately 12.5% of the principal amount of RBC's First Lien debt) be taken on RBC's First Lien debt holdings.⁵³

39. This analysis was not disclosed at the comeback hearing on May 29, 2015, at which RBC submitted to the court that it "rejects" the Applicants' view that there is no value available for the Second Lien Lenders.⁵⁴ RBC's internal EBITDA analysis is also fundamentally inconsistent with the CDG Group document (which is itself inadmissible). On cross-examination, Vowell said

⁵² Exhibit "1" to the Cross-examination of Les Vowell on August 5, 2015 at Tab K3, Transcript Brief, Vol. II, Tab V.1.K.

⁵³ Exhibit "1" to the Cross-examination of Les Vowell on August 5, 2015 at Tab K-3, Transcript Brief, Vol. II, Tab V.1.K; Cross-examination of Les Vowell on August 5, 2015, questions 437-438, 526-555, pp. 128-129, 151-158, Transcript Brief, Vol. II, Tab V.1.

⁵⁴ Factum of RBC (May 28, 2015) at para. 82.

that he did not tell CDG, before it prepared its value document, of RBC's own internal conclusions using the same methodology.⁵⁵

E. The Evidence of Judge Gropper

40. Allan L. Gropper is a Harvard Law School graduate, and has been a member of the New York bar since 1969. He practiced as a commercial lawyer in New York from 1972 to 1999, and then sat as a bankruptcy judge in the Southern District of New York for more than fourteen years, until his retirement in January of this year. Judge Gropper is thoroughly familiar with complex commercial transactions, and has extensive experience reviewing documents governed by New York law.⁵⁶

41. The First Lien Credit Agreement, Second Lien Credit Agreement and Intercreditor Agreement (the "**Loan Documents**") each expressly provide that they are to be governed by and construed in accordance with the laws of the State of New York.⁵⁷ To assist this court, Judge Gropper has tendered an expert opinion addressing various issues of New York law that have arisen in connection with the loan documents.⁵⁸ Judge Gropper's opinion is the only expert evidence before the court on these issues. Judge Gropper was not cross-examined on the expert opinion.

42. Judge Gropper concluded, among other things, that:

⁵⁵ Cross-examination of Les Vowell on August 5, 2015, questions 267, 567-569, pp. 80-81, 160-161, Transcript Brief, Vol. II, Tab V.1.

⁵⁶ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at pp. 1-2, First Lien Holders' Responding Motion Record, Tab 3, pp. 5-6.

⁵⁷ Exhibit "D" to the Affidavit of Greg Nordal sworn May 11, 2015 at s. 10.14, Application Record, Tab 2D, p. 306; Exhibit "E" to the Affidavit of Greg Nordal sworn May 11, 2015 at s. 10.14, Application Record, Tab 2E, p. 452; Exhibit "F" to the Affidavit of Greg Nordal sworn May 11, 2015 at s. 8.10, Application Record, Tab 2F, p. 491.

⁵⁸ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015, First Lien Holders' Responding Motion Record, Tab 3, pp. 5-14.

- (a) the First Lien Agent has the right to credit bid the entire First Lien debt and is obligated to do so upon the direction of the Required Lenders (as defined in the First Lien Credit Agreement), which direction has been given;
- (b) the provisions of the First Lien Credit Agreement providing the First Lien Agent with power to release or sell collateral, and to require the First Lien Agent to follow the directions of the Required Lenders with respect thereto, are valid and binding as a matter of New York law;
- (c) the Intercreditor Agreement is enforceable under New York law in accordance with its terms;
- (d) while the Second Lien Agent is permitted to receive the required payments of amounts owed in respect of the Second Lien Credit Agreement, the Intercreditor Agreement does not permit the Second Lien Agent to exercise any action or proceeding to enforce its right to receive such payments – i.e. RBC's request for payments to the Second Lien Lenders in its motion is a violation of the Intercreditor Agreement;
- (e) the Second Lien Agent has no right to retain any payment of unpaid interest, fees or expenses prior to the discharge of the First Lien debt; and
- (f) there is no provision of the Loan Documents or of New York law that would give RBC any right to a consent fee that did not exist as a matter of separate contract.

PART III: LAW AND DISCUSSION

A. Principles governing distributions in CCAA proceedings

43. Distributions to creditors and equity holders in insolvency proceedings are governed by certain basic rules of priority. As Justice Farley described in *Re T. Eaton Co.*, there is a "natural and legal 'hierarchy of interests to receive value in a liquidation related transaction'".⁵⁹ The rules of creditor priority continue to apply in CCAA proceedings, notwithstanding that there is no explicit scheme of priority distribution in the Act.⁶⁰ This issue was squarely before the court in *Re Windsor Machine & Stamping Ltd.*, where a motion was brought for an interim distribution on account of an unsecured claim. Justice Morawetz (as he then was) denied the motion, holding that "it is essential, in a court supervised process, to give due consideration to the priority rights of secured creditors".⁶¹ Justice Morawetz also rejected the contention that the payments should be made simply because the company had sufficient cash available.⁶² In another decision released earlier this year, Regional Senior Justice Morawetz again held that:

The purpose of a CCAA stay order is to maintain the status quo amongst creditors and prevent their maneuvering for position. While the stay order prevents secured creditors and other parties from exercising and confirming their security for proprietary rights, it should not be used to prejudice those rights or to reorder the priorities as they existed on the date that the stay is granted.⁶³

⁵⁹ *Re T. Eaton Co.*, 1999 CarswellOnt 4661 (Sup. Ct. J.) at para. 9, 15 C.B.R. (4th) 311, First Lien Holders' Book of Authorities, Tab 2.

⁶⁰ *Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39771 (Ont. Sup. Ct. J.) at para. 43, 2009 CarswellOnt 4471, First Lien Holders' Book of Authorities, Tab 3.

⁶¹ *Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39771 (Ont. Sup. Ct. J.) at para. 43, 2009 CarswellOnt 4471, First Lien Holders' Book of Authorities, Tab 3. See also *Re Canwest Global Communications Corp.*, 2010 ONSC 1746 at para. 33, First Lien Holders' Book of Authorities, Tab 4; *Re Redstone Investment Corp.*, 2015 ONSC 533 at para. 57, First Lien Holders' Book of Authorities, Tab 5.

⁶² *Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39771 (Ont. Sup. Ct. J.) at para. 46, 2009 CarswellOnt 4471, First Lien Holders' Book of Authorities, Tab 3.

⁶³ *Re Redstone Investment Corp.*, 2015 ONSC 533 at para. 57, First Lien Holders' Book of Authorities, Tab 5.

