Clerk's Stamp:


JS
June 19, 2020
Justice Eidsvik

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| COURT FILE NUMBER | 2001-05630 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA IN BANKRUPTCY AND INSOLVENCY |
| JUDICIAL CENTRE OF | CALGARY |
| APPLICANTS | IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED<br><br>AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF DOMINION DIAMOND MINES ULC, DOMINION DIAMOND DELAWARE COMPANY LLC, DOMINION DIAMOND CANADA ULC, WASHINGTON DIAMOND INVESTMENTS, LLC, DOMINION DIAMOND HOLDINGS, LLC AND DOMINION FINCO INC. |
| DOCUMENT | **BENCH BRIEF AND ARGUMENT OF THE TRUSTEE**<br>**June 19, 2020 Hearing – Continuation of Hearing Commenced May 29, 2020**<br>**SECOND AMENDED AND RESTATED INITIAL ORDER** |
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## I. INTRODUCTION AND OVERVIEW

1. Wilmington Trust, National Association, in its capacity as Trustee, Notes Collateral Agent, Paying Agent, Transfer Agent and Registrar (the "**Trustee**") under an indenture dated October 23, 2017 (as amended from time to time, the "**Trust Indenture**"), pursuant to which Northwest Acquisitions ULC (as predecessor-in-interest to Dominion Diamond Mines ULC, "**Dominion**"), as Issuer, and Dominion Finco Inc., as Co-Issuer, issued certain 7.125% Senior Secured Second Lien Notes Due 2020 (the "**Notes**"), files this Bench Brief in response to the relief sought in the Applicants' amended application served, in part, on June 12, 2020, and the balance on June 15, 2020 (the "**Amended Application**"). The hearing of the Applicants' Initial Application commenced on May 29, 2020, was to be continued on June 3, 2020, and was then adjourned at the Applicants' request to June 19, 2020.

2. This Bench Brief is to be read in conjunction with the Trustee's Bench Brief filed May 28, 2020 (the "**Trustee's SISP Brief**"). Capitalized terms used but not otherwise defined herein have the meanings given to them in the Trustee's SISP Brief, or in the Applicants' Bench Brief dated June 12, 2020 (the "**Applicants' Supplementary Brief**"), as applicable.

3. This Bench Brief responds to the Applicants' request for an Order (the "**Second ARIO**") substantially in the form attached as Schedule "A" to the Applicants' Amended Application dated June 12, 2020:

   (a) authorizing and directing the Dominion Vendors to execute and enter into a definitive Stalking Horse Agreement of Purchase and Sale (the "**Stalking Horse Agreement**"), with the Stalking Horse Bidder;

   (b) approving the SISP;

   (c) authorizing the Dominion Vendors to reimburse the Stalking Horse Bidder for certain fees pursuant to and in accordance with the Stalking Horse Agreement and approving certain bid procedures;

(d) approving an Amended and Restated Interim Financing Term Sheet dated June 15, 2020 (the "**Interim Financing Term Sheet**"), between Dominion, as borrower, Washington Lending and other lenders party thereto (collectively, the "**Interim Lenders**"), and the agent to the Senior Lenders, providing the Applicants with Interim Financing and granting the Interim Lenders' Charge in connection therewith;

(e) approving the Financial Advisor Agreement between the Applicants and Evercore and granting the Financial Advisor Charge on the terms and with the priority set out in the proposed Second ARIO;

(f) approving the KERP and the KERP Charge; and

(g) extending the Stay Period from June 19, 2020, to September 28, 2020.

4. The Stalking Horse Agreement, the SISP, and the Interim Financing Term Sheet are collectively referred to in this Bench Brief as the "**Insider Restructuring Proposal**".

5. In the lead up to the May 29, 2020 hearing, the Trustee did not oppose the bulk of the relief related to the Applicants' request for Interim Financing, other than to request specific changes and modifications set out in paragraphs 14 to 16 of the Trustee's SISP Bench Brief. However, the Trustee did request an adjournment of the balance of the relief related to the SISP and the Stalking Horse Bid.

6. Immediately prior to the May 29, 2020 hearing, and following the negotiation of certain amendments in respect of the form of the Second ARIO, the SISP timelines, certain SISP protections[1] and the Court's oversight of the SISP process (including the ability to deny the proposed sale to the Stalking Horse Bidder), the Trustee agreed that it would no longer seek an adjournment and would not actively oppose the relief sought on May 29, 2020. The Trustee did just that. However, the Trustee's agreement was not, and could not be construed as, an

[1] Primarily in respect of section 38(f) of the SISP, which made it clear that nothing in the SISP alters or amends the rights, terms or obligations under any intercreditor agreement or indenture and that the credit bid rights of the Noteholders and the Trustee were confirmed.

acquiescence to the whole of the Initial Application. This is particularly true in relation to the merits of the Stalking Horse Bid under a structure that would permit the Equity to retain its ownership position while simultaneously diverting tens of millions (possibly hundreds of millions) of dollars in bid value to junior creditors at the expense of secured Noteholders who are owed in excess of CAD $800 million.

7. On May 29, 2020, the Court began but did not conclude the hearing on the Insider Restructuring Proposal. After hearing arguments from counsel to some parties in interest, the Court set the hearing over to be continued on June 3, 2020. Prior to June 3rd, however, the Applicants requested an additional 16-day adjournment to June 19, 2020, ostensibly to obtain further clarity regarding the very Stalking Horse Bid they supported just five days before.

8. During the intervening time, there have been several developments in respect of the Insider Restructuring Proposal that constitute several critical steps backward in the process and that justify denial of the Applicants' requested relief absent important alterations. In particular:

   (a) in terms of SISP timelines, the SISP approval application was adjourned to June 19, 2020, but there has been no conforming of timelines under the SISP as recommended by the Monitor in its Supplement to the Fourth Report dated June 2, 2020 (the "**Fourth Report Supplement**").[2] The Trustee fears that this time compression could adversely affect the SISP process by prejudicing and otherwise dissuading other potential third-party bidders, particularly in relation to the Phase I Bid Deadline;

   (b) the Applicants have now served the Stalking Horse Agreement, which has replaced the Stalking Horse Term Sheet. However, the Stalking Horse Agreement is still highly conditional and problematic in that it continues to seek to deprive the Noteholders in respect of their secured second lien CAD $800 million Notes, while directing significant value to the Equity and the Applicants' other creditors (including unsecured) creditors, without any evidence regarding the relative creditor priorities; and

[2] Fourth Report Supplement, Appendix "L"

(c) in response to the Trustee advocating for the rights and interests of the Noteholders leading up to and during the May 29, 2020 hearing (in fulfilment of its fiduciaries duties under the Trustee Indenture), the Applicants have now agreed to the Equity's demand to amend section 22(f) of the Interim Financing Term Sheet to provide that the Trustee's fees, and those of its counsel, shall not be paid from the Interim Financing if the Trustee criticizes or challenges any aspect of the Insider Restructuring Proposal (the "**Retaliatory Amendment**"). In other words, the Trustee can be paid if it supports the Applicants but otherwise not.

9. With respect to the proposed SISP timelines, the Trustee seeks to have certain timelines extended by at least a further seven days, as discussed below.

10. The Trustee's concerns related to the Stalking Horse Agreement, as set out in the Trustee's SISP Brief, remain valid, notably in respect of the proposed reordering of insolvency priorities and the total disregard of the Noteholders' interests as the Applicants' largest secured creditor.

11. Further, the Amended Application and the Applicants' Supplementary Brief still fails to justify the Equity's demanded Stalking Horse protections, including the proposed payment of millions of dollars in a Break-up Fee and Expense Reimbursement amounts. Notwithstanding the Applicants' suggestion that the Stalking Horse Agreement is an improvement because it is no longer based upon a "term sheet", the proposed Stalking Horse Agreement demonstrates that several material contingencies continue to exist. Such conditionality alone undercuts the need for Stalking Horse protections. Secondly, such protections – including a multimillion dollar Break-up Fee – is unwarranted because the Equity needed no incentive to submit a bid that would permit it to retain ownership of a financially cleansed business by channeling value away from the secured Noteholders and toward junior creditors with whom the Equity wishes to continue to do business.

12. With respect to the amendments to the Interim Financing Term Sheet, the Trustee submits that the Retaliatory Amendment ought to be struck from the Interim Financing Term Sheet. This represents an improper attempt by the Applicants and the Equity to muzzle the Trustee and

prevent it from fulsomely performing its role as a fiduciary to the Noteholders in these CCAA proceedings. Moreover, it constitutes a violation/breach of the Trust Indenture and the Intercreditor Agreement.

## II. LAW AND ARGUMENT

### The SISP

13. The Trustee repeats and relies on the submissions contained in the Trustee's SISP Brief regarding the overall integrity of the Insider Restructuring Proposal, including the SISP. The Trustee's position remains that the SISP is unnecessarily aggressive in the context of a global pandemic in which there are continuing restrictions in respect of the diamond markets, labour and commodity movements and general market uncertainty.

14. With respect to the SISP timelines, in its Supplement to the Fourth Report dated June 2, 2020 (the "**Fourth Report Supplement**"),[3] the Monitor recommended certain SISP timelines based on the assumption that a SISP Order would be granted on June 3, 2020. The following chart compares the Monitor's recommended timelines in the Fourth Report Supplement to the Applicants' current proposed timelines, which assume a June 19, 2020 SISP Order:

| **SISP Event** | **Monitor's Recommendation (Assuming June 3, 2020 SISP Order)** | **Applicants' Proposal (Assuming June 19, 2020 SISP Order)** |
|---|---|---|
| Phase I Bid Deadline | July 10, 2020 | July 20, 2020 |
| Phase II Bid Deadline | August 21, 2020 | August 31, 2020 |
| Auction Commencement | August 24, 2020 | September 3, 2020 |
| Selection of Successful Bid | August 28, 2020 | September 7, 2020 |
| Successful Bid Definitive Documents | September 1, 2020 | September 11, 2020 |

[3] Fourth Report Supplement, Appendix "L"

| | | |
|---|---|---|
| Approval Motion | September 14, 2020 | September 21, 2020 |
| Target Closing Date | September 23, 2020 | October 7, 2020 |
| Outside Date | October 31, 2020 | October 31, 2020 |

15. The SISP approval motion is being heard 16 days later than anticipated when the Monitor made its recommendations in the Fourth Report Supplement. Therefore, the SISP timeline should be extended by a corresponding period of time (*i.e.* a minimum of 16 days, not the 10 days in the current version of the SISP), save for the Outside Date of October 31, 2020, which can remain in place.

16. More importantly, the Trustee submits that the SISP is missing a very important concept, namely a termination provision. Considering that the Applicants have stated that COVID-19 has had a devastating impact on the global diamond mining industry,[4] and considering that COVID-19 restrictions are in the process of being relaxed around the world, there is a real possibility that diamond markets around the world may rebound in the coming months. As such, and in light of the "insider" nature of the SISP,[5] it would be appropriate in the circumstances of this case to afford the Monitor the opportunity to terminate the SISP in that event.

**The Stalking Horse Agreement – Priority and Insider Issues**

17. In the Trustee's SISP Brief, the Trustee raised serious concerns regarding the Stalking Horse Bid's impact on not only the Noteholders' rights as a secured creditor, but also on the unprecedented reordering of the priorities under Canadian insolvency law. The Trustee's

[4] See paragraph 12 of the Affidavit of Kristal Kaye sworn April 21, 2020 (the "**Kaye April 21 Affidavit**").

[5] For commentary regarding the necessity for an active monitor in the context of "insider" transactions, see Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert, "Credit Bidding – Recent Canadian and U.S. Themes", 2010 Annual Review of Insolvency Law, Ed. Janis P. Sarra. **[TAB 1]**

concerns in this regard are not addressed in the Stalking Horse Agreement. The submissions contained in the Applicants' Supplementary Brief are also unresponsive.[6]

18. First, paragraphs 39 and 40 of the Applicants' Supplementary Brief state that the Trustee "made the submission at the May 29th hearing that should the Stalking Horse Bid be approved, it would represent a violation of the absolute priority rule…" and that the absolute priority rule does not apply in respect of "sale transactions where certain obligations may be *assumed* by a purchaser as part of a going concern…".

19. The Applicants mischaracterize the Trustee's submissions in this regard. The Trustee did not cite nor rely upon the "absolute priority rule" in the Trustee's SISP Brief, nor in its counsel's oral submissions on May 29, 2020.[7] The absolute priority rule, which is primarily a U.S. bankruptcy law concept, provides that a plan of compromise or arrangement shall not provide for payment to equity interests until creditors are paid in full, nor payment to junior creditors until more senior creditors receive payment in full.

20. While the principles underlying the absolute priority rule may apply by analogy, the Trustee's objection is broader than the absolute priority rule. Here, the Equity has constructed an integrated, comprehensive Insider Restructuring Proposal that will (i) benefit Equity itself as it will retain control of the Applicants' business and assets; (ii) eliminate the interests and security of the Noteholders; and (iii) provide value to creditors ranking both above and, more critically, below the Noteholders, without regard to the priority structure under the BIA, which informs the operation of priorities under the CCAA.[8]

21. Second, at paragraph 39 of the Applicants' Supplementary Brief, the Applicants state that the "[a]ssumption of unsecured liabilities has occurred in a *great many* CCAA cases where an asset sale has involved the *assumption* of employee and trade creditor obligations as part of a going

[6] In fact, the Applicants' Supplementary Brief has an unusual disclaimer at paragraph 32 which provides that the summaries of the Stalking Horse Agreement contained in the Brief are "for reference purposes only and are qualified in their entirety to the Stalking Horse APA". See footnote 12 of the Applicants' Supplementary Brief.

[7] In fact, it was Equity's counsel that used the term "absolute priority rule" in oral argument on May 29, 2020.

[8] See paragraphs 20-29 of the Trustee's SISP Brief.

concern transaction, and yet the purchase price has not been sufficient to repay certain financial securities of the debtors (such as notes)." [Emphasis added.]

22. Despite using the expression "in a great many CCAA cases", the only authority cited in the Applicants' Supplementary Brief in support of this proposition is the CCAA proceedings of Lightstream Resources Ltd.[9] *Lightstream* is neither binding nor persuasive and it is distinguishable from the facts of the present case on a number of grounds, including:

(a) the sale process in *Lightstream* contemplated a credit bid from the second lien noteholders, not a stalking horse bid from a party related to the equity interest in those proceedings – thus *Lightstream* was not an insider transaction (in contrast to the present Stalking Horse Agreement);[10]

(b) the second lien noteholders' credit bid was ultimately the successful bid;[11]

(c) while the first lien lenders were paid out in full, certain subordinate bondholders did not receive recovery as they were unsecured under the plain terms of the unsecured indenture agreement;[12] and

(d) certain other unsecured liabilities were assumed by the second lien noteholders, including liabilities under assigned contracts, environmental liabilities, tax liabilities related to purchased assets, trade payables, accrued vacation pay of transferred employees and certain other priority claims.[13]

23. As such, *Lightstream* stands for little more than the uncontroversial proposition that a successful non-equity bidder in a CCAA sale process can elect to assume certain unsecured obligations,

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[9] Lightstream Resources Ltd. ABQB Court File. No. 1601-12571 ("***Lightstream***"). Court materials can be found online at: http://cfcanada.fticonsulting.com/Lightstream/

[10] The Court in *Lightstream* approved the Sales Procedures as part of the Initial Order **[TAB 2]**. The Sale Procedures are attached as Appendix "A" to the Initial Order. See paras. 28-30 of the Sale Procedures regarding the second lien noteholders' credit bid.

[11] The results of the Sale Process were discussed in the Third Report of the Monitor dated November 30, 2016. See para. 23 regarding the results of the Sale Process.

[12] *Ibid*. See para. 30(a)-(c).

[13] *Ibid*. See para. 31(b).

while excluding other unsecured obligations. *Lightstream* does not stand for the proposition that BIA priority rules do not apply to – or that the Court should routinely rubber-stamp – an integrated, comprehensive Insider Restructuring Proposal that (i) favours related-party equity interests and (ii) proposes to push out the debtor companies' largest secured creditor.

24. Third, at paragraph 42 of the Applicants' Supplementary Brief, the Applicants criticize the Trustee's reference to section 36 of the CCAA in the relation to a sales process and state that the presence or absence of a liquidation analysis only applies in respect a sale approval transaction. The Trustee notes that the Applicants' themselves state in their Bench Brief dated May 27, 2020, that "[w]hile not technically applicable at the sale process stage, the factors set out in subsections 36(3)-(4) of the CCAA have also been considered when deciding whether to approve a sale process."[14] The Applicants cannot rely on the section 36 factors that support their position at the sales process stage and then dismiss the factors that weigh against their position as being irrelevant. Their position in this regard is contradictory. There is no evidence before the Court as to what the waterfall recoveries to creditors would be in respect of a "music stops" scenario.

25. Fourth, in response to paragraph 47 of the Applicants' Supplementary Brief, the Trustee agrees that a related party is not prohibited at law from advancing stalking horse bid in the context of a CCAA sale process. With that said, "insider" stalking horse bids are extraordinarily rare in Canada and there are few examples of such bids outside of *Brainhunter* (which, unlike the present case, was approved at the sale process stage without any opposition from creditors).[15] Moreover, the Courts universally subject insider transactions to heightened scrutiny and challenge.[16]

26. While any related-party transaction in an insolvency proceeding must be subjected to heightened scrutiny, the Trustee maintains its submission that the SISP and the Stalking Horse Bid in the present case must be given the highest level of scrutiny by this Court as:

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[14] Applicants' Bench Brief dated May 27, 2020. See paras. 68-71.

[15] See the Applicants' Bench Brief dated May 27, 2020, at para 61 and Tab 5.

[16] See footnote 5, *supra*.

(a) the Stalking Horse Bidder is related to the Equity and is therefore a related-party or "insider";

(b) the insider Stalking Horse Agreement proposes to fully push out the Applicants' largest secured creditor while giving value to unsecured creditors, which is without precedent in Canada; and

(c) the insider Stalking Horse Agreement is part of an integrated, comprehensive Insider Restructuring Proposal that now includes an Interim Financing Term Sheet that, by its terms, seeks to silence the fiduciary of the Applicants' largest secured creditor (*i.e.* the Trustee) and violates the Trust Indenture and the Intercreditor Agreement.

**The Stalking Horse Agreement – Lack of Clarity Regarding Assumed Liabilities**

27. In paragraph 37 of the Applicants' Supplementary Brief, the Applicants purport to provide clarity regarding the "Total Illustrative Purchase Price Value" under the Stalking Horse Agreement. In the Trustee's view, the details set out in paragraph 37 of the Applicants' Supplementary Brief simply give rise to new questions and concerns in that regard.

28. First, paragraph 37(a) of the Applicants' Supplementary Brief provides no clarity in respect of the liabilities that the Stalking Horse Bidder will assume. For example, the chart contained in paragraph 37(a) includes a line item entitled "Reclamation, Letter of Credit and Guarantees" in the amount of USD $224 to USD $323 million without any explanation as to what those items actually mean and whether any of those sizable amounts enjoy a priority (or not) to the Noteholders.

29. The next line of the paragraph 37(a) chart references "Unfunded Pension Benefits" in the amount of USD $17 million. As there is no specific indication as to whether that is in relation to a solvency deficiency of an underfunded defined benefit plan, which it appears to be,[17] such

[17] See paragraphs 96 to 99 of the Kaye April 21 Affidavit which references liability deficiencies of various plans, none of which enjoy a priority to prior ranking secured creditors.

amount would be fully subordinated to the Noteholders – but without further information it is impossible for the reader to analyze and comprehend that line item.

30. Paragraph 37(b) of the Applicants' Supplementary Brief is also confusing in that it "confirms" USD $20 million will be allocated to "pre-filing trade suppliers (less the amount the Applicants are authorized to pay under the DIP Budget and orders of the CCAA Court in respect of cure amounts, but have not been paid)". The Applicants' Supplementary Brief provides no clarity as to whether the Critical Vendors Accounts Payable is to be subtracted from that USD $20 million. In reviewing the DIP Budget[18] it appears that such $5 million "Critical Supplier Vendors Account Payable Amount" would act as a dollar-for-dollar subtraction from the USD $20 million. In addition, there are other amounts payable to the Applicants' trade creditors pursuant to the DIP Budget that may or may not form a subtraction to the USD $20 million referenced in paragraph 37(b) of the Applicants' Supplementary Brief.

31. As such, it appears that the parties have taken the non-binding, highly conditional Stalking Horse Term Sheet and simply incorporated such terms into the Stalking Horse Agreement and called it "binding obligations", even though the Stalking Horse Agreement remains highly conditional. Among other things, the Stalking Horse Agreement is conditional because it includes:

(a) a broad "No Material Adverse Effect" clause;

(b) a surety condition that is not fully explained;

(c) governmental COVID-19 restrictions;

(d) the Rio Condition; and

(e) significant financing conditions.

[18] Attached as Schedule "C" to the Interim Financing Term Sheet.

**The Interim Financing Term Sheet**

32. By email sent on Monday, June 1, 2020, counsel for the Washington Group of Companies (including the Stalking Horse Bidder and the Interim Lender) advised the Service List that, "based on the positions taken by counsel to the Ad Hoc Second Lien Noteholder Group and counsel for the Trustee for the Second Lien Notes at the hearing last Friday", the form of Interim Financing Term Sheet presented to the Court during the May 29, 2020 hearing was no longer acceptable to the proposed Interim Lenders.[19] The Applicants repeat and reiterate the Equity's position in this regard at paragraph 29 of the Applicants' Supplementary Brief.