44. The primary consideration, in determining whether to approve a distribution order, is whether the other creditors would be prejudiced. As summarized in *Re SemCanada Crude Company*:

While orders allowing interim distributions to creditors for one reason or another are not without precedent, at the least, an application for an interim distribution to one creditor must be carefully scrutinized and found to be justifiable for good and sustainable reasons, recognizing that it may create a preference. The court is required to consider the advantages, disadvantages and potential prejudice of such an interim distribution to all the stakeholders of the debtor entity.⁶⁴

45. It is typical of insolvency proceedings that there are some creditors (or equity holders), who are so far "underwater" that they have no reasonable expectation of recovery, and thus have no economic interest in the debtor company.⁶⁵ A subordinated creditor with no economic interest in the assets of a company cannot be prejudiced, advantaged or disadvantaged by the distribution of the company's assets to creditors who are in the money. In such situations, it is appropriate for the court to approve relief that compromises the claims of creditors not having an economic interest for the greater benefit of the company, and its employees, suppliers and customers.⁶⁶ As Justice Newbould recently observed in *Re 4519922 Canada Inc.*, "the objectives and purposes of a CCAA should not be frustrated by the self-interest of a single creditor."⁶⁷

⁶⁴ *Re SemCanada Crude Company*, 2009 ABQB 90 at para. 27, First Lien Holders' Book of Authorities, Tab 6.

⁶⁵ See e.g. *Re Laidlaw Inc.*, 2002 CarswellOnt 790 (Sup. Ct. J.) at paras. 2-4, First Lien Holders' Book of Authorities, Tab 7; *Re Anvil Range Mining Corp.*, 2002 CarswellOnt 2254 (C.A.) at paras. 31-36, First Lien Holders' Book of Authorities, Tab 8.

⁶⁶ See *Re GT Group Telecom Inc.*, 2002 CarswellOnt 5046 (Sup. Ct. J.), 41 C.B.R. (4th) 60, leave to appeal denied, 2003 CarswellOnt 448 (C.A.), First Lien Holders' Book of Authorities, Tab 9; *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Sup. Ct. J.) at para. 13, First Lien Holders' Book of Authorities, Tab 10.

⁶⁷ *Re 4519922 Canada Inc.*, 2015 ONSC 124 at para. 59, First Lien Holders' Book of Authorities, Tab 11.

46. The sale of assets and the distribution of proceeds may be authorized "even if there will be insufficient assets to retire the creditor claims in full."⁶⁸ In *Re AbitibiBowater Inc.*, the court approved a \$200 million distribution to a first-ranking creditor, in connection with the sale of collateral, and denied the objections of a lower-ranking creditor as irrelevant:

Despite what the Bondholders argue, it is neither unusual nor unheard of to proceed with an interim distribution of net proceeds in the context of a sale of assets in a CCAA reorganization. Nothing in the CCAA prevents similar interim distribution of monies. There are several examples of such distributions having been authorized by Courts in Canada.

While the SSNs are certainly subject to a stay of proceedings much like the other creditors involved in the present CCAA reorganization, an interim distribution of net proceeds from the sale of an asset subject to the Court's approval has never been considered a breach of the stay.

In this regard, the Bondholders have no economic interest in the MPCo assets and resulting proceeds of sale that are subject to a first ranking security interest in favor of the SSNs. Therefore, they are not directly affected by the proposed distribution of CDN\$200 million.

In *Windsor Machine & Stamping Ltd. (Re)*, Morawetz J. [as he then was] dealt with the opposition of unsecured creditors to an Approval and Distribution Order as follows:

13 Although the outcome of this process does not result in any distribution to unsecured creditors, this does not give rise to a valid reason to withhold Court approval of these transactions. I am satisfied that the unsecured creditors have no economic interest in the assets.⁶⁹

47. The Ontario Court of Appeal affirmed a distribution to a senior creditor in *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, upon finding that the

⁶⁸ *Re Crystallex International Corp.*, 2012 ONSC 2125 at para. 55, aff'd 2012 ONCA 404.

⁶⁹ *Re AbitibiBowater Inc.*, 2009 QCCS 6461 at paras. 71-74, citing *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Sup. Ct. J.) at para. 13, First Lien Holders' Book of Authorities, Tabs 13, 10.

objecting party's claim over the assets was unsecured.⁷⁰ In *Re Anvil Range Mining Corp.*, the Ontario Court of Appeal similarly affirmed a CCAA plan involving the acquisition of the debtor's business by its secured creditors.⁷¹ The court held that the unsecured creditors had "no economic interest in the assets in question", and therefore that the order "occasioned no prejudice whatsoever to the appellants".⁷²

48. In the present case, an out of the money, junior ranking creditor moves for a distribution on account of a pre-filing debt. The necessary result of any distribution would be to prejudice the First Lien Lenders by reducing the proceeds available to satisfy the claims of prior ranking secured creditors, whose claims would not be paid in full. Such a distribution would be unprecedented and contrary to principles governing distributions. In a distribution such as this case, first secured creditors must be paid in full before subordinated creditors receive any recovery.

49. The cases cited above are consistent with the effect of subsection 63(9) of the Ontario *Personal Property Security Act* (the "**PPSA**"),⁷³ which provides that where collateral is disposed of by a secured creditor (which is in substance what is occurring in this case, notwithstanding that the transaction is not being implemented under the PPSA), the disposition discharges the security interest of the secured party making the disposition and also any subordinate security interest.

⁷⁰ *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600 at paras. 44-47, aff'g 2006 CanLII 25540 (Ont. Sup. Ct. J.) at paras. 46-60, 22 C.B.R. (5th) 298, First Lien Holders' Book of Authorities, Tab 14.

⁷¹ *Re Anvil Range Mining Corp.*, 2002 CarswellOnt 2254 (C.A.), First Lien Holders' Book of Authorities, Tab 8.

⁷² *Re Anvil Range Mining Corp.*, 2002 CarswellOnt 2254 (C.A.) at paras. 31, 36, First Lien Holders' Book of Authorities, Tab 8.

⁷³ *Personal Property Security Act*, R.S.O. 1990, c. P.10, s. 63(9).

B. The Applicants' sale approval motion should be granted

1. The motion is uncontested

50. RBC's witness confirmed his understanding, on cross-examination, that RBC is not opposing the Applicants' motion for sale approval. Counsel did not interject to indicate otherwise.⁷⁴ Indeed, RBC would have no basis for opposing the motion, as it has no economic interests at stake, in its capacity as Second Lien Agent and Second Lien Lender, and, as described below, is bound by the will of the majority in its capacity as a First Lien Lender.

51. Additionally, the Intercreditor Agreement explicitly prohibits the Second Lien Lenders from objecting to the sale approval motion of the First Lien Lenders. Judge Gropper's opinion regarding the rights of the First Lien Lenders to control the form and substance of a sale of Nelson Education's business and assets can be summarized as follows:

- (a) until the First Lien debt is satisfied, the form and substance of the sale of collateral is under the exclusive control of the First Lien Lenders, and the consent of the First Lien Lenders to the sale results in the deemed consent of the Second Lien Lenders;
- (b) the waiver of rights by the Second Lien Lenders extends to any sale or disposition of any collateral of any loan party that is supported by the first lien claimholders;
and

⁷⁴ Cross-examination of Les Vowell on August 5, 2015 at questions 31-33, pp. 11-12, Transcript Brief, Vol. II, Tab V.1.

- (c) the Intercreditor Agreement is valid and enforceable under New York law in accordance with its terms.⁷⁵

52. RBC's status as a dissenting First Lien Lender does not provide it with any special rights, above and beyond those of the other Second Lien Lenders. Section 8.02 of the First Lien Credit Agreement provides that all rights and remedies under the Loan Documents (defined to include the Intercreditor Agreement) shall be exercised by the First Lien Agent, acting on behalf of the First Lien Lenders at the "request of the Required Lenders".⁷⁶ Required Lenders is a defined term, meaning (in short) lenders holding more than 50% of the total outstanding loan balance.⁷⁷

53. The First Lien Lenders' credit bid is a remedy that has been directed and authorized by First Lien Lenders holding more than 50% of the total outstanding loan balance.⁷⁸ By way of a direction letter dated May 6, 2015, the Required Lenders irrevocably authorized and directed the First Lien Agent to issue the credit bid on behalf of all First Lien Lenders.⁷⁹

2. The statutory test

54. The *Companies' Creditors Arrangement Act* (the "CCAA") sets out six-factors that must be considered in approving a sale transaction:

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may

⁷⁵ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at pp. 4-6, First Lien Holders' Responding Motion Record, Tab 3, pp. 8-10.

⁷⁶ Exhibit "D" to the Affidavit of Greg Nordal sworn May 11, 2015 at s. 8.02, Application Record, Tab 2D, p. 281.

⁷⁷ Exhibit "D" to the Affidavit of Greg Nordal sworn May 11, 2015 at s. 1.01, Application Record, Tab 2D, p. 185.

⁷⁸ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at pp. 7-8, First Lien Holders' Responding Motion Record, Tab 3, pp. 11-12; Exhibit "A" to the Affidavit of Annie Kwok sworn July 21, 2015, First Lien Holders' Responding Motion Record, Tab 6, pp. 18-103.

⁷⁹ Exhibit "D" to the Affidavit of Greg Nordal sworn May 11, 2015 at s. 9.01(a), Application Record, Tab 2D, p. 283-284.

authorize the sale or disposition even if shareholder approval was not obtained.

...

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.⁸⁰

55. The First Lien Holders rely upon the Monitor's Second Report and on the submissions of the Applicants as addressing the above factors. In brief:

(a) the process leading to the formation of the transaction before the court involved over two years of negotiations and extensive consultations with both First and Second Lien Lenders, as detailed above;

(b) the sale process itself was robust, fair and reasonable, as has been confirmed by the Monitor following an independent review conducted specifically at the request of RBC;

⁸⁰ *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 36.

- (c) the value of the First Lien Lenders' claims greatly exceeds the Company's value, which was reliably measured through the SISP;
- (d) the proposed sale transaction will result in the Company's business continuing as a going concern but also minimize adverse consequences to its employees, customers and suppliers; and
- (e) the Monitor supports the proposed sale transaction.⁸¹

56. In exercising any authority under the CCAA, a court should always bear in mind the requirements of appropriateness, good faith and due diligence:

Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — **avoiding the social and economic losses resulting from liquidation of an insolvent company.**⁸² [emphasis added]

57. The Applicants' uncontested evidence is that the proposed transaction will provide Nelson Education with financial stability, and enable it to solidify its position as Canada's leading education publisher. It also contemplates continued employment for all of Nelson Education's employees.

3. Sale transaction would not prejudice the Second Lien Lenders

58. The comprehensive SISP conducted in this case demonstrates that there is insufficient value in Nelson Education to fully repay the First Lien Lenders, and therefore that the Second Lien Lenders have no prospect of recovery. This comes as no surprise to RBC, which had

⁸¹ Monitor's Second Report at para. 16.

⁸² *Re Century Services Ltd.*, 2010 SCC 60 at para. 70 (emphasis added), First Lien Holders' Book of Authorities, Tab 15.

already reached the same conclusion after conducting its own assessment of the Company's value and which had already written off the entirety of its Second Lien position,⁸³ and taken a substantial write down of its First Lien position.⁸⁴ Where a sophisticated holder writes-off its position, that is a relevant indication of value.⁸⁵ Despite Vowell's "caveat" that write-offs are "driven from statutory concerns or issues to accounting",⁸⁶ the governing policy documents produced by RBC make no reference whatsoever to statutory or accounting considerations, and instead state that:

The Impaired Loan process identifies deteriorating trends in a borrower's ability to make scheduled principal/interest/fee payments on a loan in accordance with the terms of the credit agreement, and monitors the loan for downturns which would indicate that the loan should be placed on non-accrual.⁸⁷

59. As the Second Lien Lenders have no economic interest in the Company's assets, they will not be prejudiced or disadvantaged by the distribution of those assets to the First Lien Lenders.

C. RBC's motion for preferential payment of claims should be denied

1. The Second Lien Lenders have no economic interest in the Company's assets

60. Nelson Education has insufficient assets to fully repay its creditors, and is in the midst of an insolvency proceeding. This is precisely the situation in which the relative priority of creditors is paramount. The priority as between the First and Second Lien Creditors is as simple as their

⁸³ Cross-examination of Les Vowell on August 5, 2015, questions 434-436, 526-555, pp. 127-128, 151-158, Transcript Brief, Vol. II, Tab V.1; Exhibit "1" to the Cross-examination of Les Vowell on August 5, 2015 at Tab E, p. 5, Transcript Brief, Vol. II, Tab V.1.E.

⁸⁴ Exhibit "1" to the Cross-examination of Les Vowell on August 5, 2015 at Tab K-3, Transcript Brief, Vol. II, Tab V.1.K; Cross-examination of Les Vowell on August 5, 2015, questions 437-438, 526-555, pp. 128-129, 151-158, Transcript Brief, Vol. II, Tab V.1.

⁸⁵ *Re Beatrice Foods Inc.*, 1996 CarswellOnt 5598 (Gen. Div.) at para. 7, 43 C.B.R. (4th) 10, First Lien Holders' Book of Authorities, Tab 16.

⁸⁶ Cross-examination of Les Vowell on August 5, 2015, questions 222-223, pp. 65-66, Transcript Brief, Vol. II, Tab V.1.

⁸⁷ RBC NYB Non Accrual Loan and Loan Provision Procedures (March 31, 2014) at p. 2, Transcript Brief, Vol. II, Tab VII.

names suggest: one is first, the other is second. The Intercreditor Agreement confirms this order of priority, and according to the uncontradicted evidence of Judge Gropper, is enforceable in accordance with its terms.⁸⁸

61. As the SISP demonstrates, and the Monitor's Second Report confirms, there is insufficient value in the Company to fully satisfy the debt owing to the First Lien Lenders, and no value available for the Second Lien Lenders. The market value of Nelson Education's entire business is not sufficient to satisfy the debt owing to the First Lien Lenders. Even prior to the filing date, RBC was aware of this, with Vowell having recommended that a provision be taken on the First Lien debt.⁸⁹

62. Despite being out of the money on every available metric, RBC seeks a consolation prize. It requests that it be paid more than US\$16 million out of the Company's assets before those assets can be applied to only partially repay the debt owing to the First Lien Lenders. There are no consolation prizes for out of the money subordinated creditors. As Justice Campbell held in *Re Grant Forest Products Inc.,:*

I recognize the hardship that falls on the Second Lien Creditors when the First are entitled to recover their principal and as well default interest, while the Second recovers nothing. That is the bargain that was entered into between the First and the Second.⁹⁰

63. RBC's motion is merely an attempt to leapfrog over the First Lien Lenders and get paid first - rather than not at all - and operates to the obvious prejudice of the First Lien Lenders. It

⁸⁸ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at p. 4, First Lien Holders' Responding Motion Record, Tab 3, p. 8.