33. The Retaliatory Amendment is found at section 22(f) of the Interim Financing Term Sheet and reads as follows:

> 22. NEGATIVE COVENANTS:
>
> The Credit Parties covenant and agree not to do, or cause not to be done, with respect to itself and each of its subsidiaries, the following, other than with the prior written consent of the Required Interim Lenders and the Existing Credit Facility Agent to the extent express consent of the Existing Credit Facility Agent is required below: […]
>
> (f) Except as may be otherwise ordered by the Court, pay, incur any obligation to pay, or establish any retainer with respect to the fees, expenses or disbursements of a legal, financial or other advisor of any party, other than (i) the Monitor and its legal counsel, (ii) the respective legal, financial and other advisors of the Credit Parties, the Interim Lenders and the Existing Credit Facility Agent, in each case engaged as of the date hereof, (iii) such other parties as the Court may expressly order unless such fees, expenses or disbursements, as applicable, are reviewed and confirmed in advance by the (x) Required Interim Lenders and (y) Existing Credit Facility Agent in its reasonable discretion; provided however, in all cases, no fees, expenses, or disbursements shall be paid or reimbursed and no retainer shall be established to fund any challenges or objections to the Interim Facility, the Stalking Horse Transaction (including the sale approval hearing), or the SISP or to fund any litigation or pursuit of claims (including diligence or discovery) against any Interim Facility Lender or any of its affiliates in any capacity. [Additions underlined.]

34. If approved, the proposed Retaliatory Amendment would have the effect of limiting scrutiny of the Insider Restructuring Proposal, including the merits of the Stalking Horse Agreement. For reasons stated above and in the Trustee's SISP Brief, the Trustee submits that such an approach

[19] See the Fourth Report Supplement, para. 33, Appendix "G".

is in direct opposition to what is required in this case, *i.e.* the highest level of scrutiny by both the Court and all stakeholders.

35. Moreover, the Trustee has contractual, statutory and common law duties to discharge in these CCAA proceedings, including the duty of the Trustee to act as a fiduciary for the Noteholders. The Equity is putting forward an Insider Restructuring Proposal that combines Interim Financing, a SISP and a Stalking Horse Agreement that provides no recovery to the Noteholders. The Trustee must be afforded the unfettered ability to make appropriate arguments on behalf of the Noteholders in relation to the Insider Restructuring Proposal.

36. With respect to its submissions at the May 29, 2020 hearing, the Trustee notes that such submissions, together with those of the Ad Hoc Group and other creditors, appear to have caused the Applicants to press pause in order to scrutinize the Insider Restructuring Proposal in more detail. Such extra time, in theory, should have resulted in a much improved process and more balanced proposal that could have benefited a wider community of stakeholders. It did not. To the contrary, the added time has resulted in a more problematic approach, more compressed timelines and a Retaliatory Amendment that collectively achieve little apart from serving the interests of the Equity in these CCAA proceedings at the primary expense of the Noteholders.

37. In addition to the fairness and transparency issues, the proposed Retaliatory Amendment also breaches the Trust Indenture[20] and the Intercreditor Agreement.[21]

38. As noted in the Trustee's Bench Brief dated May 13, 2020, filed in respect of its Application for Payment of Fees, section 6.03 of the Intercreditor Agreement states:

> "… to the extent that the [Senior Lenders] are granted adequate protection in the form of payments in the amount of current post-petition fees and expenses, and/or other cash payments [in relation to an insolvency proceeding, which would include these CCAA proceedings], then the [Trustee], for themselves and on behalf of the [Noteholders] under [the Trust Indenture], ***shall not be prohibited from*** seeking adequate protection in the form of payments in the amount of current post-petition incurred fees and expenses,

[20] The Trust Indenture is attached to the Affidavit of Mark Freake sworn May 14, 2020 (the "**Freake Affidavit**") as Exhibit "A". See sections 7.2(a), (b) and(c) and 7.6(a) and (d).

[21] The Intercreditor Agreement is attached to the Freake Affidavit as Exhibit "B". See section 6.03.

> and/or other cash payments (as applicable), subject to the right of the [Senior Lenders] to object to the reasonableness of the amounts of fees and expenses or other cash payments so sought by the [Noteholders]."]

39. The cash-flow statement appended to the Monitor's Fourth Report and the DIP Budget indicates that the Senior Lenders are to receive post-filing interest and fees and legal and advisory fees.[22] Such payments plainly constitute adequate protection in favour of the Senior Lenders as contemplated by section 6.03 of the Intercreditor Agreement.

40. In contrast, the Trustee is presented with the following options: (i) accept the Retaliatory Amendment and potentially limit the Trustee's ability to perform its duties as fiduciary to the Noteholders in these proceedings, among other duties imposed on the Trustee under the Trust Indenture and at law; or (ii) reject the Retaliatory Amendment and forego receiving any payment that it is otherwise be entitled to receive pursuant to the Trust Indenture and the Intercreditor Agreement. This Court should not allow such improper, strong-arm tactics to be rewarded by approving an Interim Financing Term Sheet with the requested Retaliatory Amendment or any limitations that violate the requirements of the Trust Indenture and the Intercreditor Agreement.

41. Moreover, the Trustee notes that paragraph 38 of the SISP expressly provides that "[n]othing contained herein is intended to, or shall, alter or amend the rights, terms or obligations under any intercreditor agreement or indenture". As the Equity's Insider Restructuring Proposal, which apparently has the full support of the Applicants and the Senior Lenders, includes an integrated SISP, Interim Financing Term Sheet and Stalking Horse Agreement, a provision in the SISP relating to the Trust Indenture and the Intercreditor Agreement also applies equally to the terms of the Interim Financing Term Sheet.

42. In order for the Applicants to obtain the requested relief in respect of, among other things, the Insider Restructuring Proposal and the extension of the Stay Period, the Applicants must be shown to be acting in good faith and with due diligence. The Applicants support for the

[22] See footnote 16 of the DIP Budget contained in the Monitor's Fourth Report.

Retaliatory Amendment, appears to constitute a post-filing violation of one of the Applicants' main contracts. As such, the Applicants are not proceeding in good faith.[23]

43. Regarding the merits of the Interim Financing Term Sheet, the Trustee questions how much the Interim Financing will actually benefit the Applicants' business. For example, the maximum amount of the Interim Financing is USD $60 million (based on the Second Cash Flow Statement, approximately CAD $85.2 million if the Interim Financing is fully advanced). The Applicants cash flows over the 28-week period detailed in the Monitor's Fourth Report provide for approximately CAD $34.5 million in respect of professional fees, CAD $5.2 million in respect of Senior Lenders' interest and fees and almost another approximately CAD $1 million in Interim Financing interest. The total of such fees and interest is over CAD $40.6 million (which is about 47-48% of the CAD $85.2 million Interim Financing). This means that only CAD $44.6 million, or 52% of the Interim Financing, is projected to be used to pay the operational expenses of the Applicants' business.

44. The above analysis is in respect of a transaction with a closing date effective as of the Outside Date (*i.e.* October 31, 2020). In the event that the successful transaction closes prior to one or two possible October Interim Financing advances, the percentage of the amounts advanced under the Interim Facility that will actually pay the Applicants' operational expenses could be less than half of the Interim Financing to be advanced.

45. Moreover, it is not as though the proposed Interim Financing is the Applicants' only financing option. As the Applicants have readily admitted, multiple other interim financing proposals were made (in addition to the DDMI self-described interim financing) that apparently did not contain the problematic conditions noted above. While such other interim financing proposals allegedly proposed higher interest rates, such a difference is relatively immaterial in light of the facts of this proceeding. Even assuming the added annual interest cost of alternative financing total approximately one to two million dollars (discussed in greater detail below), given the relatively short period of the needed financing (*i.e.*, months, not years), the amount, relative to the amount

[23] CCAA, sections 11.02(3)(a) and 18.6.

of existing debt, is miniscule. Further, the party largely at risk for such added interest cost are the Noteholders.

46. While the Trustee does not have the benefit of having fulsome comparisons of the interim financing proposals (unlike the Monitor and Evercore), and further do not have the "Confidential Exhibit" comparison, the Trustee notes that the Interim Financing Term Sheet is the only interim financing proposal that incorporates a SISP and Stalking Horse Agreement. The other proposals do not. An interim financing proposal that is ten percent more expensive on annualized basis (*i.e.* 15.25% instead of 5.25%) than the Equity's Interim Financing Term Sheet would cost about USD $2,230,556 (or CAD $1,747,390 using the Monitor's Canada-US exchange rate) of additional interest over a four-and-a-half month period. This equates to about USD $123,000/additional interest per interest rate point.

47. The Court should not lose sight of whom that extra cost is affecting. The Applicants get to utilize about half the Interim Financing to pay operations, fees and interest, but at the end of the day the Applicants do not repay that money in a classic sense as there will be credit bid by the Stalking Horse Bidder (the Equity). The Senior Lenders will have their existing debt fully serviced throughout these CCAA proceedings (and paid in full in the event that the Stalking Horse Agreement transaction is culminated) and also have an opportunity to act as a one-third Interim Lender. The Interim Lenders – whether the Equity on its own or in conjunction with the Senior Lenders – will benefit from charging interest. The Noteholders alone might be impacted by a more "expensive" interim financing proposal in this case. However, the Trustee submits that in fact the Noteholders could still be in a better position absorbing a higher interest rate interim financing proposal but not facing an Interim Financing Term Sheet that is tied to the Insider Restructuring Proposal.

48. In light of the foregoing, the Court should give the Noteholders' and Trustee's views on this issue significant weight before approving financing that is tied to sweeping and problematic relief.

**The Court's Jurisdiction**

49. This Court is not bound by the Interim Financing Term Sheet as presented. This Court has the jurisdiction either to strike the Retaliatory Amendment from the Interim Financing Term Sheet, or to advise the Applicants and the Interim Lender that it will not accept the Retaliatory Amendment as drafted and order to parties to attempt to negotiate a resolution of the provision.

50. This was the approach Justice Newbould followed in Essar Steel Algoma Inc.[24] In that case, the applicants brought a motion for approval of interim financing ("**DIP**"),[25] which faced opposition from various parties. In his endorsement dated November 16, 2015,[26] Justice Newbould: (i) declined to approve the DIP; (ii) ordered that certain provisions be deleted; and (iii) directed the parties to attempt to work out appropriate revisions, failing which the parties were to return to court three days later for judicial determination of the issues.

51. In his Endorsement, Justice Newbould then went on to state:

> Regarding the DIP in general, it is clearly needed in order for the debtors to pursue a restructuring. I am satisfied that generally the court's hands will not be tied as to what can or cannot be done if there is a default of the terms of the DIP, ***so long as the changes I have referred to are made***. Nor will the other secured lenders [be] materially prejudiced by the DIP loan. [Emphasis added.]
>
> The DIP terms are supported by the Monitor. The terms are far from ideal and I do not see the DIP lenders as being merely altruistic. Like any DIP lender, it is in their interest to take what they can get. Their interest, of course, in a situation such as this in which they are all ABL or Term lenders, is to see the business successfully restructure, but to be sure they work it on their terms as much as possible.
>
> In this case, the Monitor will have an important role to play in dealing with budgets and I am confident will play a large part in that and bring to the Court any issue that needs to be dealt with. In this connection, the extra terms of the Monitor's duties sought by the *ad hoc* committee of the junior noteholders are approved and are to be added to the amended initial order.

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[24] Essar Steel Algoma, et al. ONSC Court File. No. CV-15-11169-00CL. ONSC Court File No. CV-15-11169-00CL ("***Algoma***"). Documents regarding the CCAA proceedings can be found online at: https://documentcentre.eycan.com/Pages/Main.aspx?SID=352

[25] *Algoma*. Supplemental Motion Record (re Comeback). Relevant portions of proposed DIP are excerpted at **[TAB 3].**

[26] *Algoma.* Unofficial Transcript of Endorsement of The Honourable Justice Newbould dated November 16, 2015. **[TAB 4]**

52. In the result, the parties agreed to amend the DIP in the manner suggested by Justice Newbould and the Court[27] approved the DIP on November 19, 2015.[28]

53. With respect to the Monitor's views regarding the Retaliatory Amendment, the Monitor has provided such views in Appendix "K" to the Fourth Report Supplement.[29] In particular, the Monitor found that the Retaliatory Amendment "**to be very restrictive and proscriptive**" and "**not necessary to the effective functioning of the SISP or the CCAA Proceedings**" but left it in this Court's hands as to whether the Retaliatory Amendment should be approved.

**Mediation**

54. If the Court is not inclined to dismiss the Amended Application, the Trustee submits in the alternative that the Court should consider ordering a further adjournment of the Amended Application, and direct that the Applicants and their key stakeholders engage in a meaningful mediation process to try to resolve these issues.

55. Given the many issues and variables at this important stage in the Applicants' restructuring process, it is in the best interest of all parties to engage in a comprehensive and concerted effort at this time to resolve critical matters, explore potential restructuring transactions and opportunities, and decide on a consensual path forward that balances the interests of all stakeholders.

56. The Trustee submits that the Applicants have been unduly focused on the Insider Restructuring Proposal and have not expended sufficient time or effort engaging with their stakeholders, including the Trustee, to develop restructuring alternatives.

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[27] Due to Justice Newbould's absence, Justice Morawetz was the presiding judge at the return hearing.

[28] *Algoma*. Supplementary Motion Record dated September 22, 2016. Relevant portions of amended DIP are excerpted at **[TAB 5]**

[29] Fourth Report Supplement, Appendix "K", page 4.

## III. RELIEF SOUGHT

57. For the foregoing reasons, the Trustee respectfully requests that this Court:

(a) dismiss the Amended Application in respect of the Insider Restructuring Proposal; or

(b) in the alternative, adjourn the Amended Application *sine die* and direct the Applicants and their key stakeholders to attend a without prejudice mediation process on terms mutually agreeable among the parties, or as this Court may direct at a future hearing; or

(c) in the further alternative, (i) strike the Retaliatory Amendment from the Interim Financing Term Sheet; (ii) extend the SISP timelines by a minimum of one week (except for the Outside Date); (iii) empower the Monitor to terminate the SISP depending on future diamond market conditions; and (iv) strike the Break-up Fee and Expense Reimbursement provisions from the Stalking Horse Agreement and decline to provide a Court-ordered charge in that regard.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** on June 17, 2020, at Toronto, Ontario.

**DENTONS CANADA LLP**

Per: 

**JOHN SALMAS / MARK FREAKE**
Counsel for Wilmington Trust, National Association, in its capacity as Trustee, Notes Collateral Agent, Paying Agent, Transfer Agent and Registrar

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# TAB 1

**2010 ANNREVINSOLV 1**

**Annual Review of Insolvency Law**
Editor: Janis P. Sarra

1 — Credit Bidding — Recent Canadian and U.S. Themes

# Credit Bidding — Recent Canadian and U.S. Themes

*Pamela Huff, Linc Rogers, Douglas Bartner and Craig Culbert* [*]

## I. — Introduction

On 1 June 2009, General Motors Corp. — the Detroit head-quartered automotive giant which, throughout much of its history, was inextricably linked to the very notion of American industrial prosperity — filed for and received protection from its creditors pursuant to chapter 11 of the *U.S. Bankruptcy Code* (*Bankruptcy Code*). [2] The filing was the first, formal step in the implementation of a massive, pre-negotiated operational and financial restructuring, engineered by GM's largest secured creditor, the U.S. government.

At the completion of the expedited restructuring process, tens of billions of dollars in secured loans advanced by the U.S. and Canadian federal governments, as well as the government of the Province of Ontario, formed part of a credit bid which left majority ownership of "New GM" — a newly created acquisition vehicle with a rationalized business model — in the hands of U.S. and Canadian taxpayers. In the context of a formal insolvency proceeding, a credit bid allows a creditor to use its debt as a form of currency in a competitive bidding process, in order to protect its investment or pursue an acquisition opportunity with future upside. That is, a creditor or group of creditors is able to bid for the business of a debtor, wherein the purchase price for the assets is satisfied by a credit or offset against the debt owing to the creditor. [3]

The $47 billion credit bid for GM's assets was also, arguably, the culmination of the largest and most ambitious loan to own strategy in history. [4] New GM launched its much anticipated initial public offering in November 2010, achieving a partial reduction of the U.S. and Canadian governments' investment in New GM for the benefit of U.S. and Canadian tax payers. [5]

On the Canadian side of the border, the credit bidding process was front and centre in the successful sale of the business of Canwest (Canada) Inc., Canwest Publishing Inc. and Canwest Books Inc. which, along with Canwest Limited Partnership (the "Canwest Publishing Group"), sought protection under the *Companies' Creditors Arrangement Act* (*CCAA*) [6] on 8 January 2010. [7] The Canwest Publishing Group was the largest publisher of English language daily newspapers in Canada, as measured by paid circulation and revenue. A subsidiary of Canwest Publishing Group owned the National Post, one of only two Canadian national newspapers.

Pursuant to a support agreement concluded before the filing, the senior lenders put forward a stalking horse offer for all of the assets of the Canwest Publishing Group at the very outset of the proceedings, credit bidding the amount of their indebtedness of approximately $950 million. [8] If no superior offer had been forthcoming, the stalking horse credit bid would have been implemented by a plan of arrangement to the senior lenders only. The plan contemplated the vesting of the assets of the Canwest Publishing Group in the acquisition vehicle established by the senior lenders, free and clear of unsecured claims, including the claims of unsecured noteholders owed in excess of $400 million. What followed was a fast-paced sale and investor solicitation process, a superior cash offer from a majority group of those noteholders, parallel plans and complicated structural planning, all

of which was concluded within seven months of filing. This superior cash offer was implemented through a plan of arrangement to the noteholders and the unsecured creditors, which saw the senior lenders paid in full.

The utility of credit bidding in facilitating what are often massive financial restructurings to preserve and enhance value is clearly evidenced by cases such as GM and Canwest; however, credit bidding is not without its critics. Many believe that it is an unfair manipulation of the credit markets for the benefit of a uniquely well situated group of stakeholders. This paper argues that if a sales process is fair, transparent and reasonable, the criticisms of credit bidding can be adequately addressed. First, credit bidding is explained in the context of, and in contradistinction to, the general foreclosure remedies available to secured creditors. Credit bidder motivations, creditor governance issues and credit bidding in and outside of a plan are also discussed. Specific criticisms of credit bidding are considered. Following that general discussion of credit bid issues is a more in-depth analysis of these topics and current themes in credit bidding and its judicial consideration in both U.S. and Canadian courts, as well as a consideration of the issues that arise in a credit bid for a Canada/U.S. cross-border enterprise.

**A. — Foreclosure and Credit Bidding**

In its simplest form, a credit bid is like a foreclosure. In the Canadian context, the secured creditor accepts ownership of the collateral in satisfaction of the entire indebtedness. In the U.S. context, a foreclosure is a sale process, in which a secured creditor can bid its indebtedness. Foreclosure is governed in Canada and the U.S. by the respective provincial, state and federal statutory foreclosure procedures available to secured creditors. This paper focuses on credit bids in large, commercial insolvencies, such as GM Corp. and Canwest Publishing Group, where such a straightforward foreclosure is not appropriate or possible, or where there are complicated structural and tax issues. In such cases, the debtor corporation requires the full benefit of the stay of proceedings under chapter 11 of the *Bankruptcy Code* or under the *CCAA*, and the broad spectrum of options available in such proceedings to preserve value for creditors and other stakeholders.

The credit bid can be accomplished through a sale of assets or a sale of assets in conjunction with a plan. Which method is used to implement the credit bid will be influenced by creditor governance issues, the complexities of the capital structure of the debtor company, tax considerations, and the desired treatment of both prior ranking and subordinate claims, among other things. In such large, commercial insolvencies, creditors seeking to make a credit bid usually form a special purpose acquisition vehicle (a partnership or corporation controlled by the bidding creditors) that will make the offer. [9]

**B. — Motives of Lenders**

Creditors consider making a credit bid for three principal reasons:

**(i)** Creditors can put forward a credit bid as the culmination of a long term “loan to own” strategy;

**(ii)** Creditors can own and operate the business for an interim period of stabilization, outside of formal insolvency proceedings, with a view to selling the business for a higher recovery when market conditions improve; and

**(iii)** Creditors can put forward a credit bid as a stalking horse or reserve bid, with a view to encouraging higher bids in an auction environment or to owning the business if no such higher value materializes.

***i. — Loan to Own***

A “loan to own” strategy involves the tactical deployment of capital with a view to converting debt into an equity position in a distressed company. The primary candidates to pursue this strategy are hedge funds, private equity sponsors and other providers of private capital which, in many spheres, have replaced traditional cash flow lenders as the principal providers of commercial capital. [10] These funds are often able to acquire secured debt in the secondary market on a discounted basis and then bid the full face value of the debt as part of a credit bid. This strategy allows them to maximize the financial leverage in an economically efficient manner. Although there are obvious risks in acquiring debt that may never be repaid, these private equity investors have a far greater appetite for commercial risk in the pursuit of potentially lucrative acquisition opportunities than did their

predecessors. As enterprise and collateral values plunged in the post-Lehman financial crisis, secured first lien debt has traded sharply lower generally, providing an opportunity to execute on a loan to own credit bid strategy.

***ii. — Stabilization***

Other credit bids develop not out of design from the outset of the loan or acquisition of the debt, but from a perceived necessity in the face of a distressed credit. Many corporate debtors have debt structures that were put in place at the height of the previous business cycle. Debtors fitting this profile often include the portfolio companies of private equity funds. Typically, the assets of the portfolio company itself were used to secure a substantial amount of the acquisition financing. Thus, these companies are carrying a heavy secured debt burden of acquisition financing in addition to traditional working capital loans. With the turn of the business cycle, asset values in many industries have collapsed and revenue has decreased significantly. Accordingly, a business, although viable and potentially profitable, might be distressed because of unsustainable secured debt levels.

If such a business was sold to a third party in the current economic environment, the lender may be facing an immediate and unacceptable loss. The preferable alternative may be for the lender to acquire the assets of the business, rationalize its debt structure, hold for a period of stabilization and recovery, and then sell the business in a more favourable economic climate. In circumstances such as these, credit bidding can be used defensively, to protect and preserve value, if only for a finite amount of time.

***iii. — Reserve Bid***

In yet other circumstances, a lender may have identified a level of recovery on the debt owed to it by a distressed debtor that represents an acceptable loss. Below that amount, however, the lender would prefer to adopt the strategy outlined above — hold the assets and sell at a later time. In light of the alternatives, a creditor may be willing to bid its debt, or some portion thereof, in order to establish a baseline value for the business in an auction process. This initial salvo may be necessary to give customers and other stakeholders of the distressed business confidence that the lender supports the business and will continue to operate the business if it is the successful bidder, while at the same time creating a competitive environment to encourage higher bids. In other words, credit bidding allows a lender to establish itself as a stalking horse and open the bidding by delineating a threshold value for the debtor's assets.