⁸⁹ Exhibit "1" to the Cross-examination of Les Vowell on August 5, 2015 at Tab K-3, Transcript Brief, Vol. II, Tab V.1.K; Cross-examination of Les Vowell on August 5, 2015, questions 437-438, 526-555, pp. 128-129, 151-158, Transcript Brief, Vol. II, Tab V.1.

⁹⁰ *Re Grant Forest Products Inc.*, 2011 ONSC 7698 at para. 36, First Lien Holders' Book of Authorities, Tab 17.

also runs counter to the fundamental rules of creditor priority, which are foundational to Canadian commerce.

64. RBC's witness, Vowell, readily and repeatedly conceded on cross-examination that the Second Lien Lenders can only be paid *after* the First Lien debt is satisfied in full, including all principal, interest and fees.⁹¹ RBC's claim for preferential payment of fees and interest apparently rests on the proposition that the Company should have already paid these amounts to the Second Lien Lenders prior to the commencement of the CCAA proceeding, when (according to RBC) the rules of creditor priority had not yet been triggered.⁹²

65. The simple fact is that the Company did not pay RBC's interest and fees prior to filing date, just as it did not pay the principal balance that came due under the First Lien Credit Agreement on July 3, 2014. Simply because a debt obligation arises prior to the CCAA filing date does not mean that it has priority over all other claims advanced in the proceeding. A company's pre-filing debt obligations are what get compromised in order to effect a restructuring under the CCAA; if RBC's position was correct and all pre-filing debt obligations needed to be paid prior to a restructuring being implemented, then there would never be any restructurings.

66. RBC has complained that Nelson Education continues to pay all other debts in the ordinary course, with the exception of amounts owing to the Second Lien Lenders. RBC's implication is that this is somehow unfair. To the contrary, there is nothing improper or unusual about employees and trade creditors being paid in preference to senior creditors if the business judgment of the parties is that it is best for the business for such amounts to be paid. If anything,

⁹¹ Cross-examination of Les Vowell on August 5, 2015, questions 234-236, 239-240, 252-253, pp. 69-70, 71-72, 75, Transcript Brief, Vol. II, Tab V.1.

⁹² Cross-examination of Les Vowell on August 5, 2015, questions 83-85, 440-444, pp. 26-27, 129-130, Transcript Brief, Vol. II, Tab V.1.

such payments operated to the benefit of the Second Lien Lenders, as they allowed the Company to continue as a going concern, and potentially accrue more value. Vowell agreed that a creditor's prospects of recovery are typically higher when the debtor continues as a going concern, including by making ordinary course payments to employees and suppliers.⁹³

67. As is evident from the results of the SISP, the Monitor's Second Report and RBC's internal valuations, there is insufficient value in the company to repay even the First Lien Lenders. Accordingly, the money paid to the Company's employees and trade creditors is not money that would otherwise go to the Second Lien Lenders – it is money that, in a liquidation, would otherwise go entirely to the First Lien Lenders.

68. The payment of interest and fees to the First Lien Lenders, leading up to filing date, is irrelevant. Had these payments not been made, the outstanding balance under the First Lien Credit Agreement would be correspondingly higher, and the First Lien Lenders would still be entitled, as a senior ranking secured creditor, to be paid before the Second Lien Lenders. The notion that the Second Lien Lenders should be paid interest simply because the First Lien Lenders were paid interest completely ignores the relative priorities of the First and Second Lien debt (and the contractual provisions of the Intercreditor Agreement discussed below).

2. RBC has no claim to consent fees

69. Leaving aside quantum, the First Lien Holders do not dispute that RBC, as Second Lien Agent, has a contractual claim to the payment of interest and certain professional fees, just as it also has a claim for outstanding principal balance under the Second Lien Credit Agreement. The

⁹³ Cross-examination of Les Vowell on August 5, 2015, questions 403-410, pp. 120-122, Transcript Brief, Vol. II, Tab V.1.

issue with these fees is principally one of priority and is squarely addressed by applicable law and the provisions of the Intercreditor Agreement.

70. The First Lien Holders firmly dispute, however, that RBC, as a First Lien Lender, is entitled to receive a consent fee pursuant to the First Lien Support Agreement. It defies all manner of logic and reason that RBC could receive fees under a contract that RBC did not sign and did not perform. RBC, like all other First Lien Lenders, was provided an opportunity to execute the First Lien Support Agreement in order to receive its pro rata share of the consent fees. Another institution that (like RBC) was both a First and Second Lien Lender signed the agreement.⁹⁴ However, RBC (in its capacity as a First Lien Lender) chose not to do so, partly in order to support its position as a Second Lien Lender.⁹⁵ The First Lien Support Agreement is clear on its face that First Lien Lenders were only entitled to the consent fee if they executed the First Lien Support Agreement by the consent deadline,⁹⁶ and in Judge Gropper's uncontroverted opinion, there is nothing in the Loan Documents that gives RBC any right to receive the consent fees.⁹⁷

71. RBC has, at various points, questioned the propriety or reasonableness of the consent fees paid to the consenting First Lien Lenders. However, such criticisms are inconsistent with the fact that RBC's motion demands that it be paid those same consent fees. Regardless, there is no evidence before the court establishing the impropriety or unreasonableness of the consent fees. Indeed, in July of 2014, RBC agreed to a proposal put forward by Nelson Education that

⁹⁴ Cross-examination of Les Vowell on August 5, 2015, question 57, p. 19, Transcript Brief, Vol. II, Tab V.1; Affidavit of Greg Nordal sworn May 11, 2015 at para. 94, Application Record, Tab 2, pp. 44-45.

⁹⁵ Cross-examination of Les Vowell on August 5, 2015, questions 294-296, pp. 88-89, Transcript Brief, Vol. II, Tab V.1.

⁹⁶ First Lien Term Sheet at part VI, Exhibit "G" to the Affidavit of Greg Nordal sworn May 11, 2015, Application Record, Tab 2G, pp. 536-538.

⁹⁷ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at p. 9, First Lien Holders' Responding Motion Record, Tab 3, p. 13.

similarly included a consent fee that would only be payable to the First Lien Lenders that executed a support agreement by the consent deadline.⁹⁸ As Vowell explained on cross-examination:

169 Q. So, in fact, RBC did consider at the time that this was signed in July that it was commercially reasonable that if somebody didn't want to go along with this, they wouldn't get the consent fee but the transaction may nonetheless go ahead; correct?

A. That seemed commercially reasonable, yes.⁹⁹

72. RBC's position seems to be that a consent fee is only fair and reasonable if it is a deal RBC is prepared to sign up to.

3. Proposed payments contradict the policy objectives of the CCAA

73. From a policy perspective, it is significant that the relief requested by RBC would put the Second Lien Lenders in a better position than they would have been in had Nelson Education commenced a CCAA proceeding in March 2014, when the Company was not prepared to make the full interest payment to the Second Lien Lenders. In that alternative scenario, consistent with the Model CCAA Initial Order, the Company would have been precluded from making the payments of interest and professional fees that RBC now claims. Indeed, RBC's witness claims that he did not expect RBC to receive interest payments from the Company after March 2014, precisely because he anticipated that a CCAA proceeding was going to be commenced upon the maturity of the First Lien in July 2014.¹⁰⁰

⁹⁸ Responses to written questions of RBC on the Affidavit of Greg Nordal sworn May 11, 2015 at Schedule "D", Transcript Brief, Vol. I, Tab IV.D; Cross-examination of Les Vowell on August 5, 2015, questions 105-107, 146-154, pp. 33, 43-45, Transcript Brief, Vol. II, Tab V.1.

⁹⁹ Cross-examination of Les Vowell on August 5, 2015, question 169, p. 50, Transcript Brief, Vol. II, Tab V.1.

¹⁰⁰ Cross-examination of Les Vowell on August 5, 2015, questions 453-456, 597, pp. 131-133, 169-171, Transcript Brief, Vol. II, Tab V.1.

74. Instead, however, Nelson engaged in out-of-court negotiations with its creditors in an effort to reach a consensual restructuring arrangement, ultimately embodied in the First Lien Support Agreement that RBC had the opportunity to sign up to. This consensual process avoided the cost and uncertainty for the Company associated with a CCAA proceeding before there was any clarity on what the objective of any such proceeding would be (i.e. a "free fall CCAA filing"), while allowing the business to continue operating in the ordinary course from the perspective of its key non-creditor stakeholders. This is entirely consistent with the policy objectives of the CCAA, and ought to be encouraged. However, if RBC is granted its motion for the interest and fees accrued during settlement negotiations and the sale process, the First Lien Lenders will have been penalized for permitting that to have happened. This will have a chilling effect on pre-filing negotiations in future cases and cause an increase in costly and lengthy proceedings under the CCAA.

4. Second Lien Lenders are contractually prohibited from pursuing preferential payments

75. The Intercreditor Agreement explicitly confirms the order of priority as between the First and Second Lien Lenders, and provides certainty regarding how that priority can be enforced.

Section 3.1(b) is particularly apposite:

Until the Discharge of the First Lien Obligations has occurred, whether or not any Insolvency or Liquidation Proceeding has been commenced by or against the Company or any other Grantor, subject to Section 3.1(a)(1), the First Lien Collateral Agent and the First Lien Claimholders shall have the right to enforce rights, exercise remedies (including set off and the right to credit bid their debt which, to the extent the Collateral is located in Canada, will be subject to applicable law in Canada and an order of a Court that has jurisdiction over such matters in Canada) and make determinations regarding the release, disposition, or restrictions with respect to the Collateral without any consultation with or the

consent of the Second Lien Collateral Agent or any Second Lien Claimholder."¹⁰¹

76. In support of its motion RBC purports to rely on section 3.1(f) of the Intercreditor Agreement,¹⁰² which permits the Second Lien Agent to receive payments of interest and other amounts due on account of the Second Lien debt. While RBC may be permitted to receive interest payments voluntarily made by Nelson Education, RBC is prohibited by the Intercreditor Agreement from taking proactive steps to compel such payments, as it is now doing.

77. As Judge Gropper explains in his opinion, "the payment of the prepetition and postpetition interest, fees and expenses of the Second Lien Agent would be inconsistent with several provisions of the Intercreditor Agreement."¹⁰³ Section 3.1(f) of the Intercreditor Agreement, Judge Gropper notes, is expressly subject to section 3.1(a), which prohibits the exercise of rights or remedies until the First Lien debt is paid in full.¹⁰⁴ Section 3.1(a)(1) also imposes a 180 day standstill on the exercise of rights or remedies by Second Lien Lenders after notice of an event of default is given by the Second Lien Collateral Agent to the First Lien Collateral Agent. This notice has not been given.¹⁰⁵ RBC's motion is untimely and expressly prohibited by the Intercreditor Agreement. The bringing of this motion represents a breach of contract by RBC.

78. RBC's credit files acknowledge the limitations it is now breaching:

¹⁰¹ Exhibit "F" to the Affidavit of Greg Nordal sworn May 11, 2015 at s. 3.1(b), Application Record, Tab 2F, p. 469.

¹⁰² Notice of Motion (Re: Directing certain Payments be made prior to the conclusion of the FLL Credit Bid Transaction) at para. 13, RBC's Motion Record, Tab 1, p. 5.

¹⁰³ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at p. 9, First Lien Holders' Responding Motion Record, Tab 3, p. 13.

¹⁰⁴ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at p. 9, First Lien Holders' Responding Motion Record, Tab 3, p. 13.

¹⁰⁵ Cross-examination of Les Vowell on August 5, 2015, question 514, p. 147, Transcript Brief, Vol. II, Tab V.1; Affidavit of Greg Nordal sworn July 22, 2015 at para. 8, Applicants' Responding Motion Record, Tab 1, p. 4; Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at p. 9, First Lien Holders' Responding Motion Record, Tab 3, p. 13.

We are fully writing off the 2nd lien debt. If there is a recovery it will be in 3-5 years. Under the terms of the inter-creditor agreement, 2nd lien debt must standstill for 180-days. Once restructured, 2nd lien should not expect to collect any interest until first lien debt is fully repaid. [...]

Under the Inter-Creditor Agreement, the 2nd lien lenders could not under take any legal remedies. The stand-still period is 180-days; [...]¹⁰⁶

5. RBC's conduct is relevant to claim of discretionary relief

79. RBC has invoked the court's equitable and discretionary authority seeking to grant it relief that RBC knows it has no legal right to obtain.¹⁰⁷ When asked to grant discretionary relief, it is appropriate for the court to consider the conduct of the party requesting the relief. Even in cases where the discretionary relief sought is not equitable in nature, courts have routinely considered equitable principles, including the "clean hands" doctrine, as a potential basis for denying relief.¹⁰⁸

80. RBC lacks clean hands. It comes to this court in breach of its contractual obligation under the Intercreditor Agreement, in order to seek relief that undermines the very purpose of the Intercreditor Agreement and the fundamental principles of priorities on which the agreement is premised. Moreover, RBC does so knowingly, fully aware that the Second Lien Lenders can only be paid after the First Lien debt is satisfied in full, and fully aware of the standstill provision preventing the Second Lien Lenders from pursuing legal remedies. This court should not

¹⁰⁶ Exhibit "1" to the Cross-examination of Les Vowell on August 5, 2015 at Tab E, pp. 3, 5, Transcript Brief, Vol. II, Tab V.1.E; Cross-examination of Les Vowell on August 5, 2015, questions 498-499, 505-508, pp. 142-146, Transcript Brief, Vol. II, Tab V.1.

¹⁰⁷ Notice of Motion (Re: Directing certain Payments be made prior to the conclusion of the FLL Credit Bid Transaction) at para. 26, RBC's Motion Record, Tab 1, p. 7.