Whatever the motive of the creditor, the credit bid must be put forward in a process that is fair and transparent, and that demonstrates that the appropriate value has been given for the business. Both in Canada under the *CCAA* and in the U.S. under chapter 11, two fundamental issues emerge in the formulation of a credit bid, namely (a) creditor governance issues and, related to that point but not exclusively, (b) whether the credit bid is affected through a plan or in a sale process outside of a plan.

**C. — Creditor Governance Issues**

Irrespective of the motive of a credit bidder, it faces challenges caused by the current complexities of the market place in the formulation and execution of a credit bid. It is common for a single, large commercial credit to be advanced by a syndicate of lenders represented by an administrative and/or collateral agent or by disparate noteholders represented by a trustee under a trust indenture. The agent or trustee will be charged with interacting with the debtor, holding the security on behalf of the syndicate or noteholders and enforcing the security for their benefit. Depending on the terms of the underlying security and credit documents, the agent/trustee will be at liberty to exercise some discretion in certain circumstances, but, will need direction and authority from a prescribed majority of lenders/noteholders, holding a prescribed majority of debt, to act on other matters. In certain areas, unanimity may be required before the agent/ trustee can act. In virtually all circumstances, a credit bid would require a super majority or unanimity of lenders or noteholders.

In a credit bid, each member of the syndicate will become an equity participant in a distressed entity. The desire to be part owner of a distressed enterprise may vary widely among members of a large syndicate. Some lenders may have acquired a position with that very objective in mind. At the other end of the scale, some other lenders could be restricted for a variety of internal policy or regulatory reasons from holding equity in an operating company. Another group of syndicate members, given

their commercial mandate, may simply want to recover as much of the debt owing to them as possible and extricate themselves from the distressed credit.

In order to make a credit bid, these different views and positions must be accommodated or addressed. Accordingly, regulated lenders who have restrictions on holding equity and those who simply wish to be paid out must be provided some form of liquidity (often by sale of their debt to a distressed investor).

Recently, creditor governance — between members of a syndicate in support of a credit bid and those opposed — has manifested itself in U.S. case law. As discussed below, U.S. bankruptcy courts have held that where the underlying documentation provides express authority to exercise remedies against the collateral in accordance with applicable law (after being directed by the requisite majority of lenders established by the credit documents), a court will recognize an agent's authority to bid the debt on behalf of an entire syndicate. These cases, dealing with so-called "drag along rights", have turned on the interpretation of the credit documentation in the context of the provisions of the *Bankruptcy Code*, with courts determining that bidding the debt is an exercise of remedies against the collateral. As of yet, Canadian courts have not been asked to consider the question of whether credit bidding can constitute a permitted remedy under credit documentation, notwithstanding the fact that such documentation does not expressly authorize credit bidding. [11]

**D. — Credit Bidding Outside of a Plan or in a Plan**

The U.S. cases noted above dealing with "drag along" rights have arisen in the context of sales of assets outside of a plan of reorganization. Sales of this nature are governed by s. 363 of the *Bankruptcy Code*. Section 363(k) of the *Bankruptcy Code* expressly authorizes credit bidding in these circumstances (i.e. where no plan has been filed).

In Canada, s. 36 of the recently amended *CCAA* establishes the regime for the sale of assets outside of a plan of compromise or arrangement. [12] Unlike the *Bankruptcy Code*, however, there is no express statutory right to credit bid in asset sales, although credit bidding has been widely accepted in Canadian insolvency proceedings. This paper considers the tests applied by the U.S. and Canadian courts for approval of a sale of assets outside of a plan.

A sale of assets and the filing of a plan are not mutually exclusive propositions. A plan of reorganization under the *Bankruptcy Code* or plan of compromise or arrangement under the *CCAA* may establish a process for the sale of assets, or may give effect to a sale of assets, which results in the creditors acquiring the business. As discussed in more detail below, notwithstanding that in both the U.S. and Canada the sale of all of the assets of a business can take place outside of a plan, different dynamics apply if the sale is conducted or implemented through a plan. In either case, the primary objective of the supervising court is to ensure the fairness of the process and the transaction it is ultimately asked to approve.

Under the *CCAA*, a plan must be approved by a majority of voting creditors holding 66 and 2/3% of voting claims, in each class entitled to vote on the plan. Plan approval under the *Bankruptcy Code* follows this general supermajority approach; however, in certain circumstances a debtor is entitled to "cram down" a class of creditors. That is, a debtor can seek confirmation of a plan by the U.S. bankruptcy court, notwithstanding that a class or classes of creditors has not voted in favour of the plan in the requisite majorities.

Canadian courts, in the absence of a statutory basis for "cram down", have nonetheless approved plans made only to secured lenders that provided for a sale of the debtor's business to such secured lenders, vesting the assets in the purchaser free and clear of claims and interests and without a vote of the unsecured creditors. Where either a marketing process or some other compelling evidence of value supports the approval of the sale and the vesting of assets in the lender as purchaser, Canadian courts have effectively exercised "cram down" of subordinate creditors. [13]

In the context of credit bidding, recent U.S. case law, including *In Re Philadelphia Newspapers*, [14] has addressed a debtor's ability to deny a secured lender the right to credit bid and still seek to have a plan confirmed on the basis that the debtor can provide its secured lender with the "indubitable equivalent" of its secured claim (i.e. the value of the collateral subject to its

liens). This line of cases is based on the express provisions of the *Bankruptcy Code* which has no equivalent in Canada. This paper considers these Canadian and U.S. differences in the context of a plan.

**E. — Criticisms of Credit Bidding**

In *Philadelphia Newspapers*, the debtor sought to advance a plan which prevented a secured lender credit bid. There may be legitimate reasons why a debtor may wish to pursue this avenue and restrict a lender's ability to credit bid. In court-supervised distressed sales, it is common for the secured creditor, the party with the primary economic interest in the outcome of the sale (especially one that also provides debtor-in-possession or "DIP" financing), to have influence over the sale process, including with respect to timing, procedure and outcome. If the same secured creditor that plays a role in dictating the sales process seeks to acquire the collateral at the end of it, questions of fairness and transparency are engaged.

If bidding creditors want to own the business, they will be motivated to pay as little as possible. Other creditors (and any guarantors liable for the deficiency claim) may fear, rightly or wrongly, that such bidding creditors will use their influence over the bidding process to discourage competitive bidding. An obvious tool is to use their influence as creditors to insist on an overly speedy sale process, where the advantage from the starting gate is clearly to the existing creditors as bidders with the superior knowledge of the assets of the debtor. The long-term viability of the court-supervised sales process must engender confidence and trust in the market place that bidders will have a real opportunity to buy the debtor's assets and that appropriate value will be obtained. Critics suggest that the manipulation, real or perceived, by an insider such as a senior secured creditor threatens that system. [15]

There may also be concern by a debtor, other creditors, and any guarantors liable for the deficiency claim that a credit bidder might chill the market. This can occur if other potential purchasers are of the view that an under-secured lender will simply trump any third party offers by allocating enough debt to the credit bid so that no reasonable third party will match the offer. A debtor may take the position that restricting credit bidding will generate greater interest among a wider cross-section of bidders and the competitive environment will result in a higher recovery than if credit bidding were permitted.

In the final analysis, these criticisms of credit bids are best addressed by a fair and transparent process, so the court and other stakeholders are confident of the reasonableness of the transaction and that potential bidders were given an opportunity and encouraged to participate. A credit bid as a stalking horse in a court-approved marketing process may best serve such an objective; creating a transparent process for bidding creditors and an opportunity to achieve the best recovery for creditors.

**II. — Credit Bidding under Canada's CCAA**

**A. — Credit Bidding outside a Plan**

The jurisdiction of a court to facilitate sales in *CCAA* proceedings, outside of a plan of arrangement, has long been recognized by Ontario courts. For example, in the 1998 case of *Canadian Red Cross*, [16] the Ontario court approved the sale of substantially all of the Red Cross' blood donor assets before a restructuring plan was put to creditors. In the absence of express statutory authority, the court relied on its inherent jurisdiction and/or statutory discretion to approve sales by a debtor company. The sale of assets outside of a plan, however, met some resistance in other provincial jurisdictions in Canada. [17]

In September 2009, any debate regarding the scope of a court's authority to approve and implement a sale of assets outside of a plan should have been settled as the *CCAA* was amended to grant a court the express authority to approve asset sales outside a plan of arrangement. [18] Subsections 36(3) and (4) of the *CCAA* provide a non-exhaustive list of factors to be considered by the court in approving a sale of assets, outside the ordinary course of business:

> (3) Factors to be considered — 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.
>
> (4) Additional factors — related persons — 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.

These factors raise a number of issues in connection with credit bidding:

***i. — Reasonableness of Sale Process***

One of the primary concerns with credit bidding is that the integrity of the process not be compromised and that a senior creditor not be permitted to use its influence as an existing stakeholder to truncate the sales process or otherwise manipulate the process in such a way that the credit bid is a foregone conclusion or value is not otherwise maximized for subordinate creditors. As discussed in more detail below, the issue may be amplified where the credit bidder also has an existing equity position in the debtor company and plays a role in managing its affairs. Further, the credit bidder may provide the DIP financing for the insolvency proceeding and be able to require terms of sale as a condition of the availability of such needed financing for the debtor that may not be available from another source. The secured lender as DIP lender has even more influence over the process.

In light of these real or perceived concerns, it may be appropriate for the court to establish a more active, watchdog role for the court appointed monitor in Canadian proceedings. The court may also appoint an investment banker/financial advisor or chief restructuring officer in respect of the debtor's case that works in concert with the monitor in fashioning the sale process and vetting and analyzing offers received for the business in such process. Obviously, the fairness of the process would be called in to question if a secured creditor/credit bidder was able to review other bids while participating in the process (while other bidders had no such rights) or if a secured creditor/credit bidder held a general veto over competing bids, as is sometimes provided for in DIP credit agreements. Both scenarios have the potential to chill, not encourage, a healthy bidding process. In the absence of an unsecured creditors' committee in Canadian proceedings, the court can, and should, look to the monitor to help ensure the reasonableness of a sales process, particularly where a credit bid is involved.

***ii. — Monitor Approval of Sales Process***

The second factor, which focuses on the s. 36 requirement for the monitor's approval of the sales process, reaffirms the manifest necessity that the monitor be, and be seen to be, an independent watchdog, not subject to direction or undue influence by the debtor or the senior lenders. Monitors are under growing scrutiny (particularly in large complex cases with multiple stakeholder interests that may be in conflict) to be an impartial officer of the court that promotes a fair balancing of the interests of the

broad stakeholder constituency. [19] This scrutiny should be all the more intense in the context of a credit bid. For instance, in establishing the sales process, courts should require that the monitor file a report to the court that confirms the monitor has received an opinion from its independent counsel, subject to the usual qualifications, that the credit bidder's security is valid and enforceable and in priority to all other liens and encumbrances. This often occurs as a matter of practice, but should be a requirement. The monitor should be asked to report as to whether the timetable set out in the proposed sale process is adequate for the completion of due diligence, the advancement of and consideration of offers, and approval of the winning bid.

***iii. — Sale Relative to a Bankruptcy***

On this same theme of monitor as watch dog, s. 36 contemplates that the monitor to file a report in support of approval of a sale stating that, in its opinion, the sale is more beneficial than the recovery that would be expected in a bankruptcy. In certain circumstances, a piecemeal sale of assets by a trustee in bankruptcy may result in a higher return to a particular constituency of creditors, than in a going concern sale. For example, in the current lending environment, it is common that a lender may have a different priority position on different pools of assets. A term loan may be secured against fixed assets, pursuant to a first ranking charge securing a debt obligation far in excess of the value of such assets. Accordingly, in the liquidation of these assets in a bankruptcy, there would be no value for unsecured creditors.

The same or a different secured creditor may have a revolving loan that is over-secured against a different pool of assets such as inventory and receivables. In a liquidation, there may be value for unsecured creditors from this asset pool. Depending on the assets subject to its security and the value of the underlying collateral, the credit bidder may have to include a cash component in its bid, to make up the difference between the amount of its secured debt and the liquidation value of the assets if there is greater value in the collateral or to address other priority creditors. Thus, allocation and valuation issues, among and between pools of assets, can be of critical importance in assessing the benefits of a sale relative to a bankruptcy.

***iv. — Consultation with Creditors***

This factor demands a careful balancing act. In a credit bid, the potential purchaser is also a secured creditor and, as suggested above, too much consultation with this party may be inappropriate and undermine the integrity of the process. Of course, there may be other large and important creditor constituencies such as bondholders, major trade creditors and potentially unions, that should be consulted in conjunction with the sales process. If these constituents feel they have been unfairly excluded from the process, this exclusion may form the basis of an objection.

***v. — Effect of Proposed Sale on Creditors and other Parties***

The impact on the sale of the creditor bidder itself, is that the credit bidder will become the equity holder of the debtor's business. Subject to the comments below, if the credit bidder is under-secured, subordinate creditors would not receive any recovery from the sale. If the credit bid is the highest and best offer, following a fair and reasonable process, those subordinate creditors will not be able to assert prejudice as the process will have demonstrated no value for their claims.

A credit bidder would also be expected to monetize or pay any outstanding obligations to prior ranking creditors or obligations secured by priority court-ordered charges such as the administration charge commonly granted in *CCAA* proceedings to secure payment to professionals. It would also be expected that the credit bidder assume any obligations to pay outstanding post-filing accruals, including to transferred employees for accrued but unpaid wages and vacation pay. Credit bidders would also be required to pay any cure costs for pre-filing arrears in connection with any contracts assigned pursuant to s. 11.3 of the *CCAA*.

***vi. — Fair and Reasonable Consideration***

It is reasonable to infer that if the prior factors are satisfied and a fair process has been conducted, the court should be able to quickly conclude that a fair result was obtained. Indeed, it would be a daunting task to try to convince a court otherwise, where the court that has established the process, the debtor has carried it through in accordance with its terms, and the monitor approves of both the debtor's conduct in the process and the result. There is no doubt that issues of fairness have to be addressed at the outset of the process, rather than waiting until the conclusion, as it will be difficult for a disgruntled stakeholder to persuade the

court at the end of the process that what looked like a reasonable process when approved, did not turn out to be a fair process in its implementation.

In the recent *CCAA* proceedings of Brainhunter Inc. and its subsidiaries (collectively, "Brainhunter"), a question arose as to the value to be ascribed to debt instruments issued by the debtor. In that case, a third party called Zylog submitted a cash bid that was greater in value than the stalking horse bid submitted by a party related to Brainhunter. Zylog subsequently acquired, in the secondary market, notes issued by Brainhunter. Zylog was in a position to tender the notes as part of its bid. An issue arose as to the value to give to those notes, if tendered. Brainhunter's position was that the value to be ascribed to the notes should be equal to the consideration received by other members of the class after the notes were tendered. Zylog, however, was of the view that the notes should be afforded their full face value. [20] The issue is summarized by the debtor's counsel, as follows:

> For example, assuming that there were approximately $11 million of Notes outstanding, if, during the auction, the stalking horse bidder tendered an additional $1.1 million of cash in excess of the Zylog original offer, there would be funds available to permit a distribution of 10 cents on the dollar to all of the Noteholders. Brainhunter took the position that in order to top such a bid, Zylog would have to tender Notes and pay a cash amount sufficient to give the remaining Noteholders whose Notes were not tendered more than 10 cents on the dollar. Zylog could achieve such a result by bidding more than $1.1 million recognizing that a portion of this amount would be returned to it as a distribution on the Notes which it held or alternatively could tender its Notes plus a cash amount sufficient to pay the other Noteholders more than 10 cents on the dollar. [21]

During the course of the proceedings, Zylog acquired substantially all of the notes; thus the Court held that the issue was rendered moot. Accordingly, the question as to how debt instruments should be valued in these circumstances has not been resolved. [22]

***vii. — Related party sales***

The *CCAA* imposes greater scrutiny on transactions between insiders. As stated above, a private equity firm may hold an equity position in a debtor company, may be a secured creditor to the debtor company and may be the credit bidder for the assets of a debtor company. These scenarios all but necessitate a more active role for the monitor in the sales and bid approval process and place further emphasis on the need for the monitor to be an objective third party, not beholden to any particular constituency. [23]

**B. — Credit Bidding in a Plan — the Canwest Story**

While credit bidding has an established history in Canada, there is little caselaw on the topic — particularly credit bidding in connection with a plan. The *CCAA* proceedings of the Canwest Publishing Group provide the best and most recent example of the considerations in a credit bid, including the establishment of a fair process for the stakeholders, no matter how unique. In this case, all three motivations for credit bidding were at play. The senior lenders were prepared to put forward a credit bid as stalking horse in order to encourage a higher offer in an auction process. If that offer did not materialize, the senior lenders were prepared to own, hold and sell in the future, to avoid an immediate loss on their investment. The unsecured noteholders were prepared to buy, not only to protect their position, but to give effect to a "loan to own" strategy for many of them, particularly those that bought notes at a discount.

When reviewing the course of events, it is apparent that the stakeholders of Canwest Publishing Group benefited from the stalking horse credit bid put forward by Canwest's senior lenders who were owed approximately $950 million. [24] To be effective for such stakeholders, the credit bid had to be put forward in a process that would allow a sufficient opportunity for interested parties to come forward with a superior offer, recognizing that a timetable for the sale of a business in distress is a fast track ride that requires interested parties to move quickly or miss the opportunity. The court has to balance the need to move quickly, to address the real or perceived deterioration of value of the business during a sale process or the limited availability of restructuring financing, with a realistic timetable that encourages and does not chill the auction process.

The process that unfolded in Canwest Publishing Group did create that dynamic, resulting in a sale of assets to an entity sponsored by the Ad Hoc Committee of the 9.25% senior subordinated noteholders (the "Ad Hoc Committee"). The sale resulted

in payment in full to the senior lenders, a preservation of the business as a going concern and continued employment for its workforce, plus some recovery for unsecured creditors. There is no doubt that the fast-tracked and innovative process created some strenuous dynamics between the Ad Hoc Committee and the senior lenders. Nonetheless, the parties were able to negotiate through a process that ultimately resulted in a superior offer to the stalking horse credit bid.

Prior to filing for *CCAA* protection before the Ontario Superior Court of Justice, Canwest Publishing Group had defaulted on its senior secured credit facilities and its senior subordinated notes. In the months leading up to the filing, Canwest Publishing Group and its senior lenders negotiated the terms of a comprehensive, pre-packaged restructuring transaction pursuant to which the senior lenders would put forward a stalking horse credit bid and whereby the senior lenders would acquire the businesses of the Canwest Publishing Group in substantial satisfaction of their outstanding secured claims (the "Credit Bid"). The terms of such transaction were set out in a Support Agreement which provided, among other things, that the Canwest Publishing Group would file for protection under the *CCAA*, take steps to implement the transaction and immediately conduct a sale and investor solicitation process (the "SISP") for the purpose of identifying if there was an offer for the acquisition or recapitalization of the businesses of the Canwest Publishing Group that would result in a cash distribution to the senior lenders on closing of the total amount of their claims minus a discount (a "Superior Cash Offer").

The Canwest Publishing Group and the senior lenders agreed that if a Superior Cash Offer was identified in the SISP, the Canwest Publishing Group would pursue the transaction contemplated by the Superior Cash Offer, subject to a timeline for completion set out in the Support Agreement. In the meantime, the Credit Bid provided stability to Canwest Publishing Group as it demonstrated, from the outset of the *CCAA* filing, that the Canwest Publishing Group had the support of its senior lenders and would carry on business with such senior lenders as owner, unless a better offer came forward. In any event, there would be a going concern solution to the insolvency of Canwest Publishing Group.

The process started in full gear. The Initial Order (1) authorized the SISP; (2) approved the Support Agreement that established the framework for the Credit Bid; (3) accepted for filing a plan of arrangement addressed to the senior lenders alone (the "Senior Lenders' Plan") to give effect to the Credit Bid; (4) established a claims process for the senior lenders to file claims and vote on the Senior Lenders' Plan; and (5) set a meeting of senior lenders on 27 January 2010, three weeks after the filing, to vote on the Senior Lenders' Plan. The Senior Lenders' Plan was the best way to address any real or perceived governance issues. It created the voting mechanism to bind the syndicate to the Credit Bid and all steps to implement the Credit Bid, without any dispute as to the extent the provisions of the credit documentation were insufficient. The senior lenders approved the Senior Lenders' Plan on 27 January 2010 by an overwhelming majority.

With market confidence protected by the Credit Bid and a process set in motion for its approval by the senior lenders, the SISP commenced on 11 January 2010. It proceeded in two phases. The first phase was intended to identify potential offers. The SISP would not proceed to a second phase unless at the end of the first phase, the monitor determined that there was no reasonable prospect of a Superior Cash Offer. If the SISP was terminated at the end of the first phase, Canwest Publishing Group would immediately move for sanction of the Senior Lenders' Plan and implement the Credit Bid. The Senior Lenders' Plan provided no recovery to any other creditor. By delaying sanction until the results of the SISP were known, the Court would be able to take into account the results of the marketing process in assessing whether the Senior Lenders' Plan was fair and reasonable to creditors.

At the end of phase one, there were a number of non-binding indications of interest from financial and strategic. The Monitor made a recommendation on March 12th that the SISP proceed to phase two. No steps were taken to seek sanction of the Senior Lenders' Plan. On 30 April 2010, two bids were put forward to acquire substantially all of the assets of the Canwest Publishing Group and one bid to make an investment in the Canwest Publishing Group. Following its review of the three bids, the Monitor determined that only the offer received from the Ad Hoc Committee (the "AHC Bid") was a credible, reasonably certain and financially viable offer and a Superior Cash Offer.