¹⁰⁸ *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167 at 191-192, 1993 CarswellAlta 250 at paras. 38-40, First Lien Holders' Book of Authorities, Tab 18 (regarding declaratory relief); *Gillespie v. Gillespie*, 2014 ONSC 3755 at para. 7, First Lien Holders' Book of Authorities, Tab 19 (regarding a costs award); *Zanchetta v. Canada (Citizenship and Immigration)*, 2012 CanLII 72815 (Can. I.A.B.) at para. 14, First Lien Holders' Book of Authorities, Tab 20 (regarding "humanitarian and compassionate" statutory relief); *Tatarchenko v. Tatarchenko*, 1999 CarswellOnt 2249 (Sup. Ct. J.) at paras 12-15, First Lien Holders' Book of Authorities, Tab 21 (regarding family law statutory relief).

exercise its discretion in such a way as to aid the Second Lien Lenders in flagrantly breaching their contractual obligations, and to grant the Second Lien Lenders the very same rights that that they knowingly bargained away.

81. RBC's delay in pursuing this relief is also a relevant consideration, with RBC having received its last interest payment from the Company more than fourteen months before the filing date. After successfully "squeez[ing] out one last payment" from the Company in April 2014, RBC sat on its hands and did nothing further to compel the Company's payment of interest.¹⁰⁹ RBC did not even note the Company in default.¹¹⁰ The reasons for this are not a mystery. RBC's internal documents reveal that it understood the Intercreditor Agreement prevented it from exercising legal remedies to enforce its rights, until after the First Lien debt had been paid in full.¹¹¹ It would be a gross misuse of this court's discretionary authority to grant RBC a helping hand in subverting the bargain willingly entered into between the First and Second Lien Lenders.

D. Judge Gropper's opinion is admissible, relevant and uncontroverted

82. Foreign law is a question of fact and must be proven by evidence.¹¹² In applying foreign law, this court must rely on the evidence of an expert competent to explain and interpret the foreign law.¹¹³ It is generally inappropriate for a court to conduct its own investigation into

¹⁰⁹ Cross-examination of Les Vowell on August 5, 2015, questions 186-188, 194-195, pp. 55-56, 59, Transcript Brief, Vol. II, Tab V.1.

¹¹⁰ Cross-examination of Les Vowell on August 5, 2015, questions 67, 514, pp. 21, 147, Transcript Brief, Vol. II, Tab V.1.

¹¹¹ See *supra* note 106 and accompanying text.

¹¹² *Asad v. Canada (Citizenship and Immigration)*, 2015 FCA 141 at para. 24, First Lien Holders' Book of Authorities, Tab 22.

¹¹³ *Friedl v. Friedl*, 2009 BCCA 314 at para. 20, First Lien Holders' Book of Authorities, Tab 23.

foreign law,¹¹⁴ and it would be an error to determine an issue of foreign law without reference to the opinion of a foreign law expert.¹¹⁵

83. These principles apply to the interpretation of the First Lien Credit Agreement, Second Lien Credit Agreement and Intercreditor Agreement, each of which must be construed in accordance with foreign law. Judge Gropper's opinion is the only expert evidence before the court providing guidance on the interpretation of the loan documents, and on the issues discussed above. RBC chose not to cross-examine Judge Gropper or otherwise attempt to challenge his evidence, at any point prior to the submission of this factum. Indeed, RBC's own documents agree with Judge Gropper's analysis, as noted above. Any last minute criticisms of Judge Gropper's opinion or alternative theories of interpretation raised on the eve of the hearing date would run afoul of the rule in *Browne v. Dunn*, as Judge Gropper would be deprived of the opportunity to respond.¹¹⁶

E. Specific Terms of the Sale Approval and Vesting Order

84. The terms of the draft sale approval and vesting order are appropriate and reasonable under the circumstances. To the extent that the terms of the draft order vary from those of the Model Approval and Vesting Order,¹¹⁷ those variations are necessary to give proper effect to the proposed sale transaction.

Payments to First Lien Lenders

¹¹⁴ *JPMorgan Chase Bank v. Lanner (The)*, 2008 FCA 399 at para. 37, First Lien Holders' Book of Authorities, Tab 24.

¹¹⁵ *General Motors Acceptance Corporation of Canada, Limited v. Town and Country Chrysler Limited*, 2007 ONCA 904 at paras. 36-37, First Lien Holders' Book of Authorities, Tab 25.

¹¹⁶ *R. v. Lytle*, 2004 SCC 5 at paras 64-65, First Lien Holders' Book of Authorities, Tab 26.

¹¹⁷ Blackline of Draft Approval and Vesting Order to Model Approval and Vesting Order, Applicants' Motion Record, Tab 3, pp. 161-173.

85. This court previously held that on the basis of evidence before it at that time, the Company was not permitted to pay amounts to the First Lien Lenders in respect of interest, costs and expenses while not making such payments to the Second Lien Lenders as well. At that time, RBC had alleged that there might be value beyond the First Lien debt.¹¹⁸

86. Since that time, various additional materials have been put before the court, which materials clearly demonstrate that there is no value beyond the First Lien debt. Those materials include the Monitor's Second Report, the Company's sale approval motion, and the evidence of RBC provided in connection with the Vowell cross-examination.

87. In addition, as described in detail above, applicable law and the Intercreditor Agreement require that the First Lien Lenders rank in priority to the Second Lien Lenders and that the Second Lien Lenders cannot recover any amounts until the First Lien Lenders have been paid in full. That is the uncontroverted evidence of Judge Gropper, and consistent with RBC's understanding, as admitted repeatedly on cross-examination.¹¹⁹

88. The proposed transaction requires that all accrued and unpaid interest owing to the First Lien Lenders and all unpaid professional fees of the First Lien Agent and the First Lien Lenders be paid prior to closing. Given that there is no value to the Second Lien debt, there can be no prejudice to the Second Lien Lenders in connection with such payments.

Stockholder and Registration Rights Agreement

89. The First Lien Lenders submit that the paragraph of the draft approval and vesting order that deems the Stockholders and Registration Rights Agreement to be effective and binding on

¹¹⁸ *Re Nelson Education Limited*, 2015 ONSC 3580 at paras. 45, 47, First Lien Holders' Book of Authorities, Tab 1.

¹¹⁹ Cross-examination of Les Vowell on August 5, 2015, questions 234-236, 239-240, 252-253, pp. 69-70, 71-72, 75, Transcript Brief, Vol. II, Tab V.1.

all holders of the purchaser's common shares immediately upon issuance of the common shares with the same force and effect as if such persons were signatories to the Stockholders and Registration Rights Agreement is necessary, fair and reasonable. Similar relief has previously been granted in a CCAA proceeding,¹²⁰ and in the context of an arrangement under the *Canada Business Corporations Act*.¹²¹

90. The First Lien Support Agreement already provides for the support of 20 out of the 21 First Lien Lenders who will become shareholders pursuant to the credit bid transaction (i.e. more than 95%), and all First Lien Lenders other than RBC have already executed the Stockholders and Registration Rights Agreement. However, because RBC has refused to execute the Stockholders and Registration Rights Agreement, it would not be practical or reasonable in the circumstances to require each shareholder to individually execute the agreement. RBC's attempt to frustrate the implementation of the sale transaction should not be condoned by this court. The draft approval and vesting order seeks to avoid this scenario.