The material terms of the AHC Bid were set out in the proposed form of asset purchase agreement between 7535538 Canada Inc. ("Holdco"), CW Acquisition Limited Partnership (the "Purchaser") and the Canwest Publishing Group dated as of 10 May 2010 (the "AHC APA"). Pursuant to the AHC APA, a corporation sponsored by members of the Ad Hoc Committee would effect a transaction (the "AHC Transaction") to acquire substantially all of the financial and operating assets of the Canwest

Publishing Group and the shares of National Post Inc. (the "Acquired Assets") on an "as is, where is" basis for an effective purchase price of $1.1 billion. The Purchaser would continue to operate all of the business of the Canwest Publishing Group and offer employment to substantially all of the employees.

Canwest Publishing Group had the Credit Bid in hand, the closing of which was virtually a certainty. It also had the AHC Transaction, a Superior Cash Offer, but for which the Purchaser had to obtain financing of $1.1 billion to close. Pursuant to the Support Agreement, the Senior Lenders' Plan had to be sanctioned on or before 15 May 2010. The AHC Transaction was a leveraged buy-out and, while arrangements for such financing were in progress, closing could not be guaranteed. As discussed below, Canwest Publishing Group took the unprecedented step of seeking conditional sanction of the Senior Lenders' Plan while also seeking court approval of the AHC Transaction. In this dual track approach, Canwest Publishing Group would proceed toward implementation of the AHC Transaction while concurrently taking steps to remain in compliance with the Support Agreement and moving toward the closing of the Credit Bid. In the event that the AHC Transaction did not close, Canwest Publishing Group would immediately consummate the Credit Bid.

On 17 May 2010, Madam Justice Pepall determined that such a dual track process was fair in the circumstances and granted the necessary orders to accomplish such result. The Canwest Publishing Group was granted an order approving the AHC Transaction and authorizing the Canwest Publishing Group to enter into the AHC APA and take whatever additional steps were necessary or desirable to implement the AHC Transaction and effect the transfer of Acquired Assets to the Purchaser. The Court approved the sale on its own merits, applying the test for approval of the sale of assets outside of a plan, discussed above. Madam Justice Pepall held as follows:

> Clearly the SISP was successful and in my view, the LP Entities should be authorized to enter the Ad Hoc Committee Asset Purchase Agreement as requested. ...
>
> The proposed disposition of assets meets the section 36 *CCAA* criteria and those set forth in the *Royal Bank of Canada v. Soundair Corp.* decision. Indeed, to a large degree, the criteria overlap. The process was reasonable and the Monitor was content with it. Sufficient efforts were made to attract the best possible bid; the SISP was widely publicized; ample time was given to prepare offers; and there was integrity and no unfairness in the process. The Monitor was intimately involved in supervising the SISP and also made the Superior Cash Offer recommendation. The Monitor had previously advised the Court that in its opinion, the Support Transaction was preferable to a bankruptcy. The logical extension of that conclusion is that the AHC Transaction is as well. The LP Entities' Senior Lenders were either consulted and/or had the right to approve the various steps in the SISP. The effect of the proposed sale on other interested parties is very positive. Amongst other things, it provides for a going concern outcome and significant recoveries for both the secured and unsecured creditors. The consideration to be received is reasonable and fair. The Financial Advisor and the Monitor were both of the opinion that the SISP was a thorough canvassing of the market. The AHC Transaction was the highest offer received and delivers considerably more value than the Support Transaction which was in essence a "stalking horse" offer made by the single largest creditor constituency. The remaining subsequent provisions of section 36 of the *CCAA* are either inapplicable or have been complied with. In conclusion the AHC Transaction ought to be and is approved. [25]

Also on 17 May 2010, the Canwest Publishing Group obtained an order sanctioning the Senior Lenders' Plan, and vesting all the assets of Canwest Publishing Group in the senior lender's acquisition vehicle on closing, free and clear of all claims and encumbrances, but providing that the Senior Lenders' Plan was not effective until after delivery of a certificate by the Monitor. The Monitor's certificate would not be delivered if the AHC APA closed.

The Court approved the Senior Lenders' Plan addressing the tests of plan approval set out in the *CCAA*. On the basis that the SISP had thoroughly canvassed the market and only the AHC Transaction had emerged, Justice Pepall approved the conditional sanction of the Senior Lenders' Plan and concluded that it was "fair and reasonable" notwithstanding the existence of the clearly superior AHC Transaction. The Senior Lenders' Plan was a sale — the Credit Bid — within a plan. As a result, Justice Pepall applied the test for plan approval and held as follows:

> The LP Entities are seeking the sanction of the Senior Lenders' *CCAA* Plan on the basis that its implementation is conditional on the delivery of a Monitor's Certificate. The certificate will not be delivered if the AHC Bid closes. Satisfactory arrangements have been made to address closing timelines as well as access to advisor and management time. Absent the closing of the AHC Transaction, the Senior Lenders' *CCAA* Plan is fair and reasonable as between the LP Entities and its creditors. If the AHC Transaction is unable to close, I conclude that there are no available commercial going concern alternatives to the Senior Lenders' *CCAA* Plan. The market was fully canvassed during the SISP; there was ample time to conduct such a canvass; it was professionally supervised; and the AHC Bid was the only Superior Offer as that term was defined in the SISP. For these reasons, I am prepared to find that the Senior Lenders' *CCAA* Plan is fair and reasonable and may be conditionally sanctioned. I also note that there has been strict compliance with statutory requirements and nothing has been done or purported to have been done which was not authorized by the *CCAA*. As such, the three part test set forth in the *Re: Canadian Airlines Corp.* has been met. Additionally, there has been compliance with section 6 of the *CCAA*. [26]

Although, the AHC Transaction was approved on May 17th as a standalone sale outside of a plan, it was determined that a plan would be used to implement the AHC Transaction, not just a vesting of assets in the Purchaser on closing. Apparently for administrative reasons and to facilitate a cleaner distribution, a plan was put forward between the Canwest Publishing Group and certain of its unsecured creditors (the "AHC Plan"). By Order dated 17 May 2010, the Court authorized Canwest Publishing Group to file the AHC Plan and call a meeting of creditors for the purpose of considering and, if thought advisable, voting on the AHC Plan.

The AHC Plan provided for two types of distributions to Affected Creditors:

**(a)** a distribution of cash in an amount up to $1,000 to Affected Creditors that either: (i) have claims of less than $1,000 and are deemed to elect to receive a cash payment in the amount of the claim (a "Cash Election") or (ii) make a Cash Election in full satisfaction of the amount of their outstanding claims; and

**(b)** a distribution of equity shares of Holdco to those Affected Creditors with Proven Claims of more than $1,000 that have not made a Cash Election.

The AHC Plan provided for payment in full to the senior lenders and approximately $150 million in notional value to unsecured creditors through a combination of cash and shares representing 32.5% of the equity on emergence. After the filing of the AHC Plan on May 21st, the AHC Plan was amended on June 10th, considered and overwhelmingly approved at a meeting of affected creditors on June 14th and sanctioned on 18 June 2010. The AHC Plan sanction order vested the Acquired Assets in the Purchaser on closing, free and clear of all claims. By closing, approximately 89% of the noteholders participated in the AHC Transaction.

In the end, the AHC Plan represented the best available outcome for the Canwest Publishing Group and its stakeholders. The SISP was a comprehensive and robust test of the value of the Acquired Assets in the market, which gave Justice Pepall the evidence she needed to approve the innovative and unprecedented dual track process. Justice Pepall was able to determine that the AHC APA should be approved as fair and reasonable, but if it did not close, there would be no better offer, demonstrating that the Senior Lenders' Plan was fair and reasonable. Sanction of the Senior Lenders' Plan, although approved by the senior lenders on January 27th, only came forward to the Court in mid-May 2010, after the SISP had identified the value of the business and provided the evidentiary basis for approval.

While all turned out to be a success, critics of the process may suggest that it could have gone the other way, with no value generated for unsecured creditors. Canwest Publishing Group had effectively lost control of the process to its senior lenders and was a bystander during the process. The Support Agreement set out aggressive milestones, including a requirement that the Senior Lenders' Plan be sanctioned by May 15th and an ultimate requirement that the Credit Bid be completed before 30 June 2010. That date had to be extended until mid-July, presumably with much negotiation and the need for a court order to put the extension into effect. In order to ensure that a Superior Cash Offer — assuming that one was identified in the SISP

— could be consummated before that date, and assuming that such alternative transaction included a recovery for unsecured creditors, Canwest Publishing Group would have to conduct a claims process, file a plan of compromise or arrangement for the alternative transaction, hold a creditors' meeting, obtain court sanction of the alternative plan and close the transaction to sell a significant business in a matter of weeks.

Some critics may suggest that, but for the highly motivated noteholders who stood to lose their entire investment, this fast track process chilled the ability of other potential participants to bid in the process. While the Credit Bid established certainty for the going concern prospects of the insolvent business from the outset, critics may say that the Credit Bid sent a negative message to potential purchasers. It assumed an enterprise value equal to the outstanding secured debt and did not offer any recovery whatsoever to unsecured creditors, including the noteholders owed approximately $400 million.

At the same time, certain benefits of the pre-negotiated restructuring framework are indisputable: a going concern outcome was secured prior to filing, and it is highly unlikely that the *CCAA* proceeding would have progressed from initial application to plan implementation in seven months without an aggressive pre-negotiated timetable in place. The existence of the Credit Bid also projected critically needed confidence in the future of the business for the employees, trade creditors and other stakeholders of the Canwest Publishing Group.

## III. — Credit Bidding under U.S. Bankruptcy Law

### A. — General Overview

The *Bankruptcy Code* permits a debtor, after notice and a hearing, to sell assets outside of the ordinary course of business free and clear of all liens and encumbrances.[27] The debtor has a fiduciary obligation to obtain the "highest and best" offer for the debtor's assets for the benefit of the debtor's estate. In almost every case, the debtor and its professionals will conduct a sale process designed to canvass a broad spectrum of potentially interested financial and strategic buyers. That process — which for all intents and purposes is frequently tantamount to a "private auction" — is generally followed by an auction conducted by the debtor in accordance with the sale procedures approved by the bankruptcy court. The sale of assets free and clear of a secured lender's liens raises issues as to the extent a secured creditor can protect its interest in collateral if the proceeds from the sale are less than the debt secured by the lender's claim.

The *Bankruptcy Code* strives to achieve a balance between protecting a secured creditor's interest in valid and perfected liens in collateral which comprise part of the debtor's estate on the one hand, and permitting a debtor to use such property and, in certain circumstances, sell such property over the objection of the secured creditor, on the other. For example, the *Bankruptcy Code* permits a debtor to continue to use collateral subject to a secured creditor's security in the ordinary course of business[28] and generally prohibits a secured creditor from taking enforcement action that could interfere with such use,[29] but also requires that a debtor provide a secured creditor with adequate protection for this use and diminution in value of collateral.[30] With bankruptcy court approval, a debtor may also sell collateral free and clear of the secured creditor's lien over the objection of the secured creditor.[31] The principal protection afforded to the secured creditor to avoid having its collateral sold at what it believes is below its value, is the right to credit bid the full allowed amount of its allowed claim.

Section 363(k) of the *Bankruptcy Code* provides that a secured creditor has the right to offset its claim against the purchase price of the property on which the secured creditor has a lien, ensuring that the property will not be sold to a third party against the wishes of the secured creditor, unless the proceeds received from the sale exceeds the secured creditor's total claim.[32] In simple terms, if the secured creditor is the winning bidder at the auction for the sale of its collateral, it simply offsets the debt, with no cash being paid by the secured creditor. The right to credit bid the full claim under section 363(k) of the *Bankruptcy Code* creates a significant advantage for a secured creditor that has acquired secured debt at a discount and whose goal is to own the underlying collateral or be in a position to drive third-party cash bids higher. The tactical advantage arises because under Section 363(k) a secured creditor is entitled to bid up to *the full amount of the claim* secured by a lien on the property to be sold, regardless of the purchase price of the secured claim, the trading price of the secured claim in the marketplace or the

"fair market value" of the property to be sold. [33] Although historically considered sacrosanct in the bankruptcy arena, the right to credit bid has come under attack recently, and to a certain degree, as discussed below, the attacks have been successful.

**B. — Application of Section 363**

Prior to the enactment of the *Bankruptcy Code*, it was a generally established rule that a bankruptcy court could order the sale of an asset free and clear of liens only where it was reasonably probable that the proceeds derived from the sale would exceed the total encumbrances on the asset and the costs of performing the sale. [34] The enactment of section 363(k) of the *Bankruptcy Code* codified credit bidding within the asset sale scheme set forth in the *Bankruptcy Code*.

Pursuant to section 363 of the *Bankruptcy Code*, a debtor is permitted to sell assets outside of the ordinary course of business after notice and a hearing and with court approval. [35] The debtor, in order to avail itself of this sale right, must provide adequate notice to all interested parties, meet specific procedural requirements and establish a clear business justification for the sale. [36] Furthermore, when selling an asset, a debtor is required to obtain the highest and best offer, and typically, the bankruptcy court will require the debtor to conduct an auction for the assets to ensure that this requirement is met. In the context of an auction, a bid in all cash — versus a bid composed of some or all consideration is not always considered the "highest and best." The debtor is required to consider issues such as conditionality, material differences in respective deal structure or asset purchase agreements and termination rights in determining which bid is the "highest and best."

In theory, the auction should create a market for the assets being sold and, presumably, assure obtaining the highest and best offer for the debtor's assets. In furtherance of a fair and orderly auction process, the debtor will submit to the bankruptcy court for approval a set of bidding procedures that sets forth the proposed auction process, including the terms and conditions of the due diligence process, bid protections for a stalking horse bid, if any, requirements to be considered a qualified bidder and submission of a qualified bid. The bidding procedures may specifically state whether credit bidding by a secured creditor under section 363 of the *Bankruptcy Code* will be permitted as a qualified bid. If the bidding procedures are silent on credit bidding, a secured creditor will be permitted, unless otherwise ordered by the bankruptcy court, to bid at the auction pursuant to section 363(k).

The bankruptcy court has the authority to deny a secured creditor the right to credit bid "for cause." [37] Bankruptcy courts have applied the "for cause" exception to the right of a secured creditor to credit bid where the claim or lien was subject to a bona fide dispute and there was a need for a prompt sale of the assets. [38]

The *Bankruptcy Code* does not provide any guidance as to what constitutes "for cause" under section 363(k). In other contexts, bankruptcy courts have found aggressive tactics by distressed debt professionals objectionable and have fashioned remedies to address behaviour that, while perfectly in accord with applicable bankruptcy law and rules, violates, in such court's view, the spirit of the law or the overall equitable balance in a bankruptcy case. [39] In one recent case involving a strategic acquiror, *In re DBSD North America, Inc.* [40], DISH Network acquired all of the outstanding first lien secured debt of the debtor after the debtor filed its plan of reorganization. [41] DISH Network then proceeded to vote all of its acquired claims against the plan of reorganization proposed by the debtor, and simultaneously sought to terminate the debtor's exclusivity period to file its own plan of reorganization.

The debtor objected to DISH Network's attempts to derail its plan, and moved for the court to designate (i.e., ignore) DISH Network's votes as having been made in bad faith. The bankruptcy court agreed with the debtor's arguments, holding that DISH Network's actions demonstrated "that DISH did not purchase and vote its claim in order to gain financially by way of a distribution in [the] case. Rather ... its purpose was as a strategic investor — and, it may be fairly inferred, to use status as a creditor to provide advantages over proposing a plan as an outsider, or making a traditional bid for the company or its assets." [42]

A sale of substantially all of the assets of a chapter 11 debtor can also be made pursuant to a confirmed plan of reorganization. [43] In the context of a sale effectuated through a plan of reorganization, higher "bids" are made by way of competing plans. [44] As

discussed more fully below, recent case law has addressed a debtor's ability to cram down a plan of reorganization on a class of objecting secured creditors by providing the class of secured creditor the "indubitable equivalent" of their claims rather than the opportunity to credit bid. [45]

**C. — Credit Bidding and the Collective Action Doctrine**

A syndicated loan facility is a loan or multiple types of loans or the furnishing of credit (e.g., term loans, revolving credit loans, letters of credit) provided by a group of lenders and is typically structured, arranged and administered by one or several commercial or investment banks acting as agent(s) for the syndicate. While certain provisions of the credit documents in a syndicated loan facility provide that the lenders will be treated as a single group represented by an agent who acts in accordance with majority rule, other provisions of a syndicated loan facility provide that in certain circumstances, each of the lenders retain individual rights that cannot be modified by the group. The extent to which a lender under a secured credit facility may be dragged along into a credit bid over its objections is largely defined by the credit agreement and security documents that govern the relationship among the lenders in the lending group.

Each lender in a syndicated loan typically retains veto rights over amendments or waivers that affect the economics of such lender's loan. Matters such as the principal amount of the loan, the interest rate of the loan and the maturity of the loan cannot be modified as to any lender without such lender's consent. In contrast, the enforcement of remedies under a syndicated loan agreement is usually characterized by collective action — or majority rule — provisions. Remedies such as the acceleration of the maturity of debt and the foreclosure on collateral are usually governed by majority rule. Upon the occurrence and during the continuance of an event of default under a syndicated credit agreement, the agent is typically required to exercise remedies at the direction of the majority of principal amount of debt outstanding. Thus, lenders who do not wish to have their debt accelerated or exercise remedies in respect of their debt are nonetheless required to acquiesce in acceleration and foreclosure because they have previously agreed to majority rule on such matters when entering into the syndicated loan facility.

Syndicated loan agreements and the related security documents typically are silent on credit bidding in chapter 11. Bankruptcy courts that have addressed whether dissenting lenders should be required to participate in a credit bid authorized by the requisite vote of a majority of the lenders, or in other words be "dragged along," have decided in favour of collective action and overruled objections asserted by the dissenting minority.

In *In re GWLS*, all but one lender consented to the purchase of substantially all of the assets of the debtor pursuant to a credit bid in a bankruptcy auction. [46] A dissenting lender argued that the agent did not have the authority to bid the entire amount of the first lien debt without unanimous consent of all of the first lien lenders. To support its position, the agent argued that upon an event of default, the agent, on behalf of the lenders, had the right to exercise all rights and remedies of a secured party under New York law *or any other applicable* law. [47] The minority lender in turn argued that the credit bid was really an amendment or waiver of the credit agreement that released all of the collateral, which required unanimous lender consent. [48] The Bankruptcy Court held that the provision in the security agreement that granted the agent all rights and remedies of a secured party under any applicable law included the right to credit bid because section 363(k) of the *Bankruptcy Code* constitutes "applicable law." [49]

A similar result was obtained in *In re Foamex International* [50] where the minority lenders holding 35% of the debt under the credit facility withheld their consent to the agent's credit bid for substantially all of the assets of the debtor. At the auction, the agent credit bid $155 million along with an option for holders to receive a pro rata share of $146.5 million in cash instead of equity in the reorganized debtor. The minority lenders challenged the credit bid and cash-out option based on the sharing of payments clause contained in the credit facility. [51] The bankruptcy court held that the loan provisions were analogous to those in *Re GWLS* and that it is a natural consequence of the authority granted to an agent that it be able to credit bid, and to come to any other conclusion would lead to chaos in section 363 sales. [52]

In *In re Metaldyne Corp.* [53] , the Bankruptcy Court held that the provision in the loan documents that permitted the agent to exercise all rights and remedies of a secured party under the *Uniform Commercial Code* or any other applicable law included

the right to credit bid under section 363(k) of the *Bankruptcy Code*. Furthermore, the Bankruptcy Court held that a sale through a credit bid under section 363(k) of the *Bankruptcy Code* does not require an amendment, waiver or modification of any loan document and therefore does not require the consent of all the lenders pursuant to the amendment provision of the credit agreement.

The weight of the case law to date supports the drag-along of dissenting minority lenders under a syndicated loan agreement where a credit bid is properly authorized under the governing documents. The bankruptcy courts have not addressed issues relating to post-acquisition governance of the acquired assets or business. Arguably, once the sale has been consummated, the bankruptcy court no longer has jurisdiction to consider disputes among the former lenders who are now owners. [54] Accordingly, disputes regarding governance of the acquired assets or business would be channelled into applicable non-bankruptcy courts for resolution.

**D. — Credit Bidding and the Secured Creditor's 1111(b) Election**

In general, a secured claim is bifurcated pursuant to section 506(a)(1) of the *Bankruptcy Code* into secured and unsecured portions by reducing the secured claim to the amount equal to the value of the collateral and leaving the remaining difference between the value of the allowed claim and value of the collateral as an unsecured deficiency claim against the debtor's estate. An under-secured creditor has the right, pursuant to section 1111(b)(2) of the *Bankruptcy Code*, to waive its deficiency claim against the debtor and have its entire allowed claim treated as a secured claim.

By making an 1111(b) election, the under-secured creditor elects to become fully secured in the collateral for the full amount of its claim. To the extent the debtor retains the secured creditor's collateral pursuant to its plan of reorganization, the secured creditor would be entitled to receive deferred cash payments totalling the allowed claim, while retaining its lien on the collateral, pursuant to the cramdown provisions of the *Bankruptcy Code*. [55] Therefore, making the 1111(b) election allows an under-secured creditor to avoid the risk of receiving a lower value placed on the collateral and ultimately protects itself from being cashed out by the debtor at that lower valuation upon confirmation of the plan and being left with an unsecured deficiency claim, which may receive little or no recovery. A secured creditor who believes the value of the collateral will increase post-confirmation, and whose recovery on its deficiency claim does not compensate it for value that would otherwise be lost if the 1111(b)(2) election were not made, would likely make the election to protect its interest in the future value of the collateral.

Section 1111(b) restricts a secured creditor's ability to make this election if the collateral is sold under a chapter 11 plan or pursuant to section 363 of the *Bankruptcy Code*. Presumably, the ability to make this election is no longer required in the context of a sale of the collateral as the secured creditor will have the opportunity to credit bid the full value of its allowed claim pursuant to section 363(k) of the *Bankruptcy Code*. In this scenario, the ability to credit bid provides the necessary protection to the secured creditor from having its collateral sold at a price below its claim.