Releases

91. The proposed sale approval and vesting order contains mutual releases, which the First Lien Lenders submit is fair and reasonable in the circumstances for the following reasons, among others:

¹²⁰ *Re Skylink Aviation Inc.*, Plan Sanction Order (April 23, 2013) at para. 17, Court File No. 13-1003300-CL (Ont. Sup. Ct. J.).

¹²¹ *Re 7588674 Canada Inc., Gateway Casinos & Entertainment Inc. and Gateway Casinos & Entertainment Limited*, Final Order (August 16, 2010) at para. 9, Court File No. S-105095 (B.C.S.C.).

- (a) The First Lien Term Sheet provides for usual and customary mutual releases for transactions of this type;¹²²
- (b) Releases of this type have been granted by this court in CCAA sale transactions;¹²³
- (c) With the exception of RBC, all of the First Lien Lenders support the proposed releases, which means that "Required Lenders" have authorized the releases, which binds RBC pursuant to the collective action provision of the First Lien Credit Agreement;¹²⁴
- (d) RBC agreed to have a substantially similar release sought in a court order in the other support agreement that was proposed by the Company in July, 2014,¹²⁵ so it is clear that RBC cannot have a principled objection to the inclusion of a court-ordered release.

PART IV: ORDER REQUESTED

92. The First Lien Holders request that:

- (a) an order be made granting the relief sought by the Applicants in their notice of motion dated May 15, 2015, in the form of an approval and vesting order proposed by the Applicants and the First Lien Holders;

¹²² Exhibit "G" to the Affidavit of Greg Nordal sworn May 11, 2015 at Schedule "A", p. 8, Application Record, Tab 2G, pp. 535.

¹²³ *Re Mobilicity*, Vesting Order (June 29, 2015) at para. 18, Court File No. CV-13-10274CL; *Re Canwest Publishing Inc.*, Conditional Credit Acquisition Sanction, Approval and Vesting Order (May 17, 2010) at paras. 43-44, Court File No. CV-10-8533-00CL.

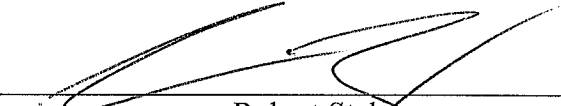
¹²⁴ Exhibit "B" to the Affidavit of Allan L. Gropper sworn July 22, 2015 at pp. 7-8, First Lien Holders' Responding Motion Record, Tab 3, pp. 11-12; Exhibit "A" to the Affidavit of Annie Kwok sworn July 21, 2015, First Lien Holders' Responding Motion Record, Tab 6, pp. 18-103.

¹²⁵ Responses to written questions of RBC on the Affidavit of Greg Nordal sworn May 11, 2015 at Schedule "D", s. 4(e), Transcript Brief, Vol. I, Tab IV.D

- (b) RBC's motion dated July 13, 2015 be dismissed; and
- (c) RBC be ordered to pay the Company's and the First Lien Holders' costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of August, 2015.

August 11, 2015



Robert Staley
Kevin Zych
Sean Zweig

Lawyers for Wilmington Trust, National
Association, as the First Lien Agent, Cortland
Capital Market Services LLC, as the
Supplemental Agent, and the First Lien
Steering Committee

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re Nelson Education Limited*, 2015 ONSC 3580
2. *Re T. Eaton Co.*, 1999 CarswellOnt 4661 (Sup. Ct. J.), 15 C.B.R. (4th) 311
3. *Re Windsor Machine & Stamping Ltd.*, 2009 CanLII 39771 (Ont. Sup. Ct. J.), 2009 CarswellOnt 4471
4. *Re Canwest Global Communications Corp.*, 2010 ONSC 1746
5. *Re Redstone Investment Corp.*, 2015 ONSC 533
6. *Re SemCanada Crude Company*, 2009 ABQB 90
7. *Re Laidlaw Inc.*, 2002 CarswellOnt 790 (Sup. Ct. J.)
8. *Re Anvil Range Mining Corp.*, 2002 CarswellOnt 2254 (C.A.)
9. *GT Group Telecom Inc.*, 2002 CarswellOnt 5046 (Sup. Ct. J.), 41 C.B.R. (4th) 60, leave to appeal denied, 2003 CarswellOnt 448 (C.A.)
10. *Re Windsor Machine & Stamping Ltd.*, 2009 CarswellOnt 4505 (Sup. Ct. J.)
11. *Re 4519922 Canada Inc.*, 2015 ONSC 124
12. *Re Crystallex International Corp.*, 2012 ONSC 2125, aff'd 2012 ONCA 404
13. *Re AbitiBowater Inc.*, 2009 QCCS 6461
14. *Harbert Distressed Investment Fund, L.P. v. General Chemical Canada Ltd.*, 2007 ONCA 600, aff'g 2006 CanLII 25540 (Ont. Sup. Ct. J.), 22 C.B.R. (5th) 298
15. *Re Century Services Ltd.*, 2010 SCC 60
16. *Re Beatrice Foods Inc.*, 1996 CarswellOnt 5598 (Gen. Div.), 43 C.B.R. (4th) 10
17. *Re Grant Forest Products Inc.*, 2011 ONSC 7698
18. *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167, 1993 CarswellAlta 250
19. *Gillespie v. Gillespie*, 2014 ONSC 3755
20. *Zanchetta v. Canada (Citizenship and Immigration)*, 2012 CanLII 72815 (Can. I.A.B.)
21. *Tatarchenko v. Tatarcenko*, 1999 CarswellOnt 2249 (Sup. Ct. J.)

22. *Asad v. Canada (Citizenship and Immigration)*, 2015 FCA 141
23. *Friedl v. Friedl*, 2009 BCCA 314
24. *JPMorgan Chase Bank v. Lanner (The)*, 2008 FCA 399
25. *General Motors Acceptance Corporation of Canada, Limited v. Town and Country Chrysler Limited*, 2007 ONCA 904
26. *R. v. Lyttle*, 2004 SCC 5
27. *Re Skylink Aviation Inc.*, Plan Sanction Order (April 23, 2013), Court File No. 13-1003300-CL (Ont. Sup. Ct. J.)
28. *Re 7588674 Canada Inc., Gateway Casinos & Entertainment Inc. and Gateway Casinos & Entertainment Limited*, Final Order (August 16, 2010), Court File No. S-105095 (B.C.S.C.)
29. *Re Mobilicity*, Vesting Order (June 29, 2015), Court File No. CV-13-10274CL (Ont. Sup Ct. J.)
30. *Re Canwest Publishing Inc.*, Conditional Credit Acquisition Sanction, Approval and Vesting Order (May 17, 2010), Court File No. CV-10-8533-00CL (Sup. Ct. J.)