**E. — Credit Bidding as Part of the Loan-To-Own Strategy**

The typical loan-to-own transaction involves an investor purchasing, at a discount, outstanding debt of the distressed target which the investor most likely believed to be the fulcrum security. In the loan-to-own context, the "fulcrum security" is generally described as the security that will receive equity in the reorganized company after confirmation of a chapter 11 plan. [56]

The bankruptcy of Lehman Brothers and the sub-prime mortgage crisis and ensuing sharp global economic downturn resulted in deep asset devaluations. As a result, the secured debt of distressed companies has frequently become the fulcrum security. Accordingly, loan-to-own investors have had an opportunity to purchase secured debt at a discount, with the right to credit bid the full amount of the debt when the debtor's assets are subsequently sold pursuant to section 363(k) of the *Bankruptcy Code* or through a plan of reorganization. The investor's ability to credit bid the full amount of the secured debt provides significant leverage with respect to the sale of assets and the ultimate formulation of the debtor's Chapter 11 plan. In this context, the bidding floor for the debtor's assets will be based on the total amount of the secured debt purchased by the investors rather than the discounted value paid by the investor. Thus, the loan-to-own investor has, in essence, purchased $1 of currency for use in an acquisition of assets for less than $1. The creation of the bidding floor at a value higher than the implied value of the equity,

and the non-cash currency possessed by the loan-to-own investor, very likely reduces the likelihood of competing bids at an auction for the debtor's assets or competing plans of reorganization.

**F. — Credit Bidding in the Context of a Cramdown Plan**

Two recent decisions — from the Court of Appeals for the Fifth Circuit and the Court of Appeals for the Third Circuit — have held that a secured creditor may not have a right to credit bid in the context of a plan of reorganization that involves the sale of such secured creditor's collateral. At the centre of both decisions is section 1129(b)(2)(A) of the *Bankruptcy Code*, which contains the test for determining whether a plan of reorganization can be crammed down on a class of secured creditors that rejected the plan.

In order to be confirmed by the Bankruptcy Court, a plan of reorganization must satisfy the provisions of section 1129 of the *Bankruptcy Code*.[57] Among other provisions, the plan must have been accepted by each class of claims by a vote of the holders of claims in the class.[58] Section 1129(b) of the *Bankruptcy Code* — the cramdown section — permits the confirmation of a plan notwithstanding the failure of a class to have voted in favour of the plan's confirmation.[59]

In order for a cramdown plan to be confirmed under section 1129(b), the proponent of the plan must demonstrate to the Bankruptcy Court that the plan is "fair and equitable" with respect to each class that rejected the plan. Section 1129(b)(2)(A) provides that a plan would be "fair and equitable" to a secured creditor if it provided for: (i) the secured creditor to retain its lien and receive cash payments equal to the allowed amount of the claim; (ii) the sale, subject to section 363(k), of the collateral, with the liens of the secured creditor attaching to the proceeds (the "Sale Prong") or (iii) the secured creditor to receive the "indubitable equivalent" of its claim (the "Indubitable Equivalent Prong").

***i. — In the Matter of Pacific Lumber Co.***

Pacific Lumber Co. and five of its affiliates filed separate chapter 11 bankruptcy petitions in the Southern District of Texas. Within a year of the bankruptcy filing, a plan of reorganization was proposed jointly by a creditor, Marathon Structured Finance, and a competitor, Mendocino Redwood Company. The plan provided for Marathon and Mendocino to convert debt into equity and inject cash to fund payments under the plan, including a cash payment of approximately $513.5 million to certain secured noteholders. After an extensive valuation hearing, the Bankruptcy Court found that, based upon the value of the noteholders' collateral, a cash payment of $513.6 million was the "indubitable equivalent" of the noteholders' secured claim, and as a result, the plan complied with the Indubitable Equivalent Prong in section 1129(b)(2)(A)(iii) of the *Bankruptcy Code*.[60]

In reaching its decision, the Bankruptcy Court overruled the noteholder's objection that in the context of a sale, confirmation of a plan would not be fair and equitable unless it complied with the Sale Prong and afforded the secured creditor the right to credit bid its debt. On appeal, the Fifth Circuit affirmed the Bankruptcy Court's decision.

In addressing this issue, the Fifth Circuit held that the subsections of section 1129 are disjunctive and should be treated as alternatives, based upon the separation of the subsections with the word "or", and the fact that the lead in to the section provides that it "includes" the Sale Prong and the Indubitable Equivalent Prong.[61] Accordingly, the Fifth Circuit determined that even in the context of a sale of assets under a plan, the Indubitable Equivalent Prong can afford a distinct basis for confirming a plan so long as the plan in fact offers the realization of the indubitable equivalent of such claims.

Although the term "indubitable equivalent" is not defined in the *Bankruptcy Code*, the Fifth Circuit reasoned that for purposes of satisfying the Indubitable Equivalent Prong, "paying off secured creditors in cash can hardly be improper if the plan accurately reflected the value of the Noteholders' collateral."[62] The Fifth Circuit made clear that, based on the procedural history of the case, the noteholders had no basis to object to the Bankruptcy Court's determination that the $513.6 million being paid under the plan was the market value of the collateral.[63]

***ii. — In re Philadelphia Newspapers, LLC***

Philadelphia Newspapers, LLC and certain of its affiliates owned and operated several print newspapers that were acquired in July 2000 for $515 million as part of an acquisition by a group of investors. Funding for the acquisition came in part from a $295 million loan from a group of lenders that was secured by a first priority lien in substantially all of the debtors' real and personal property. At the time of the bankruptcy filing, the present value of the loan was approximately $318 million. On 20 August 2009, the debtors filed a joint plan of reorganization that provided for substantially all of the debtors' assets to be sold at a public auction, free and clear of all liens pursuant to sections 1123(a) and (b) of the *Bankruptcy Code*. Under the terms of the plan, the lenders would be limited to the proceeds from the auction — for which the bid by a stalking horse (majority owned by an existing equity holder) had been accepted that would result in $37 million in cash proceeds — plus a distribution of real property valued at approximately $29.5 million (for a total projected recovery of $56.5 million). The plan also provided that, as a result of the sale of the lenders' collateral, the lenders would not be allowed to elect, under section 1111(b) of the *Bankruptcy Code*, to have their full claim treated as a secured claim. [64]

In conjunction with the filing of the plan of reorganization, the debtors filed a motion for approval of protections for the stalking horse bidder and bid procedures that required all bidders to fund the purchase with cash. The requirement of cash bids only would result in the secured creditors having no ability to credit bid their $318 million in debt, despite the prospects that they would receive cash and property valued at only a $56.5 million (assuming no overbid at the auction).

On 8 October 2009, the bankruptcy court rejected the proposed bid procedures and issued an order permitting the lenders to credit bid. The bankruptcy court held that although the plan proceeded under the Indubitable Equivalent Prong of section 1129(b)(2)(A), the sale was really structured under the Sale Prong, and in light of other provisions of the *Bankruptcy Code*, the lenders must be permitted to credit bid their debt at the sale of the collateral. The debtors appealed the bankruptcy court's decision to the District Court for the Eastern District of Pennsylvania.

On appeal, the District Court, relying upon *In re Pacific Lumber*, found that the bankruptcy court incorrectly determined the language of section 1129(b)(2)(A) to be ambiguous, and instead found the language to be clear in providing three distinct alternative arrangements for plan confirmation and that a debtor is free to select any of the three to proceed to confirmation. [65] The District Court held that this clear contrasting language proved that Congress intended three separate paths to confirmation and the bankruptcy court erred in its conclusion that the lenders had a statutory right to credit bid under the Indubitable Equivalent Prong. [66] In reaching its decision, the District Court observed that the very "vagueness of the term 'indubitable equivalent' is an invitation to craft an appropriate treatment of a secured creditor's claim, separate and apart from subsection (ii)." [67] Relying on *Pacific Lumber*, the District Court found that a plan sale is potentially another means to satisfy the indubitable equivalent standard and that it is entirely plausible that Congress envisioned a situation where a debtor could assure a secured creditor the benefit of its bargain in an asset sale even without permitting a credit bid.

On 22 March 2010, the Third Circuit issued a decision affirming the District Court's decision. [68] The Third Circuit concluded that the plain and unambiguous language of section 1129(b)(2)(A) permits a debtor to conduct an asset sale under the Indubitable Equivalent Prong without permitting secured lenders the right to credit bid. The Third Circuit disagreed with the lenders' reliance on the canon of statutory interpretation that the specific term (the Sale Prong) prevails over the general term (the Indubitable Equivalent Prong) because that canon only applies when the general provision undermines a limitation created by the specific provision. [69]

In reaching its decision, the Third Circuit held that the Indubitable Equivalent Prong does not operate as a limitation because the disjunctive nature of section 1129 clearly shows that a plan can be confirmed so long as it meets any one of the three subsections of section 1129 and that the process chosen by the plan proponent does not dictate which requirements must be met for confirmation. [70] Although the Third Circuit observed that the term "indubitable equivalent" is broad, it concluded that the term was not unclear or ambiguous in this context as it reflected an intent that the "unquestionable value of a lender's secured interest [is] in the collateral." [71]

The Third Circuit also rejected the lenders' argument that a secured lender must either be permitted to treat its entire claim as a secured claim under section 1111(b) of the *Bankruptcy Code*, or have the right to bid its claim in the context of a sale. [72] The Third Circuit observed that there is no such linkage between the right to credit bid and the 1111(b) election under a plain reading of the *Bankruptcy Code*, because circumstances exist where a secured creditor has neither the right to make an 1111(b) election nor to credit bid under 363(k) of the *Bankruptcy Code*. [73]

In a lengthy dissent, Circuit Judge Ambro, a former practicing bankruptcy attorney, argued that Congress intended for the Sale Prong to be the exclusive method through which a debtor can cram down a plan when selling collateral free of liens. [74] In his dissent, Judge Ambro made clear that few courts in the last 30 years of *Bankruptcy Code* jurisprudence have interpreted section 1129(b)(2)(A) of the *Bankruptcy Code* the way the majority has in its decision. [75] Furthermore, Judge Ambro highlighted the practical problems associated with the majority's decision in that secured creditors rely on their ability to credit bid and such a decision may ultimately increase the cost of credit. [76] In arguing that there are other plausible interpretations of section 1129(b)(2)(A), Judge Ambro stated that Congress did not intend for the three alternatives of section 1129 to be applied universally to any plan. Rather, each alternative is a distinct route with specific requirements that must be applied depending on how the plan proposes to treat the claims of secured creditors. [77] Although the term "indubitable equivalent" is broad, as pointed out by the majority, it was not designed to supplant the Sale Prong.

Lastly, the dissent argued that when read together, sections 1129(b)(2)(A), 363(k), 1111(b) and 1123(a)(5)(D) [78] "are part of a comprehensive arrangement enacted by Congress to avoid the pitfalls of undervaluation, regardless of the mechanism chosen, and thereby ensures that the rights of secured creditors are protected while maximizing the value of the collateral to the estate and minimizing deficiency claims. ..." [79] Providing secured creditors the right to credit bid in the context of a plan that contemplates the sale of collateral free and clear of all liens furthers this comprehensive arrangement.

While the Court denied the lenders the right to credit bid their debt at the auction, a subset of the lenders participated in the all-cash auction. On 28 April 2010, a group led by investment firms Angelo, Gordon & Co., Alden Global Capital, and CIT Group Inc., all of whom had been secured lenders to the debtor, won the auction to purchase the debtor's assets for approximately $135 million. Since the lenders were owed roughly $318 million, it is likely that upon the effective date of the plan, the cash paid at the auction would be recycled to the secured creditors. It is not clear, however, what type of arrangement the lending consortium entered into with respect to the distribution of the auction proceeds seeing that the entire lending consortium did not participate in the auction. After winning the auction, the lenders failed to close the transaction after failing to reach agreement with certain labour unions. As a result, the debtor scheduled another auction on 23 September 2010 and a smaller subset of lenders lead by Angelo Gordon & Co. returned with another winning bid of $105 million.

Following *Philadelphia Newspapers*, a bankruptcy court in the Northern District of Illinois was recently presented with bidding procedures that sought to prevent the secured lenders from credit bidding in the context of a sale pursuant to a plan of reorganization. [80] The Bankruptcy Court, relying on Judge Ambro's dissent in *Philadelphia Newspapers*, held that the debtors could not sell their assets free and clear of liens under the Indubitable Equivalent Prong. [81] The Bankruptcy Court agreed with the secured lenders' argument that the Sale Prong is the exclusive means to sell a debtor's assets free and clear of liens under section 1129(b)(2)(A) of the *Bankruptcy Code* and therefore, the debtors' sale process must comply with the specific requirements of this section of the *Bankruptcy Code*. [82]

**IV. — Cross-Border Credit Bids**

The U.S. and Canadian insolvency regimes are more similar, in effect, than they are dissimilar. Some of the important distinctions in approach, terminology and process in the context of credit bidding have been outlined above; however, the underlying shared philosophy that insolvency legislation should provide a mechanism to rehabilitate distressed companies and salvage value for all stakeholders, allows courts in both jurisdictions to work cooperatively to facilitate viable solutions. Moreover, the similar economic and legal infrastructure in the two countries allows debtors to implement a common solution in an efficient and

effective manner. That co-operation is now institutionalized by chapter 15 of the *Bankruptcy Code* and the new Part IV of the *CCAA*, both of which provide for the recognition of foreign proceedings.

There have been many examples of the sales of assets in cross-border insolvencies with both Canadian and U.S. bankruptcy filings. There have been fewer examples of cross-border cases where the secured lender has put forward a credit bid which has to be considered by both courts. As in any sales process, both courts have to be vigilant as to the fairness of the process, particularly where a senior lender credit bid may raise concerns as to whether the process is generating the highest value for other stakeholders.

There have been two recent examples of credit bidding in a cross-border case. In *Re Foamex*, noted above, the bulk of the business was in the United States and accordingly, the debtor companies filed for bankruptcy protection under chapter 11 of the *Bankruptcy Code*. One of the debtor companies filed recognition proceedings in the Quebec Superior Court to address a small part of the business located in Quebec. [83] The issues with respect to the credit bid were first addressed by the U.S. Court and once approved, the Quebec Court simply recognized the U.S. orders under then s.18(6) of the *CCAA*.

In the recent cross-border sale of the assets of the White Birch Group (defined below), a credit bid was advanced in full plenary proceedings in both Canada and the U.S. Both Courts were required to consider the fairness of a sales process where the credit bid emerged following an initial cash offer by a group of secured creditors. [84]

On 24 February 2010, White Birch Paper Holding Company (”White Birch”) and various Canadian subsidiaries and affiliates filed for protection under the *CCAA* (collectively, “WB Canada”) before the Quebec Superior Court in Montreal. White Birch’s U.S. subsidiary Bear Island Paper Company, LLC (”Bear Island”, and together with WB Canada collectively, the “White Birch Group”) commenced a case under chapter 11, before the U.S. Bankruptcy Court for the Eastern District of Virginia. Several members of WB Canada also obtained relief under chapter 15 of the *Bankruptcy Code*.

At the time of filing, it was generally understood that the total value of the White Birch Group’s assets was less than the aggregate secured debt owed to lenders under a First Lien Term Credit Agreement (collectively, the “First Lien Lenders”) and lenders under a Second Lien Term Credit Agreement (the “Second Lien Lenders”). The security granted to the First and Second Lien Lenders, however, was restricted to fixed assets of the White Birch Group. The White Birch Group’s DIP lending facility, advanced by a subset of the First Lien Lenders, refinanced the existing revolving facility and was secured against working capital assets (i.e. inventory and receivables).

A stalking horse agreement was entered into with BD White Birch Investments LLC (”BD Investments”) in July 2010. BD Investments was a special purpose acquisition vehicle owned by a subset of First Lien Lenders that held approximately 65% of the indebtedness under the First Lien Term Credit Agreement. The stalking horse agreement provided a cash purchase price of $90 million, with no allocation of purchase price among the assets or between WB Canada and Bear Island.

On 28 April 2010, the stalking horse agreement was approved by the Quebec and U.S. Courts, together with bidding procedures that permitted both the agent under the DIP Agreement and the First Lien Term Credit Agreement to credit bid pursuant to section 363(k) of the *Bankruptcy Code*. Although the stalking horse agreement was an all cash offer, BD Investments eventually supplemented its cash offer with a credit bid while participating in an auction for the assets.

On 17 September 2010, the White Birch Group received a qualifying offer in accordance with the bidding procedures from a different group of First Lien Lenders that were not otherwise participating in the bid submitted by BD Investments (”Sixth Avenue”). Similar to BD Investments’ bid, Sixth Avenue made an all cash offer for the White Birch Group. With two qualifying cash bids, both submitted in accordance with the bidding procedures, the White Birch Group held an auction in New York on 22 September 2010

BD Investments’ winning offer consisted of US$78 million in a credit bid allocated to fixed assets in Canada plus US$94.5 million in cash towards current assets, together with assumed liabilities and payment of cure costs in connection with assigned contracts. The total aggregate value of the offer was approximately US $236.1 million. The final Sixth Avenue bid was a cash

bid of US$175 million with $136 million allocated to current assets and US$35.3 million allocated to fixed assets. Sixth Avenue also assumed liabilities and paid cure costs as well as the breakup fee and expense reimbursement for total consideration of US $235.6 million, $500,000 less than BD Investments' competing bid.

The approval hearing was held before the Quebec Court on 24 September 2010 and after a full day of contested proceedings, the Quebec Court eventually accepted the monitor's recommendation and approved the sale to BD Investments. [85] The approval hearing before the U.S. Court was heard a few days later on 30 September 2010. The U.S. Bankruptcy Court ultimately approved the sale after concluding that BD Investments' bid was the highest and best and that the majority lenders did have authority to bind the syndicate and advance the BD Investments' credit bid.

The White Birch case demonstrates an interesting complexity that can arise in a credit bid, whether the case is domestic or cross-border. The issue for the courts in either jurisdiction is to ensure the fairness of the process so that a credit bid enhances not chills value realized on the sale. The process in White Birch provided greater recovery to the secured creditors as they received greater value through the equity of the company.

**V. — Conclusion**

Debtor companies, creditors, monitors, purchasers and the courts on both sides of the border that supervise insolvency proceedings must be alive to the criticisms and concerns around credit bidding. However, it is evident that a fair, transparent and reasonable process can effectively address those criticisms and alleviate those concerns.

Even though it is common for a DIP lender or senior secured creditor to have a defining influence on the structure of a sales process involving collateral subject to its security, that influence is not determinative. The sales process as supervised by the court must be fair. Transparency is paramount to ensuring this outcome. In Canada, the monitor has a key watchdog role in that regard.

Courts must be alive to the complexities of the modern lending environment, which is often characterized by multiple participants with differing priority claims against different pools of assets. Allocation and valuation issues may be complex, but this same analysis would have to be undertaken prior to the distribution of proceeds resulting from an all cash bid. The question the court must ask itself is: if the secured creditor paid cash for any particular asset, would the cash be recycled to the secured creditor? If the answer is yes, then an acquisition of the assets through credit bidding should be permitted. If another party would be entitled to a distribution of some or all of the cash paid in respect of an asset, then the credit bidder should have to include a cash component or some other form of consideration in the amount that would leak out to another creditor.

A credit bidder that does not simply seek to acquire the assets subject to its security but wishes to encourage a competitive environment for the distressed assets and potentially increase its recovery, should carefully reflect on its opening bid. Opening the bidding at the right number and communicating the right message to the marketplace is critical to a successful credit bidding strategy. There will always be some element of risk in this calculation and an overly aggressive opening posture may very well chill the market. A weak opening bid may demonstrate belief that the business has a low enterprise value. However, the Canwest Publishing Group case, where the senior lenders bid their entire debt at the outset which led to a superior cash bid that paid them out in full, is a clear example that the strategic use of credit bidding can be a highly effective one, for the benefit of multiple stakeholders.

Footnotes

* Pamela Huff and Linc Rogers are partners in the Restructuring and Insolvency Group at the Toronto office of Blake, Cassels & Graydon LLP. Douglas Bartner is a partner and Craig Culbert is an associate at the New York office of Shearman Sterling LLP.

2 U.S.C. tit. 11 §101 *et seq.* (2010).

3 A creditor acquisition could also be accomplished through a debt for equity conversion implemented through a reorganization plan.

4 Jamie Mason, "Cheap trick" *The Deal Magazine* (18 September 2010), online: <http://www.thedeal.com/newsweekly/features/hard-times-1/cheap-trick.php>.

5 Claire Baldwin and David Bailey, "GM files for IPO and plans dual listing" *Reuters* (18 August 2010), online: Reuters <http://www.reuters.com/article/idUSTRE67B4JW20100818>.

6 *CCAA*, R.S.C. 1985, c. C-36.

7 The initial order granting *CCAA* protection to the Canwest Publishing Group and other court documents may be found at the website of the court-appointed monitor: <http://cfcanada.fticonsulting.com/clp/>.

8 Note that the stalking horse offer did not contemplate subsequent higher offers by the senior lenders in an auction. The stalking horse offer was understood to be the senior lender final offer.

9 A similar result can be achieved through a plan of arrangement that converts the debt held by creditors to new equity of the debtor held by the acquisition vehicle.

10 Don Durfee, "Meet Your New Bankers", *CFO Magazine* (1 February 2006), online: <http://www.cfo.com/printable/article.cfm/5435444>.

11 If the agent cannot make a credit bid or otherwise requires lender guidance to advance a credit bid, steering committees or ad hoc committees are formed to provide that guidance, subject to the voting rights of the creditors under the applicable credit agreement or trust indenture, or voting rights in a plan of arrangement proposed under chapter 11 or the *CCAA*.

12 A receiver, appointed over the assets of the debtor, can also be granted authority to sell the assets of a distressed business with court approval. See s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 [*BIA*] and various provincial statutes regarding appointment of receivers, e.g., *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 101.

13 In *Re Philip Services Corp.* (1999), 13 C.B.R. (4th) 159 (Ont. S.C.J. [Commercial List]), the Canadian court was presented with valuation evidence that clearly demonstrated that the enterprise value of the business was significantly less that the amounts owed to senior lenders. The court approved a plan to secured creditors only and the vesting of the assets of the Canadian business in the acquisition vehicle of the secured lenders, concurrently with the implementation of a debt for equity swap under a chapter 11 plan for the U.S. businesses. A receiver was appointed to effect the transfer of assets and address post closing matters; In the *CCAA* proceedings of Canwest Publishing Group, described in detail below, a plan to secured creditors only was approved after a robust sales process demonstrated the fairness of the plan. The court granted an order that would have vested the assets in the senior lender acquisition vehicle free and clear of all unsecured claims, had the plan been implemented. As described below, a superior cash offer was put forward by a group of the unsecured noteholders.

14 *In re Philadelphia Newspapers, LLC*, 418 B.R. 548 (E.D. Pa. 2009).

15 "If somebody is coming to the table with $300 million in funny money, they have an enormous advantage ... A fair and open auction should treat all bidders the same." Larry McMichael of Dilworth Paxson LLP as quoted in "Philly Creditors Seek Control of Company" *New York Times* (2 October 2009) Deal Book, online: New York Times <http://dealbook.blogs.nytimes.com/2009/10/02/philly-newspaper-creditors-seek-control-of-company/>.

16 *Re Canadian Red Cross Society / Société Canadienne de la Croix-Rouge*, 5 C.B.R. (4th) 299, 1998 CarswellOnt 3346 (Ont. Gen. Div. [Commercial List]); additional reasons at 1998 CarswellOnt 3347 (Ont. Gen. Div. [Commercial List]); additional reasons at 1998 CarswellOnt 3345 (Ont. Gen. Div. [Commercial List]); leave to appeal refused 1998 CarswellOnt 5967 (Ont. C.A.) [*Canadian Red Cross*]; see also *Re Consumers Packaging Inc.* (2001), 27 C.B.R. (4th) 197, 150 O.A.C. 384 (Ont. C.A.) and more recently *Re Nortel Networks Corporation* (2009), 55 C.B.R. (5th) 229, 2009 CarswellOnt 4467 (S.C.J.).

17 See *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327, 296 D.L.R. (4th) 577, [2008] 10 W.W.R. 575 (B.C. C.A.) [*Cliffs over Maple Bay*].

18 Subsection 36(1) prohibits sales of assets unless authorized by the Court. If so authorized, subsection 36(6) authorizes sales free and clear of any security, charge or other restriction.

19 See James Farley, "Musings (a.k.a. Ravings) About the Present Culture of Restructurings" (2010) 22 *Comm. Insol. R.* 57 at p. 59-60.

20 Jay Swartz and James Bunting, "A Question Relating to Credit Bidding in an Auction" (2010) 22 *National Insolvency Review* 25 at 27.

21 *Ibid.*

22 *Ibid.*

23 In the 2010 restructuring of Signature Aluminum Canada Inc. ("Signature"), a party related to the equity holder submitted a credit bid, which was approved as a stalking horse offer at the initial application. The monitor was granted extensive consent and approval rights in the bid solicitation process in order to give the Court further confidence in the integrity of the process. Signature ultimately elected to proceed by way of plan of arrangement, rather than consummate the sale of assets. All court documents in the Signature *CCAA* proceedings may be found at the website of the monitor: <http://cfcanada.fticonsulting.com/signature/>.

24 See M. Wasserman and B. Putnam "Guaranteeing a Going Concern Outcome: The *CCAA* Proceeding of the Canwest Publishing Entities", Vol. 22, No. 6, p. 60 (August 2010). 22 *Comm. Insol. R.* (August 2010) at 60.

25 *Re Canwest Publishing Inc./Publications Canwest Inc.*, 2010 ONSC 2870, 2010 CarswellOnt 3509 (Ont. S.C.J. [Commercial List]) at paras. 12-13 (citations omitted).

26 *Ibid.* at para. 18.

27 11 U.S.C. §363(b). Section 363(b) states, in relevant part, "The Trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate ..." For the purposes of this section, the *Bankruptcy Code* provides that a reference to "trustee" can be read as the debtor-in-possession.

28 *Ibid.*

29 11 U.S.C. §362(a)(3). The "automatic stay" contained in section 362 of the *Bankruptcy Code* prohibits, among other actions, "any act to obtain possession of property of the estate or property from the estate or to exercise control over property of the estate."

30 11 U.S.C. §363(e). Section 363(e) states "Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, by the trustee, the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest." Adequate protection is not defined in the *Bankruptcy Code*. However, courts have generally defined adequate protection as "protection for the [secured] creditor to assure its collateral is not depreciating or diminishing in value." *In re Gunnison Center Apartments, LP*, 320 B.R. 391 at 396 (Bkrtcy. D.Colo. 2005) (citing *In re O'Connor*, 808 F.2d 1393 at 1397 (10th Cir. 1987); see also *In re Gallegos Research Group, Corp.*, 193 B.R. 577 (Bkrtcy. D.Colo. 1995) at 584 (stating that "adequate protection means that the value of the debtor's collateral must be protected from diminution while the property is being used or retained in the bankruptcy case.") (citing *United Sav. Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365 (U.S. Tex. 1988)).

31 As discussed in more detail below, section 1129(b)(2)(A)(ii) of the *Bankruptcy Code* allows the proponent of a plan of reorganization to "cram down" a plan notwithstanding the rejection of such plan by a class of secured creditor, even where the plan contemplates the sale of the secured creditors' collateral.

32 11. U.S.C. §363(k). Section 363(k) states "At a sale under subsection (b) of this section of property that is subject to a lien that secures an allowed claim, unless the court for cause orders otherwise the holder of such claim may bid at such sale, and, if the holder of such claim purchases such property, such holder may offset such claim against the purchase price of such property."

33 See *In re SubMicron Systems Corp.*, 432 F.3d 448 (3d Cir. 2006) at 459-60 (noting that "It is well settled among district and bankruptcy courts that creditors can bid the full face value of their secured claim under §363(k). In fact, logic demands that §363(k) be interpreted in this way; interpreting it to cap credit bids at the economic value of the underlying collateral is theoretically nonsensical.") (citations

omitted); *In re Dollar Associates*, 172 B.R. 945 (Bkrtcy. N.D.Cal. 1994) at 952 ("Whether Debtor's plan should be confirmed is also not affected by the fact that [secured creditor] purchased the Note at a substantial discount. The purchaser of a claim is entitled to enforce all rights under the claim, irrespective of the price paid for the claim.").

34 *Hoehn v. McIntosh*, 110 F.2d 199 (6th Cir. 1940) (burden to show that sale of property will result in proceeds in excess of the total encumbrances is on the trustee); *R.F.C. v. Cohen*, 179 F.2d 773 (10th Cir. 1950).

35 11 U.S.C. §363(b)(1).

36 See Fed. R. Bankr. P. 2002. Rule 2002(a)(2) requires that "the clerk or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees at least 21 days' notice by mail of ... a proposed use, sale, or lease of property of the estate other than in the ordinary course of business."

37 See 11 U.S.C. §363(k). Section 363(k) provides a secured creditor the right to credit bid "unless the court for cause orders otherwise."

38 See *In re Akard St. Fuels, L.P.*, No. CIV.A.3:01-CV-1927-D, 2001 WL 1568332 (N.D. Tex. Dec. 4. 2001); see also *In re McMullan*, 196 B.R. 818 (Bkrtcy. W.D.Ark. 1996) (holding that a creditor would not be entitled to credit bid any of its alleged liens or security interests because the validity of its liens and security interests was unresolved).

39 See *In re Allegheny Intern., Inc.*, 118 B.R. 282 (Bkrtcy. W.D.Pa. 1990) (designating the votes of a plan proponent as being made in "bad faith" where the plan proponent purchased a clear blocking position in debtor's secured bank debt in an attempt to derail confirmation of debtor's plan of reorganization).

40 *In re DBSD North America, Inc.*, 421 B.R. 133 (Bkrtcy. S.D.N.Y. 2009); affirmed 2010 WL 1223109 (S.D.N.Y. 2010); affirmed in part 2010 WL 4925878 (2d Cir. 2010).

41 DISH Network paid the first lien debtholders one hundred cents on the dollar to acquire the relevant debt.

42 *In re DBSD North America, Inc.*, 421 B.R. 133 at 139-40 (Bkrtcy. S.D.N.Y. 2009).

43 11 U.S.C. §1123(b)(4).

44 A court may consider more than one plan, but can confirm only one. See 11 U.S.C. §1129(c). A particularly spirited bidding war developed in the United States when Extended Stay Hotels filed for chapter 11 protection in June of 2009. As the recession continued to cut corporate travel and leisure throughout 2009, Extended Stay struggled to service its large debt load undertaken in connection with the 2007 leveraged buyout of the company. To date, this filing constitutes one of the largest commercial real-estate bankruptcies in the United States. At the outset of the bankruptcy case, the Extended Stay board initially backed a $450 million plan sponsor proposal from a group lead by the private equity group Centerbridge Partners LP. In March of 2010, the board was faced with a rival offer from Starwood Capital to sponsor a plan of reorganization and invest as much as $905 million. Centerbridge Partners won an auction held in May, 2010 with a $3.925 billion bid, which was confirmed by the bankruptcy court in July, 2010. The mortgage lender, with a secured claim of $4.1 billion, had the right to credit bid, but did not exercise its right.

45 11 U.S.C. §1129. Section 1129(a) of the *Bankruptcy Code* provides the requirements that must be satisfied in order for a court to approve a consensual plan of reorganization. In the "cramdown" context, where one or more classes of claims object to the plan of reorganization, a plan may meet the fair and equitable requirements of section 1129(b)(2)(A)(ii) if it provides "for the sale, subject to section 363(k) of this title, of any property that is subject to the liens securing such claims, free and clear of such liens, with such liens to attach to the proceeds of such sale."

46 *In re GWLS Holdings, Inc.*, 2009 WL 453110 (Bkrtcy.D.Del. 2009) [*Re GWLS*].

47 *Ibid.* at *3 (emphasis added).

48 *Ibid.* at *5.

49 *Ibid.*

50 *In re Foamex International*, No. 09-10560 (Bankr. D. Del. 2009) ("*Re Foamex*").

51 *Ibid.* A sharing of payments clause is designed to assure that no lender will receive a disproportionate payment *vis-à-vis* any other lender.

52 *Ibid.*

53 *In re Metaldyne Corp.*, 409 B.R. 671 (Bkrtcy. S.D.N.Y. 2009).

54 See *In re Skuna River Lumber, LLC*, 564 F.3d 353 at 355 (5th Cir. 2009) (stating that "when property is transferred out of a bankruptcy estate free and clear of all liens, the bankruptcy court ceases to have jurisdiction over that property."); *Matter of Edwards*, 962 F.2d 641 at 643 (7th Cir. 1992) (holding that "[s]ince the property was no longer part of the bankrupt estate and since a determination of rights to it would not affect any dispute by creditors over property that was part of the bankrupt estate, the bankruptcy court had no jurisdiction to determine rights to the property.").

55 11. U.S.C. §1129(b)(2)(A)(i).

56 Identifying the particular security that will be entitled to this treatment is determined by analyzing a debtor's post-reorganization enterprise value and its post-reorganization debt capacity. Prepetition debt that cannot be refinanced with exit financing or converted to debt through a plan of reorganization will necessarily be converted to equity in the reorganized debtor and will be the fulcrum security.

57 Sections 1129(a)(1)-(16) of the *Bankruptcy Code* provide the requirements that must be met in order for the court to confirm a consensual plan of reorganization. As discussed below, all of these requirements — aside from those expressed in section 1129(a)(8) — must also be satisfied by a nonconsensual plan.

58 11 U.S.C. §1129(a)(8). Section 1129(a)(8) requires the acceptance of the plan by each impaired class, and section 1126 states that claims that are left unimpaired by the plan are conclusively deemed to have accepted the plan.

59 In the case of a cramdown, a confirmable plan must satisfy all of the applicable requirements of sections 1129(a)(1)-(16) aside from section 1129(a)(8) — which requires the consent of each impaired class — *and* must also satisfy the "fair and equitable" requirements of section 1129(b).

60 *In re Pacific Lumber Co.*, 584 F.3d 229 at 238 (5th Cir. 2009).

61 *Ibid.* at 246.

62 *Ibid.* at 247.

63 *Ibid.*

64 As discussed above, under section 1111(b) of the *Bankruptcy Code*, a creditor has the right to elect to have the full value of its claim treated as secured regardless of the value of the collateral. Such an election, however, cannot be made if "the holder of a claim ... has recourse against the debtor on account of such claim and such property is sold under section 363 of this title or is to be sold under the plan." 11 U.S.C. §1111(b)(1)(B).

65 *Philadelphia Newspapers* (E.D. Pa. 2009), *supra*, note 13.

66 *Ibid.* at 567.

67 *Ibid.* at 568.

68 *In re Philadelphia Newspapers, LLC*, 599 F.3d 298 (3d Cir. 2010) at 303 [*Philadelphia Newspapers* (3d Cir. 2010)].

69 *Ibid.* at 306.

70 *Ibid.* at 309-10.

71 *Ibid.*

72 *Ibid.* at 315.

73 In effect, the court rejected the notion that the right to either credit bid or make an 1111(b) election was designed to preserve the same rights as exist under non-bankruptcy law. *Ibid.* at 316, n.15. As described below, this was a major area of disagreement as expressed in the dissent.

74 *Ibid.* at 318-19.

75 *Ibid.*

76 *Ibid.* at 338.

77 *Ibid.* at 325.

78 Section 1123(a)(5)(D) of the *Bankruptcy Code* provides the statutory basis for a sale of collateral under a plan of reorganization.

79 *Philadelphia Newspapers* (3d Cir. 2010), *supra* note 67.

80 As discussed above, section 1123(b)(4) of the *Bankruptcy Code* allows a plan of reorganization to "provide for the sale of all or substantially all of the property of the estate."

81 *In re River Road Hotel Partners, LLC, et. al.*, No. 09-462, slip op. at 3 (Bankr. N.D. Ill. 5 Oct. 2010), appeal docketed, No. 10-8044 (7th Cir. Dec. 2, 2010).

82 *Ibid.*

83 *Re Foamex* (March 3, 2009), Montreal 500-11-035694-096 (Q.S.C.).

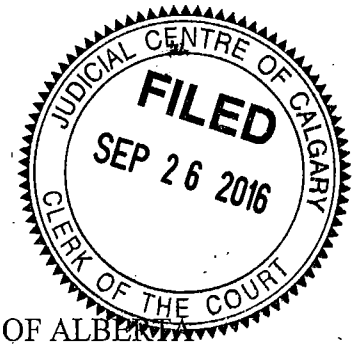
84 A copy of all court documents in connection with the White Birch Group's *CCAA* proceedings can be found at the monitor's website: <http://documentcentre.eycan.com/Pages/Main.aspx?SID?28>.

85 *Re White Birch Paper Holding Co.*, 2010 CarswellQue 10954 (Que. S.C.); leave to appeal refused 2010 QCCA 1950 (Que. C.A.).

**End of Document**

# TAB 2

Clerk's stamp:




| | |
|---|---|
| COURT FILE NUMBER: | 1601-12571 |
| COURT | COURT OF QUEEN'S BENCH OF ALBERTA |
| JUDICIAL CENTRE | CALGARY |

I hereby certify this to be a true copy of the original Order
Dated this 26 day of Sept, 2016
for Clerk of the Court

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, RSC 1985, c C-36, as amended

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD, LTS RESOURCES PARTNERSHIP, 1863360 ALBERTA LTD AND BAKKEN RESOURCES PARTNERSHIP

| | |
|---|---|
| APPLICANTS: | LIGHTSTREAM RESOURCES LTD, 1863359 ALBERTA LTD AND 1863360 ALBERTA LTD |
| PARTIES IN INTEREST: | LTS RESOURCES PARTNERSHIP AND BAKKEN RESOURCES PARTNERSHIP |
| DOCUMENT: | **CCAA INITIAL ORDER** |

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

**BLAKE, CASSELS & GRAYDON LLP**
Barristers and Solicitors
3500 Bankers Hall East
855 – 2nd Street SW
Solicitor: Kelly Bourassa / Milly Chow
Telephone: 403-260-9697 / 416-863-2594
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File Number: 89691/8

| | |
|---|---|
| **DATE ON WHICH ORDER WAS PRONOUNCED:** | September 26, 2016 |
| **NAME OF JUDGE WHO MADE THIS ORDER:** | Honourable Mr. Justice A.D. Macleod |
| **LOCATION OF HEARING:** | Calgary Courts Centre |

**UPON** the application of Lightstream Resources Ltd. ("**LTS**"), 1863359 Alberta Ltd. and 1863360 Alberta Ltd. (collectively with LTS, the "**Applicants**"); **AND UPON** having read the Originating Application, the Affidavit of Peter D. Scott, sworn September 21, 2016, filed (the "**Scott Affidavit**"), the Supplemental Affidavit of Peter D. Scott, sworn September 23, 2016, filed and the Affidavits of Service of Serene Hawkins, sworn September 22, 2016, and September 26, 2016, each filed; **AND UPON** reading the consent of FTI Consulting Canada Inc. to act as monitor (the "**Monitor**"); **AND UPON** noting that the secured creditors who are likely to be affected by the charges created herein have been provided notice of this application; **AND UPON** hearing counsel for the Applicants, counsel for the agent (the "**Agent**") and certain other financial institutions, as lenders (together with the Agent, the "**First Lien Lenders**") under a third amended and restated credit agreement, as amended from time to time, dated as of May 29, 2015 (the "**Credit Agreement**"), counsel for an *ad hoc* committee of certain holders (the "***Ad Hoc* Committee**") of 9.875% second lien secured notes due June 15, 2019 pursuant to a note indenture dated July 2, 2015, counsel for certain holders (the "**Unsecured Noteholders**") of 8.625% senior unsecured notes due February 1, 2020 pursuant to a note indenture dated January 30, 2012, and counsel for other interested parties; **IT IS HEREBY ORDERED AND DECLARED THAT**:

**SERVICE**

1. The time for service of the notice of application for this order is hereby abridged and deemed good and sufficient and this application is properly returnable today.

**APPLICATION**

2. The Applicants are companies to which the CCAA applies and, although not Applicants, LTS Resources Partnership and Bakken Resources Partnership (collectively, the "**CCAA Parties**") are necessary parties and shall receive the benefit of the relief granted in this Order.

**PLAN OF ARRANGEMENT**

3. The Applicants and the CCAA Parties shall have the authority to file and may, subject to further order of this Court, file with this Court a plan or plans of compromise or arrangement (hereinafter referred to as the "**Plan**").

4. The First Lien Lenders shall be treated as unaffected in any Plan filed by the Applicants and the CCAA Parties under the CCAA, or any proposal filed by the Applicants and the CCAA Parties under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**"), with respect to any obligations of the Applicants and the CCAA Parties under the Credit Agreement or the Loan Documents, including the Swap Documents (each as defined in the Credit Agreement). The Applicants and the CCAA Parties are hereby authorized and, to the extent within the control of the Applicants and the CCAA Parties, directed to fulfil their obligations under the Second Forbearance Agreement dated September 15, 2016, between the Applicants, the CCAA Parties, the Agent and the First Lien Lenders (the "**Forbearance Agreement**").

**POSSESSION OF PROPERTY AND OPERATIONS**

5. The Applicants and the CCAA Parties shall:

   (a) remain in possession and control of their current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "**Property**");

   (b) subject to further order of this Court, continue to carry on business in a manner consistent with the preservation of their business (the "**Business**") and Property;

   (c) be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, counsel and such other persons (collectively "**Assistants**") currently retained or employed by them, with liberty to retain such further Assistants as they deem reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order;

   (d) subject to the terms of the Forbearance Agreement, continue to have access to their cash accounts with The Toronto-Dominion Bank;

(e) be entitled to continue to utilize the corporate credit cards in place with HSBC Bank Canada (the "**Credit Cards**"). HSBC Bank Canada is hereby granted a charge (the "**Credit Card Charge**") on the Property to secure all obligations owed to it by the Applicants or the CCAA Parties relating to the Credit Cards, including without limitation principal interest and fees, to a maximum amount of $105,000. The Credit Card Charge shall have the priority set out in paragraphs 35 and 37 hereof;

(f) be entitled to continue to utilize the centralized Cash Management System currently in place as described at paragraph 39 of the Scott Affidavit, and that any present or future bank providing the Cash Management System shall not be under any obligation whatsoever to inquire into the propriety, validity or legality of any transfer, payment, collection or other action taken under the Cash Management System, or as to the use or application by the Applicant of funds transferred, paid, collected or otherwise dealt with in the Cash Management System, shall be entitled to provide the Cash Management System without any liability in respect thereof to any Person (as defined herein) other than the Applicants and the CCAA Parties; and

(g) be authorized to make inter-company transfers and advances to pay costs, expenses and amounts otherwise authorized in these proceedings.

6. To the extent permitted by law, the Applicants and the CCAA Parties shall be entitled but not required to pay the following expenses, incurred prior to or after this Order:

(a) all outstanding and future wages, salaries, employee and pension benefits, vacation pay and expenses payable on or after the date of this Order, in each case incurred in the ordinary course of business and consistent with existing compensation policies and arrangements; and

(b) the fees and disbursements of any Assistants retained or employed by the Applicants and the CCAA Parties in respect of these proceedings, at their standard rates and charges.

7. The engagement letter entered into between TD Securities Inc., ("**TD Securities**") and LTS dated May 26, 2016, the engagement letter entered into between Evercore Capital L.L.C.("**Evercore**") and LTS dated May 1, 2016, the engagement letter entered into between RBC Dominion Securities Inc. ("**RBC**") and LTS dated June 1, 2016, as amended on July 14, 2016, and the engagement letter entered into among BMO Nesbitt Burns Inc. ("**BMO**"), LTS, Goodmans LLP and the members of the *Ad Hoc* Committee and dated May 17, 2016 (the "**Financial Advisors' Engagement Letters**") attached as Exhibits "16", "17", "18" and "21" to the Scott Affidavit, are hereby approved and LTS is authorized and directed to continue the engagement of TD Securities, Evercore and RBC as Assistants thereunder and to comply with all of its obligations thereunder (TD Securities, Evercore, RBC and BMO in its capacity as financial advisor to the *Ad Hoc* Committee, are hereinafter collectively referred to as the "**Financial Advisors**"). The Financial Advisors are hereby granted a single charge in the maximum aggregate amount of $19,410,000 (collectively, the "**Financial Advisors' Charge**") on the Property to secure all obligations under the Financial Advisors' Engagement Letters. The Financial Advisors' Charge shall have the priority set out in paragraphs 35 and 37 hereof. The claims of the Financial Advisors under the Financial Advisors' Engagement Letters shall be treated as unaffected in any Plan filed by the Applicants and the CCAA Parties under the CCAA, or any proposal filed by the Applicants and the CCAA Parties under the BIA.