SCHEDULE "B"
STATUTORY REFERENCES

1. Personal Property Security Act, R.S.O. 1990, c. P.10

PART V – DEFAULT – RIGHTS AND REMEDIES

Disposal of Collateral

63. (1) Upon default under a security agreement, the secured party may dispose of any of the collateral in its condition either before or after any commercially reasonable repair, processing or preparation for disposition, and the proceeds of the disposition shall be applied consecutively to,

(a) the reasonable expenses of the secured party, including the cost of insurance and payment of taxes and other charges incurred in retaking, holding, repairing, processing and preparing for disposition and disposing of the collateral and, to the extent provided for in the security agreement, any other reasonable expenses incurred by the secured party; and

(b) the satisfaction of the obligation secured by the security interest of the party making the disposition,

and the surplus, if any, shall be dealt with in accordance with section 64.

Methods of disposition

(2) Collateral may be disposed of in whole or in part, and any such disposition may be by public sale, private sale, lease or otherwise and, subject to subsection (4), may be made at any time and place and on any terms so long as every aspect of the disposition is commercially reasonable.

Secured party's right to delay disposition of collateral

(3) Subject to subsection 65 (1), the secured party may delay disposition of all or part of the collateral for such period of time as is commercially reasonable.

Notice required

(4) Subject to subsection (6), the secured party shall give not less than fifteen days notice in writing of the matters described in subsection (5) to,

(a) the debtor who owes payment or performance of the obligation secured;

(b) every person who is known by the secured party, before the date that the notice is served on the debtor, to be an owner of the collateral or an obligor who may owe payment or performance of the obligation secured, including any person who is contingently liable as a guarantor or otherwise of the obligation secured;

(c) every person who has a security interest in the collateral and whose interest,

(i) was perfected by possession, the continuance of which was prevented by the secured party who has taken possession of the collateral, or

(ii) is perfected by registration before the date the notice is served on the debtor;

(d) every person with an interest in the collateral who has delivered a written notice to the secured party of the interest in the collateral before the date that the notice is served on the debtor.

(5) The notice mentioned in subsection (4) shall set out,

(a) a brief description of the collateral;

(b) the amount required to satisfy the obligation secured by the security interest;

(c) the amount of the applicable expenses referred to in clause (1) (a) or, in a case where the amount of such expenses has not been determined, a reasonable estimate thereof;

(d) a statement that upon receipt of payment the payor will be credited with any rebates or allowances to which the debtor is entitled by law or under the agreement;

(e) a statement that upon payment of the amounts due under clauses (b) and (c), any person entitled to receive notice may redeem the collateral;

(f) a statement that unless the amounts due are paid the collateral will be disposed of and the debtor may be liable for any deficiency; and

(g) the date, time and place of any public sale or the date after which any private disposition of the collateral is to be made.

Date of giving notice

(6) If the notice to the debtor under clause (4) (a) is mailed, sent by courier or by any other transmission provided for in section 68, then the relevant date for the purpose of clause (4) (b), subclause (4) (c) (ii) and clause (4) (d) shall be the date of mailing, the date that the notice was sent by courier or the date of transmission, as the case may be, and not the date of the service.

Notice not required

(7) The notice mentioned in subsection (4) is not required where,

(a) the collateral is perishable;

(b) the secured party believes on reasonable grounds that the collateral will decline speedily in value;

(c) the collateral is of a type customarily sold on a recognized market;

- (d) the cost of care and storage of the collateral is disproportionately large relative to its value;
- (e) for any reason not otherwise provided for in this subsection, the Superior Court of Justice, on an application made without notice to any other person, is satisfied that a notice is not required;
- (f) after default, every person entitled to receive a notice of disposition under subsection (4) consents in writing to the immediate disposition of the collateral; or
- (g) a receiver and manager disposes of collateral in the course of the debtor's business.

Secured party's right to purchase collateral

(8) The secured party may buy the collateral or any part thereof only at a public sale unless the Superior Court of Justice, on application, orders otherwise.

Effect of disposition of collateral

(9) Where collateral is disposed of in accordance with this section, the disposition discharges the security interest of the secured party making the disposition and, if the disposition is made to a buyer who buys in good faith for value, discharges also any subordinate security interest and terminates the debtor's interest in the collateral. R.S.O. 1990, c. P.10, s. 63 (9).

Idem

(10) Where collateral is disposed of by a secured party after default otherwise than in accordance with this section, then,

- (a) in the case of a public sale, if the buyer has no knowledge of any defect in the sale and if the buyer does not buy in collusion with the secured party, other bidders or the person conducting the sale; or
- (b) in any other case, if the buyer acts in good faith,

the disposition discharges the security interest of the secured party making the disposition and, where the disposition is made to a buyer for value, discharges also any subordinate security interest and terminates the debtor's interest in the collateral. R.S.O. 1990, c. P.10, s. 63 (10).

Certain transfers of collateral

(11) A person who is liable to a secured party under a guarantee, endorsement, covenant, repurchase agreement or the like and who receives a transfer of collateral from the secured party or is subrogated to the secured party's rights has thereafter the rights and duties of the secured party, and such a transfer of collateral is not a disposition of the collateral.

2. Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

PART III - General

Obligations and Prohibitions

Restriction on disposition of business assets

36. (1) A debtor company in respect of which an order has been made under this Act may not sell or otherwise dispose of assets outside the ordinary course of business unless authorized to do so by a court. Despite any requirement for shareholder approval, including one under federal or provincial law, the court may authorize the sale or disposition even if shareholder approval was not obtained.

Notice to creditors

(2) A company that applies to the court for an authorization is to give notice of the application to the secured creditors who are likely to be affected by the proposed sale or disposition.

Factors to be considered

(3) In deciding whether to grant the authorization, the court is to consider, among other things,

(a) whether the process leading to the proposed sale or disposition was reasonable in the circumstances;

(b) whether the monitor approved the process leading to the proposed sale or disposition;

(c) whether the monitor filed with the court a report stating that in their opinion the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;

(d) the extent to which the creditors were consulted;

(e) the effects of the proposed sale or disposition on the creditors and other interested parties; and

(f) whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Additional factors — related persons

(4) If the proposed sale or disposition is to a person who is related to the company, the court may, after considering the factors referred to in subsection (3), grant the authorization only if it is satisfied that

(a) good faith efforts were made to sell or otherwise dispose of the assets to persons who are not related to the company; and

(b) the consideration to be received is superior to the consideration that would be received under any other offer made in accordance with the process leading to the proposed sale or disposition.

Related persons

(5) For the purpose of subsection (4), a person who is related to the company includes

(a) a director or officer of the company;

(b) a person who has or has had, directly or indirectly, control in fact of the company; and

(c) a person who is related to a person described in paragraph (a) or (b).

Assets may be disposed of free and clear

(6) The court may authorize a sale or disposition free and clear of any security, charge or other restriction and, if it does, it shall also order that other assets of the company or the proceeds of the sale or disposition be subject to a security, charge or other restriction in favour of the creditor whose security, charge or other restriction is to be affected by the order.

Restriction — employers

(7) The court may grant the authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangement.

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 FIRST LIEN HOLDERS
(Motions Returnable August 13, 2015)**

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