8. Except as otherwise provided to the contrary herein, the Applicants and the CCAA Parties shall be entitled but not required to pay all reasonable expenses incurred by the Applicants or the CCAA Parties in carrying on the Business in the ordinary course after this Order, and in carrying out the provisions of this Order, which expenses shall include, without limitation:

   (a) all expenses and capital expenditures reasonably necessary for the preservation of the Property or the Business including, without limitation, payments on account of insurance (including directors and officers insurance), maintenance and security services;

   (b) payment for goods or services actually supplied to the Applicants or the CCAA Parties following the date of this Order;

(c) payments in respect of the Credit Cards required by paragraph 5(e) hereof; and

(d) subject to the cash flow forecast attached as Exhibit "22" to the Scott Affidavit (the "**Cash Flow Forecast**"), payment of certain pre-filing amounts or honouring cheques issued prior to the date of filing that, in consultation with the Monitor, are necessary to facilitate the Applicants' and the CCAA Parties' ongoing operations.

9. The Applicants and the CCAA Parties shall remit, in accordance with legal requirements, or pay:

(a) any statutory deemed trust amounts in favour of the Crown in Right of Canada or of any Province thereof or any other taxation authority which are required to be deducted from employees' wages, including, without limitation, amounts in respect of:

(i) employment insurance,

(ii) Canada Pension Plan, and

(iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

(b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicants or the CCAA Parties in connection with the sale of goods and services by the Applicants or the CCAA Parties, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and

(c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and which are attributable to or in respect of the carrying on of the Business by the Applicants and the CCAA Parties.

10. Until a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicants and the CCAA Parties may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicants or the CCAA Parties from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

11. Except as specifically permitted in this Order, the Applicants and the CCAA Parties are hereby directed, until further order of this Court:

    (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicants or the CCAA Parties to any of their creditors as of the date of this Order other than interest payments under the Credit Agreement and other Loan Documents (as defined in the Credit Agreement);

    (b) to grant no security interests, trusts, liens, charges or encumbrances upon or in respect of any of their Property; and

    (c) not to grant credit or incur liabilities except in the ordinary course of the Business.

**RESTRUCTURING**

12. The Applicants and the CCAA Parties shall, subject to such requirements as are imposed by the CCAA and the terms and conditions of the Amended and Restated Support Agreement entered into among the Applicants, the CCAA Parties and the members of the Ad Hoc Committee (the "**Support Agreement**"), have the right to:

    (a) permanently or temporarily cease, downsize or shut down any of their business or operations and to dispose of redundant or non-material assets not exceeding $3,000,000 in any one transaction or $12,500,000 in the aggregate, with proceeds paid to the Agent in permanent reduction of any obligations under the Credit Agreement and the Loan Documents (as defined in the Credit Agreement), provided that any sale that is either (i) in excess of the above thresholds, or (ii) in

favour of a person related to the Applicants and the CCAA Parties (within the meaning of section 36(5) of the CCAA), shall require authorization by this Court in accordance with section 36 of the CCAA;

(b) terminate the employment of such of their employees or temporarily lay off such of their employees as they deem appropriate on such terms as may be agreed upon between the Applicants or the CCAA Parties and such employee, or failing such agreement, to deal with the consequences thereof in the Plan; and

(c) pursue all avenues of refinancing of their Business or Property, in whole or part, subject to prior approval of this Court being obtained before any material refinancing,

all of the foregoing to permit the Applicants and the CCAA Parties to proceed with an orderly restructuring of the Business (the "**Restructuring**").

13. The Applicants and the CCAA Parties shall provide each of the relevant landlords with notice of the Applicants' or the CCAA Parties' intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal. If the landlord disputes the Applicants' or the CCAA Parties' entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Applicants or the CCAA Parties, as applicable, or by further order of this Court upon application by the Applicants and the CCAA Parties on at least two (2) days' notice to such landlord and any such secured creditors. If the Applicants or the CCAA Parties disclaim or resiliate the lease governing such leased premises in accordance with section 32 of the CCAA, they shall not be required to pay Rent under such lease pending resolution of any such dispute (other than Rent payable for the notice period provided for in section 32(5) of the CCAA, and the disclaimer or resiliation of the lease shall be without prejudice to the Applicants' or the CCAA Parties' claim to the fixtures in dispute.

14. If a notice of disclaimer or resiliation is delivered pursuant to section 32 of the CCAA, then:

(a) during the notice period prior to the effective time of the disclaimer or resiliation, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicants, the CCAA Parties and the Monitor 24 hours' prior written notice; and

(b) at the effective time of the disclaimer or resiliation, the relevant landlord shall be entitled to take possession of any such leased premises without waiver of or prejudice to any claims or rights such landlord may have against the Applicants or the CCAA Parties, as applicable, in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicants or the CCAA Parties, as applicable, of the basis on which it is taking possession and to gain possession of and re-lease such leased premises to any third party or parties on such terms as such landlord considers advisable, provided that nothing herein shall relieve such landlord of its obligation to mitigate any damages claimed in connection therewith.

**NO PROCEEDINGS AGAINST THE APPLICANTS, THE CCAA PARTIES OR THE PROPERTY**

15. Until and including October 26, 2016, or such later date as this Court may order (the "**Stay Period**"), no proceeding or enforcement process in any court (each, a "**Proceeding**") shall be commenced or continued against or in respect of the Applicants, the CCAA Parties or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicants or the CCAA Parties or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

**NO EXERCISE OF RIGHTS OR REMEDIES**

16. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "**Persons**" and each being a "**Person**"), whether judicial or extra-judicial, statutory

or non-statutory against or in respect of the Applicants, the CCAA Parties or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court, provided that nothing in this Order shall:

(a) empower the Applicants and the CCAA Parties to carry on any business which the Applicants and the CCAA Parties are not lawfully entitled to carry on;

(b) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by section 11.1 of the CCAA;

(c) prevent the filing of any registration to preserve or perfect a security interest; or

(d) prevent the registration of a claim for lien.

17. Nothing in this Order shall prevent any party from taking an action against the Applicants or the CCAA Parties where such an action must be taken in order to comply with statutory time limitations in order to preserve its rights at law, provided that no further steps shall be taken by such party except in accordance with the other provisions of this Order, and notice in writing of such action be given to the Monitor at the first available opportunity.

**NO INTERFERENCE WITH RIGHTS**

18. During the Stay Period, no person (other than the First Lien Lenders, in respect of any rights of termination under the Forbearance Agreement, and the *Ad Hoc* Committee, in respect of any rights of termination under the Support Agreement) shall accelerate, suspend, discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Applicants or the CCAA Parties, including, without limitation, any rights or remedies or provision that purports to effect or cause a cessation of operatorship, in any agreement, construction, ownership and operating agreement, joint venture agreement or any such similar agreements to which any of the Applicants or CCAA Parties is a party as a result of the occurrence of any default or non-performance by or the insolvency of any of the Applicants or the CCAA Parties, the making or filing of these proceedings or any

allegation, admission or evidence in these proceedings and under no circumstances shall any of the Applicants or the CCAA Parties be replaced as operator pursuant to any such agreements, except with the written consent of the Applicants or the CCAA Parties, as applicable, and the Monitor, or leave of this Court.

**CONTINUATION OF SERVICES**

19. During the Stay Period, all persons having:

(a) statutory or regulatory mandates for the supply of goods and/or services; or

(b) oral or written agreements or arrangements with the Applicants or the CCAA Parties, including without limitation all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation, services, utility or other services to the Business, the Applicants or the CCAA Parties,

are hereby restrained until further Order of this Court from discontinuing, altering, interfering with, suspending or terminating the supply of such goods or services as may be required by the Applicants or the CCAA Parties or exercising any other remedy provided under such agreements or arrangements. The Applicants and the CCAA Parties shall be entitled to the continued use of their current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the usual prices or charges for all such goods or services received after the date of this Order are paid by the Applicants and the CCAA Parties in accordance with the payment practices of the Applicants and the CCAA Parties, or such other practices as may be agreed upon by the supplier or service provider and each of the Applicants, the CCAA Parties, and the Monitor, or as may be ordered by this Court. Nothing in this Order has the effect of prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order.

**NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT**

20. Notwithstanding anything else contained in this Order, no creditor of the Applicants or the CCAA Parties shall be under any obligation on or after the date of this Order to advance or re-advance any monies or otherwise extend any credit to the Applicants or the CCAA Parties.

**PROCEEDINGS AGAINST DIRECTORS AND OFFICERS**

21. During the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA and paragraph 17 of this Order, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicants with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants or the CCAA Parties whereby the directors or officers are alleged under any law to be liable in their capacity as directors or officers for the payment or performance of such obligations, until a compromise or arrangement in respect of the Applicants and the CCAA Parties, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicants and the CCAA Parties or this Court.

**DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE**

22. The Applicants shall indemnify their directors and officers against obligations and liabilities that they may incur as directors and or officers of the Applicants after the commencement of the within proceedings except to the extent that, with respect to any officer or director, the obligation was incurred as a result of the director's or officer's gross negligence or wilful misconduct.

23. The directors and officers of the Applicants shall be entitled to the benefit of and are hereby granted a charge (the "**Directors' Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,500,000, as security for the indemnity provided in paragraph 22 of this Order. The Directors' Charge shall have the priority set out in paragraphs 35 and 37 herein.

24. Notwithstanding any language in any applicable insurance policy to the contrary:

(a) no insurer shall be entitled to be subrogated to or claim the benefit of the Directors' Charge; and

(b) the Applicants' directors and officers shall only be entitled to the benefit of the Directors' Charge to the extent that they do not have coverage under any directors' and officers' insurance policy, or to the extent that such coverage is insufficient to pay amounts indemnified in accordance with paragraph 22 of this Order.

**APPOINTMENT OF MONITOR**

25. FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the Property, Business and financial affairs of the Applicants and the CCAA Parties with the powers and obligations set out in the CCAA or set forth herein and that the Applicants, the CCAA Parties and their shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicants or the CCAA Parties pursuant to this Order, and shall co-operate fully with the Monitor in the exercise of its powers and discharge of its obligations and provide the Monitor with the assistance that is necessary to enable the Monitor to adequately carry out the Monitor's functions.

26. The Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

(a) monitor the Applicants' and the CCAA Parties' receipts and disbursements, Business and dealings with the Property;

(b) report to this Court at such times and intervals as the Monitor may deem appropriate with respect to matters relating to the Property, the Business, and such other matters as may be relevant to the proceedings herein and immediately report to the Court if in the opinion of the Monitor there is a material adverse change in the financial circumstances of the Applicants and the CCAA Parties;

(c) advise the Applicants and the CCAA Parties in their development of the Plan and any amendments to the Plan;

(d) advise the Applicants and the CCAA Parties, to the extent required by them, with the holding and administering of creditors' or shareholders' meetings for voting on the Plan;

(e) have full and complete access to the Property, including the premises, books, records, data, including data in electronic form and other financial documents of the Applicants and the CCAA Parties to the extent that is necessary to adequately assess the Applicants' and the CCAA Parties' Property, Business and financial affairs or to perform its duties arising under this Order;

(f) be at liberty to engage independent legal counsel or such other persons as the Monitor deems necessary or advisable respecting the exercise of its powers and performance of its obligations under this Order;

(g) hold funds in trust or in escrow, to the extent required, to facilitate settlements between the Applicants or the CCAA Parties and any other Person; and

(h) perform such other duties as are required by this Order or by this Court from time to time.

27. The Monitor shall not take possession of the Property and shall take no part whatsoever in the management or supervision of the management of the Business and shall not, by fulfilling its obligations hereunder, or by inadvertence in relation to the due exercise of powers or performance of duties under this Order, be deemed to have taken or maintain possession or control of the Business or Property, or any part thereof. Nothing in this Order shall require the Monitor to occupy or to take control, care, charge, possession or management of any of the Property that might be environmentally contaminated, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal or waste or other contamination, provided however that this Order does not exempt the Monitor from any duty to report or make disclosure imposed by applicable environmental legislation.

28. The Monitor shall provide any creditor of the Applicants or the CCAA Parties with information provided by the Applicants or the CCAA Parties in response to reasonable requests for information made in writing by such creditor addressed to the Monitor. The Monitor shall not have any responsibility or liability with respect to the information disseminated by it pursuant to this paragraph. In the case of information that the Monitor has been advised by the Applicants or the CCAA Parties is confidential, the Monitor shall not provide such information to creditors unless otherwise directed by this Court or on such terms as the Monitor and the Applicants or the CCAA Parties, as applicable, may agree.

29. The Monitor shall incur no liability or obligation as a result of its appointment or the carrying out of the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part. Nothing in this Order shall derogate from the protections afforded the Monitor by the CCAA or any applicable legislation.

30. The Monitor, counsel to the Monitor, counsel to the Applicants and the CCAA Parties, independent counsel to the Applicants' directors and officers, counsel to the First Lien Lenders, PricewaterhouseCoopers Inc. ("**PwC**"), in its capacity as financial advisor to the First Lien Lenders, counsel to the *Ad Hoc* Committee and BMO (on account of BMO's monthly work fee) shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements) in each case at their standard rates and charges, by the Applicants and the CCAA Parties as part of the costs of these proceedings. The Applicants and the CCAA Parties are hereby authorized and directed to pay the accounts of the Monitor, counsel for the Monitor, counsel for the Applicants and the CCAA Parties, counsel for the First Lien Lenders, PwC and counsel for the *Ad Hoc* Committee on a bi-weekly basis and the accounts of BMO on a monthly basis, in addition, the Applicants and the CCAA Parties are hereby authorized to pay to the Monitor, counsel to the Monitor, and counsel to the Applicants and the CCAA Parties, retainers in the respective amounts of $100,000, $100,000 and $250,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.

31. The Monitor and its legal counsel shall pass their accounts from time to time.

32. The Monitor, counsel to the Monitor, counsel to the Applicants and the CCAA Parties, independent counsel to the Applicants' directors and officers, counsel to the First Lien Lenders, PwC, counsel to the *Ad Hoc* Committee and BMO (on account of BMO's monthly work fee), as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the "**Administration Charge**") on the Property, which charge shall not exceed an aggregate amount of $2,000,000, as security for their professional fees and disbursements incurred at the normal rates and charges of the Monitor, PwC, and such counsel, both before and after the making of this order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 35 and 37 hereof.

**KEY EMPLOYEE RETENTION AND INCENTIVE PLANS**

33. The Key Employee Retention Plan and the Key Employee Incentive Plan described in the Scott Affidavit (the "**KERP**" and "**KEIP**", respectively), are hereby authorized and approved and the Applicants and the CCAA Parties are authorized and directed to make the payments contemplated in the KERP and the KEIP. The directors and officers of the Applicants shall have no liability for the payments contemplated in the KERP or the KEIP (and for certainty, any and all claims under the KERP or the KEIP shall be secured solely by the KERP Charge or the KEIP Charge (each as defined below), as applicable, and shall not be secured, directly or indirectly, by the Directors' Charge).

34. The beneficiaries of the KERP are hereby granted a charge (the "**KERP Charge**") on the Property to secure all obligations under the KERP, up to the maximum amount of $4,115,250.The beneficiaries of the KEIP are hereby granted a charge (the "**KEIP Charge**") on the Property to secure all obligations under the KEIP, up to the amount of $5,007,417. The KERP Charge and the KEIP Charge shall have the priority set out in paragraphs 35 and 37 hereof.

**VALIDITY AND PRIORITY OF CHARGES**

35. The priorities of the Administration Charge, the Credit Card Charge, the Directors' Charge, the KERP Charge, the KEIP Charge and the Financial Advisors' Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of $2,000,000);

Second – Credit Card Charge (to the maximum amount of $105,000);

Third – Directors' Charge (to the maximum amount of $2,500,000);

Fourth – (and subordinate to the indebtedness to the First Lien Lenders under the Credit Agreement) KERP Charge (to the maximum amount of $4,115,250);

Fifth – (and subordinate to the indebtedness to the First Lien Lenders under the Credit Agreement) KEIP Charge (to the maximum amount of $5,007,417); and

Sixth – (and subordinate to the indebtedness to the First Lien Lenders under the Credit Agreement) Financial Advisors' Charge (to the maximum amount of $19,410,000),

(all of which are, collectively, the "**Charges**").

36. The filing, registration or perfection of the Charges shall not be required, and the Charges shall be valid and enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.

37. The Charges (all as constituted and defined herein) shall constitute a charge on the Property and, subject always to section 34(11) of the CCAA, such Charges shall rank in priority to all other security interests, trusts, liens, charges and encumbrances, claims of secured creditors, statutory or otherwise (collectively, "**Encumbrances**") in favour of any Person, except as otherwise set out herein.

38. Except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicants and the CCAA Parties shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Charges, unless the

Applicants and the CCAA Parties also obtain the prior written consent of the Monitor, and the other beneficiaries of the Charges, or further order of this Court.

39. The Charges, shall not be rendered invalid or unenforceable and the rights and remedies of the chargees entitled to the benefit of the Charges (collectively, the "**Chargees**") and/or the thereunder shall not otherwise be limited or impaired in any way by:

(a) the pendency of these proceedings and the declarations of insolvency made in this Order;

(b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications;

(c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;

(d) the provisions of any federal or provincial statutes; or

(e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of Encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an "**Agreement**") which binds the Applicants or the CCAA Parties, and notwithstanding any provision to the contrary in any Agreement:

(i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof shall create or be deemed to constitute a new breach by the Applicants or the CCAA Parties of any Agreement to which it is a party;

(ii) none of the Chargees shall have any liability to any Person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges; and

(iii) the payments made by the Applicants and the CCAA Parties pursuant to this order, and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive

conduct or other challengeable or voidable transactions under any applicable law.

**ALLOCATION**

40. Any interested Person may apply to this Court on notice to any other party likely to be affected, for an order to allocate the Charges, amongst the various assets comprising the Property.

**SALE PROCEDURES**

41. The sale procedures (the "**Sale Procedures**") attached as Appendix "A" to this Order be and are hereby approved, and TD Securities, the Monitor, the Applicants and the CCAA Parties are authorized and directed to perform each of their obligations thereunder and to do all things reasonably necessary to perform their obligations thereunder.

42. Each of the Monitor and TD Securities, and their respective affiliates, partners, directors, employees, agents and controlling persons shall have no liability with respect to any and all losses, claims, damages or liabilities, of any nature or kind, to any person in connection with or as a result of the Sale Procedures, except to the extent such losses, claims, damages or liabilities result from the gross negligence or willful misconduct of the Monitor or TD Securities, as applicable, in performing its obligations under the Sale Procedures (as determined by this Court).

43. In connection with the Sale Procedures and pursuant to clause 7(3)(c) of the *Personal Information Protection and Electronic Documents Act (Canada)*, the Applicants, the CCAA Parties, TD Securities and the Monitor are authorized and permitted to disclose personal information of identifiable individuals to prospective purchasers or offerors and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sale transactions (each, a "**Transaction**"). Each prospective purchaser or offeror to whom such information is disclosed shall maintain and protect the privacy of such information and shall limit the use of such information to its evaluation of the Transaction, and if it does not complete a Transaction, shall: (i) return all such information to the Applicants, the CCAA Parties, TD Securities or the Monitor, as

applicable; (ii) destroy all such information; or (iii) in the case of such information that is electronically stored, destroy all such information to the extent it is reasonably practical to do so. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Applicants and the CCAA Parties, and shall return all other personal information to the Applicants, the CCAA Parties, TD Securities or the Monitor, as applicable, or ensure that all other personal information is destroyed.

**SEALING**

44. The Confidential KERP/KEIP Summary marked as Exhibit "20" of the Scott Affidavit shall be sealed on the Court file, notwithstanding Division 4 of Part 6 of the *Alberta Rules of Court*. The Confidential KERP/KEIP Summary shall be kept confidential and shall not form part of the public record. The Confidential KERP/KEIP Summary shall be placed, separate and apart from all contents in the Court file, in a sealed envelope attached to a notice that sets out the title of these proceedings and a statement that the contents are subject to a sealing order.

**SERVICE AND NOTICE**

45. The Monitor shall (i) without delay, publish in the Calgary Herald, Daily Oil Bulletin, and Globe and Mail (National Edition) a notice containing the information prescribed under the CCAA; (ii) within five (5) days after the date of this Order (A) make this Order publicly available in the manner prescribed under the CCAA, (B) send, in the prescribed manner, a notice to every known creditor who has a claim against the Applicants or the CCAA Parties of more than $1,000, and (C) prepare a list showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner, all in accordance with section 23(1)(a) of the CCAA and the regulations made thereunder.

46. The Applicants, the CCAA Parties, and the Monitor shall be at liberty to serve this Order, any other materials and orders in these proceedings, any notices or other correspondence,

by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery, facsimile transmission or e-mail to the Applicants' and the CCAA Parties' creditors or other interested Persons at their respective addresses as last shown on the records of the Applicants and the CCAA Parties and that any such service or notice by courier, personal delivery, facsimile transmission or e-mail shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing. The Monitor shall establish and maintain a website in respect of these proceedings at cfcanada.fticonsulting.com/Lightstream and shall post there as soon as practicable:

(a) all materials prescribed by statue or regulation to be made publically available; and

(b) all applications, reports, affidavits, orders or other materials filed in these proceedings by or behalf of the Monitor, or served upon it, except such materials as are confidential and the subject of a sealing order or pending application for a sealing order.

**GENERAL**

47. The Applicants, the CCAA Parties or the Monitor may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

48. Notwithstanding Rule 6.11 of the *Alberta Rules of Court*, unless otherwise ordered by this Court, the Monitor will report to the Court from time to time, which reporting is not required to be in affidavit form and shall be considered by this Court as evidence.

49. Nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver, a receiver and manager, or a trustee in bankruptcy of the Applicants, the CCAA Parties, the Business or the Property.

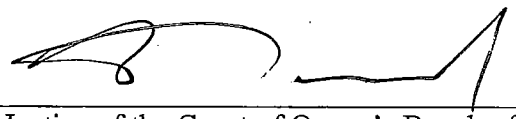
50. This Court hereby requests the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States, to give effect to this Order and to assist the Applicants, the CCAA Parties, the Monitor and their respective agents in carrying out the terms of this Order. All courts, tribunals, regulatory

and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Applicants, the CCAA Parties and to the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order, to grant representative status to the Monitor in any foreign proceeding, or to assist the Applicants, the CCAA Parties and the Monitor and their respective agents in carrying out the terms of this Order.

51. Each of the Applicants, the CCAA Parties and the Monitor be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order and that the Monitor is authorized and empowered to act as a representative in respect of the within proceeding for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

52. Any interested party (including the Applicants, the CCAA Parties and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

53. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.



Justice of the Court of Queen's Bench of Alberta

**Appendix "A"**

**LIGHTSTREAM**

**Sale Procedures**

Pursuant to an initial order (as it may be amended, restated or supplemented from time to time, the "**Initial Order**") of the Court of Queen's Bench of Alberta (the "**Court**") dated September 26, 2016, Lightstream Resources Ltd. ("**LTS**") and its wholly owned direct and indirect subsidiaries, 1863359 Alberta Ltd. and 1863360 Alberta Ltd., LTS Resources Partnership and Bakken Resources Partnership (collectively, "**Lightstream**" or the "**Company**", and each individually, a "**Lightstream Entity**") obtained protection from their creditors pursuant to proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("**CCAA**") bearing Court File No. 1601-12571 (the "**CCAA Proceedings**").

Pursuant to the Initial Order, the Court approved sale procedures to be continued in respect of the Company to seek a Successful Bid, in accordance with the terms and conditions set forth herein (as such process may be amended, restated or supplemented pursuant to the terms herein, the "**Sale Procedures**").

**Defined Terms; Interpretation**

1. All capitalized terms used herein shall have the meanings given to them in **Appendix "A"** hereto.

**Sale Process**

2. These Sale Procedures describe, among other things (collectively, the "**Sale Process**"):

   (a) the manner and timelines in which any interested party (each, a "**Prospective Bidder**") may gain access to or continue to have access to due diligence materials concerning the Lightstream Property and the Lightstream Business;

   (b) the manner and timelines in which Prospective Bidders may submit an Indication of Interest for all or substantially all of the Lightstream Property or any of the Parcels, and the required content of any Indication of Interest;

   (c) the manner and timelines in which Qualified Phase I Bidders may submit a Qualified Indication of Interest and the required content of a Qualified Indication of Interest;

   (d) the manner and timelines in which Qualified Phase II Bidders may submit a Qualified Bid and the required content of a Qualified Bid;

   (e) the process and criteria for the ultimate selection of one or more Successful Bids; and

   (f) the process for obtaining approval of one or more Successful Bids by the Court.

## Conduct of the Sale Procedures

3. The Sale Process will be carried out by the Company in accordance with these Sale Procedures, with the assistance of, and in consultation with, the Sale Advisor and the Monitor. The Company, the Sale Advisor and the Monitor are fully and exclusively authorized, empowered and directed to take any and all actions and steps pursuant to these Sale Procedures. In the event that there is a disagreement as to the interpretation or application of these Sale Procedures, the Court will have the jurisdiction to hear and resolve such dispute.

4. In addition to the disclosure covenants in the Support Agreement with the *Ad Hoc* Committee of Second Lien Noteholders and the Second Forbearance Agreement with the First Lien Lenders, the Company shall provide the *Ad Hoc* Committee of Second Lien Noteholders, the First Lien Agent and their respective legal and financial advisors, on a confidential basis, with such additional information and disclosures regarding the Sale Process (Indications of Interest and Qualified Phase 1 Bidders, Qualified Bids and Qualified Phase II Bidders, Successful Bids and Successful Bidders) as they may request.

## Sale Opportunity

5. The Sale Advisor, in consultation with the Company, the Monitor and their respective advisors, shall prepare a list of persons who may constitute Prospective Bidders and shall distribute to each such person, (a) the Process Letter, (b) a teaser (the "**Teaser**") describing the opportunity to acquire the Lightstream Property or any of the Parcels, (c) a copy of the Initial Order (including the Sale Procedures), and (d) the form of required Confidentiality Agreement. Any offer for a Parcel will be considered in combination with other offers, if any, received for other Parcels.

## "As Is, Where Is"

6. Any Sale will be on an "as is, where is" and "without recourse" basis and without surviving representations, warranties, covenants or indemnities of any kind, nature, or description by the Company, Sale Advisor, Monitor or any of their Representatives, except to the extent set forth in a Definitive Agreement with a Successful Bidder.

## Free of Any and All Claims and Interests

7. Except to the extent otherwise set forth in the relevant definitive purchase and sale agreement (a "**Definitive Sale Agreement**") with a Successful Bidder, in the event of a Sale, all of the rights, title and interests of the Company in and to the Lightstream Property or any of the Parcels to be acquired pursuant to an approval and vesting Order of the Court will be sold free and clear of all pledges, liens, security interests, encumbrances, claims, charges, options and interests thereon.

## Participation Requirements

8. Unless otherwise provided for herein, ordered by the Court, or agreed by the Company, in order to participate in the Sale Procedures and be considered for qualification as a Qualified Phase I Bidder, a Prospective Bidder must deliver to the Company in the

manner and at the address specified in **Schedule "A"** hereto, and prior to the distribution of any confidential information by the Company to a Prospective Bidder:

(a) an executed Confidentiality Agreement, which shall enure to the benefit of any Successful Bidder of the Lightstream Property or any of the Parcels on the closing of the Successful Bid;

(b) a specific indication of the anticipated sources of capital for such Prospective Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit support or enhancement that will allow the Company and its Representatives, including the Sale Advisor, to make, in their reasonable business or professional judgment, a determination as to the Prospective Bidder's financial and other capabilities to consummate the proposed Sale.

(c) a letter setting forth the identity of the Prospective Bidder, the contact information for such Prospective Bidder, full disclosure of the direct and indirect owners of the Prospective Bidder and their principals; and

(d) a written acknowledgement of receipt of a copy of the Initial Order approving these Sale Procedures and agreeing to accept and be bound by the provisions contained therein.

9. A Prospective Bidder that has satisfied all of the requirements described in section 8 above and who the Company, in consultation with the Sale Advisor and the Monitor, determines has a reasonable prospect of completing a transaction contemplated herein, will be deemed a "**Qualified Phase I Bidder**" and will be promptly notified of such classification by the Company. Notwithstanding these requirements, the Company may, in consultation with the Sale Advisor and the Monitor, designate any Prospective Bidder as a Qualified Phase I Bidder in its sole discretion.

## Due Diligence

10. The Company or Sale Advisor shall provide any person deemed to be a Qualified Phase I Bidder with access to the Data Room and the Company shall provide to the Qualified Phase I Bidders further access to such due diligence materials and information relating to (i) the Lightstream Property available for Sale (including the Parcels); and (ii) the debt and equity interests of the Company as the Company deems appropriate, including, as appropriate, access to further information in the Data Room, and management presentations, where appropriate and only to the extent that such management presentations do not cause unreasonable disruption to the Company's management and/or the Lightstream Business operations.

11. The Company and its Representatives (including the Sale Advisor) and the Monitor do not make any representations or warranties whatsoever, and shall have no liability of any kind whatsoever, as to the information or the materials provided through the due diligence process or otherwise made available to any Prospective Bidder, Qualified Phase I Bidder, Qualified Phase II Bidder, Qualified Bidder, Qualified Parcel Bidder, or Successful Bidder, with respect to the Lightstream Property or any of the Parcels, Lightstream or the Lightstream Business, including any information contained in the

Process Letter, Teaser, or Data Room and provided or made in any management presentations.

12. The Company reserves the right to limit any Prospective Bidder's or Qualified Phase I Bidder's access to any confidential information (including any information in the Data Room), where, in the Company's discretion, such access could negatively impact the Sale Procedures, the ability to maintain the confidentiality of confidential information, or the value of the Lightstream Property. Requests for additional information are to be made to the Sale Advisor.

## Phase I

### *Seeking Indications of Interest from Qualified Phase I Bidders*

13. From the Filing Date until the Phase I Bid Deadline, the Company and the Sale Advisor will continue to identify and qualify Qualified Phase I Bidders, and will solicit non-binding indications of interest from Qualified Phase I Bidders to acquire all of the Lightstream Property or any of the Parcels (each an "**Indication of Interest**").

14. In order to continue to participate in these Sale Procedures, a Qualified Phase I Bidder must deliver an Indication of Interest to the Company in the manner and at the address specified in **Schedule "A"** hereto so as to be received not later than 5:00 p.m. (Mountain Time) on Friday, October 21, 2016 or such later date or time as the Company may determine appropriate in consultation with the First Lien Agent, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor, or as the Court may order (as it may be extended, as described in this section 14, the "**Phase I Bid Deadline**").

### *Indications of Interest by Qualified Phase I Bidders*

15. Subject to Section 16, unless otherwise ordered by the Court, an Indication of Interest will be considered a "**Qualified Indication of Interest**" only if:

    (a) it is submitted by a Qualified Phase I Bidder, received on or before the Phase I Bid Deadline;

    (b) contains an indication of whether the Qualified Phase I Bidder is making an offer to acquire all of the Lightstream Property or any of the Parcels (a "**Sale Proposal**"), which identifies:

        (i) the Lightstream Property or Parcels to be included in the Sale Proposal and a detailed listing of any of the assets to be excluded from the Sale Proposal;

        (ii) the proposed purchase price for such Sale Proposal, and an explanation of proposed adjustments, if any, to the final purchase price payable at closing;

        (iii) details as to the form of consideration for the Sale Proposal, including, if non-cash consideration is being offered, supporting rationale for the value being ascribed to such consideration;

(iv) a description of any liabilities to be assumed by the Qualified Phase I Bidder and the Qualified Phase I Bidder's estimated value of such assumed liabilities;

(v) a specific indication of sources of capital for the Qualified Phase I Bidder and preliminary evidence of the availability of such capital, or such other form of financial disclosure and credit-quality support or enhancement, including contact information for capital/financing sources, that will allow the Company to make a reasonable business judgement as to the Qualified Phase I Bidder's financial or other capabilities to consummate the contemplated transaction;

(vi) an acknowledgement that the contemplated Sale will be made on an "as is, where is" and "without recourse" basis;

(vii) a description of approvals (including approvals from the board of directors, management, or investment committee, as applicable) received to date authorizing submission of the Sale Proposal and any anticipated corporate, shareholder, internal or regulatory approvals required to close the transaction and the anticipated time frame and any anticipated impediments for obtaining such approvals;

(viii) specific statements concerning the treatment of employees and plans for the ongoing involvement and roles of the Company's employees;

(ix) a timeline to closing with critical milestones and a statement with respect to the Qualified Phase I Bidder's ability to consummate the contemplated transaction by the Outside Closing Date;

(x) a detailed description of any additional due diligence required or desired to be conducted prior to the Phase II Bid Deadline, if any, and an estimated timeline for the completion of such due diligence (including with respect to any specific technical diligence matters relating to petroleum and natural gas rights or wells owned by the Company or any environmental due diligence);

(xi) all material conditions to closing that the Qualified Phase I Bidder may wish to impose;

(xii) an indication as to whether the Qualified Phase I Bidder is intending to effect the Sale Proposal through a special purpose vehicle;

(xiii) any other terms and conditions which the Qualified Phase I Bidder believes are material to the transaction;

(xiv) contact information for any business, financial or legal advisors retained or to be retained in connection with the contemplated transaction; and

(xv) such other information reasonably requested by the Lightstream Group.

16. For greater certainty, the Company shall be entitled, either prior to or following the Phase I Bid Deadline, to seek to clarify the terms of an Indication of Interest or with respect to any of the other requirements of section 15 above, and the Company, in consultation with the Monitor, may accept a revised, clarified Indication of Interest, provided that the initial Indication of Interest was received prior to the Phase I Bid Deadline. The Company, in consultation with the Sale Advisor and the Monitor, may waive compliance with any one or more of the requirements specified in Sections 15, and deem any non-compliant Indication of Interest to be a Qualified Indication of Interest.

**Assessment of Qualified Indications of Interest**

17. Promptly following the Phase I Bid Deadline, the Company will, in consultation with the Sale Advisor and the Monitor, assess Qualified Indications of Interest received during Phase I, if any, and will determine whether there is a reasonable prospect of obtaining a Qualified Bid. For the purpose of such consultations and evaluations, the Company, the Sale Advisor and the Monitor may request clarification of the terms of any Qualified Indication of Interest.

18. In assessing a Qualified Indication of Interest, the Company, following consultation with the Monitor, will consider, among other things, the following:

    (a) whether the form and amount of consideration being offered will satisfy at closing the Qualified Consideration Requirement;

    (b) whether the cash consideration being offered, will be sufficient at closing to satisfy the Secured Debt Repayment Requirement;

    (c) the nature and amount of debt and other liabilities to be assumed by the Qualified Phase I Bidder;

    (d) the assets to be included in or excluded from the Sale Proposal and the transaction costs and risks associated with closing multiple transactions versus a single sale transaction for all, or substantially all, of the Lightstream Property;

    (e) the demonstrated financial capability of the Qualified Phase I Bidder to consummate the proposed transaction;

    (f) the transition services required from the Company post-closing and any related costs;

    (g) the proposed treatment of stakeholders, including the shareholders, First Lien Lenders, Second Lien Noteholders, Unsecured Noteholders, employees and other creditors;

    (h) the conditions to closing of the proposed transaction; and

    (i) other factors affecting the speed, certainty and value of the Sale Proposal (including any remaining due diligence, regulatory approvals and others conditions required to close on or before the Outside Closing Date and whether,

in the Company's reasonable business judgment, it is reasonably likely to close on or before the Outside Closing Date.

19. If the Company, in consultation with the Sale Advisor and the Monitor, determine that there are or will be no Qualified Indication of Interest that would be sufficient to satisfy the Qualified Consideration Requirement and the Secured Debt Repayment Requirement at closing, the Credit Bid shall be deemed to be the "**Successful Bid**" and the Credit Bid Party shall be the "**Successful Bidder**" and the Company may forthwith terminate these Sale Procedures and seek to implement the Credit Bid.

20. If the Company, in consultation with the Monitor, determines that (i) one or more Qualified Indications of Interest (other than the Credit Bid) were received that would be sufficient to satisfy the Qualified Consideration Requirement and the Secured Debt Repayment Requirement at closing, and (ii) proceeding with these Sale Procedures is in the best interests of the Company and its stakeholders, these Sale Procedures will continue and each Qualified Phase I Bidder who has submitted a Qualified Indication of Interest that is determined by the Company likely to be able to be consummated, shall be deemed to be, and notified by the Company that it is, a "**Qualified Phase II Bidder**".

## Phase II

***Seeking Qualified Bids by Qualified Phase II Bidders***

21. In order to continue to participate in these Sale Procedures, a Qualified Phase II Bidder must deliver a Qualified Bid to the Company and such bid must be received by the Company no later than 5:00 p.m. (Mountain Time) on Monday, November 21, 2016 or such later date or time as the Company may determine appropriate in consultation with the First Lien Lenders, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor (the "**Phase II Bid Deadline**").

***Qualified Bids***

22. A Sale Proposal submitted by a Qualified Phase II Bidder will be considered a "**Qualified Bid**" only if the Sale Proposal complies with all of the following:

    (a) it is received by no later than the Phase II Bid Deadline;

    (b) it includes a letter stating that the Sale Proposal is irrevocable until the earlier of (i) 11:59 p.m. on the Business Day following the closing of a transaction with a Successful Bidder in respect of the Lightstream Property or the same Parcel thereof, and (ii) thirty (30) Business Days following the Phase II Bid Deadline; provided, however, that if such Sale Proposal is selected as a Successful Bid, it shall remain irrevocable until 11:59 p.m. (Mountain Time) on the Business Day following the closing of the Successful Bid or Successful Bids, as the case may be;

    (c) it includes a duly authorized and executed Definitive Agreement based on the Form of Purchase Agreement and accompanied by a mark-up (in the form of a blackline) of the Form of Purchase Agreement showing proposed amendments and modifications made thereto, specifying the consideration, and such ancillary agreements as may be required by the Qualified Phase II Bidder with all exhibits

and schedules thereto (or term sheets that describe the material terms and provisions of such ancillary agreements) and the proposed Orders to approve such Sale by the Court;

(d) it does not include any request or entitlement to any break-fee, expense reimbursement or similar type of payment;

(e) it provides for consideration at closing sufficient to satisfy the Qualified Consideration Requirement;

(f) it provides for cash consideration at closing sufficient to satisfy the Secured Debt Repayment Requirement;

(g) it includes evidence sufficient to allow the Company, in consultation with the Monitor, to make a reasonable determination as to the bidder's (and its direct and indirect owners' and their principals') financial and other capabilities to consummate the transaction contemplated by the Sale Proposal, which evidence could include but is not limited to evidence of a firm, irrevocable commitment for all required funding and/or financing from a creditworthy bank or financial institution;

(h) it is not conditioned on (i) the outcome of unperformed due diligence by the Qualified Phase II Bidder and/or (ii) obtaining any financing capital and includes an acknowledgement and representation that the Qualified Phase II Bidder has had an opportunity to conduct any and all required due diligence prior to making its Sale Proposal;

(i) it fully discloses the identity of each entity that is bidding or otherwise that will be sponsoring or participating in the Sale Proposal, including the identification of the Qualified Phase II Bidder's direct and indirect owners and their principals, and the complete terms of any such participation;

(j) it includes an acknowledgement and representation that the Qualified Phase II Bidder: (i) has relied solely upon its own independent review, investigation and/or inspection of any documents and/or the assets to be acquired and liabilities to be assumed in making its Sale Proposal; (ii) did not rely upon any written or oral statements, representations, promises, warranties or guaranties whatsoever, whether express or implied (by operation of law or otherwise), regarding the assets to be acquired or liabilities to be assumed or the completeness of any information provided in connection therewith, including by the Company, Sale Advisor or Monitor or any of their Representatives, except as expressly stated in the Definitive Sale Agreement submitted by it; (iii) is a sophisticated party capable of making its own assessments in respect of making its Sale Proposal; and (iv) has had the benefit of independent legal advice in connection with its Sale Proposal;

(k) it includes evidence, in form and substance reasonably satisfactory to the Company, in consultation with the Monitor, of authorization and approval from the Qualified Phase II Bidder's board of directors (or comparable governing body) with respect to the submission, execution, delivery and closing of the transaction contemplated by the Sale Proposal;

(l) except in the case of a Credit Bid, it is accompanied by a refundable deposit (the "**Deposit**") in the form of a wire transfer delivered to the Monitor (to a trust account specified by the Monitor), or such other form acceptable to the Monitor, in trust, in an amount equal to two and a half percent (2.5%) of the proposed gross Purchase Price, to be held and dealt with in accordance with these Sale Procedures;

(m) it provides for closing of a Qualified Bid by no later than the Outside Closing Date;

(n) if the Qualified Phase II Bidder is an entity newly formed for the purpose of the transaction, the bid shall contain an equity or debt commitment letter from the parent entity or sponsor, which is satisfactory to the Company, that names the Company as a third party beneficiary of any such commitment letter with recourse against such parent entity or sponsor;

(o) it includes evidence, in form and substance reasonably satisfactory to the Company, in consultation with the Monitor, of compliance or anticipated compliance with any and all applicable Canadian and any foreign regulatory approvals (including, if applicable, anti-trust regulatory approval and any approvals with respect to the grant or transfer of any permits or licenses), the anticipated time frame for such compliance and any anticipated impediments for obtaining such approvals;

(p) it includes specific statements concerning the proposed treatment of employees and plans for the ongoing involvement and roles of the Company's employees;

(q) it identifies the particular contracts and leases the Qualified Phase II Bidder wishes to assume and reject, contains full details of the Qualified Phase II Bidder's proposal for the treatment of related cure costs (and provides adequate assurance of future performance thereunder) and it identifies any particular executory contract or unexpired lease the assumption and assignment of which is a condition to closing; and

(r) it contains other information reasonably requested by the Company, in consultation with the Sale Advisor and the Monitor.

## Qualified Bids

23. Each bidder who has submitted a Qualified Bid shall hereinafter be referred to as a "**Qualified Bidder**".

24. For greater certainty, a Sale Proposal may be in respect of only one or more Parcels and in such case, such Sale Proposal shall constitute a "**Qualified Parcel Bid**" if it satisfies the requirements in section 22 hereof, as applicable, and in such case, the bidder shall constitute a "**Qualified Parcel Bidder**". Each Qualified Parcel Bid shall be deemed to be a Qualified Bid, and each Qualified Parcel Bidder shall be deemed to be a Qualified Bidder for all purposes of the Sale Procedures.

25. The Credit Bid shall be deemed to be a Qualified Bid and the Credit Bid Party shall be deemed to be a Qualified Bidder for the purposes of these Sale Procedures.

26. For greater certainty, the Company shall be entitled, either prior to or following the Phase II Bid Deadline, to seek to clarify the terms of any Sale Proposal submitted by a Qualified Phase II Bidder, and the Company, in consultation with the Monitor, may accept a revised and/or clarified Sale Proposal, provided that the initial Sale Proposal by the Qualified Phase II Bidder was received prior to the Phase II Bid Deadline.

27. Notwithstanding section 22 hereof, the Company, in consultation with the Monitor, may waive compliance with any one or more of the Qualified Bid requirements specified herein, and deem such non-compliant bids to be Qualified Purchase Bids; provided, however, that the Company shall not be entitled to waive the Qualified Consideration Requirement and Secured Debt Repayment Requirement nor deem any Sale Proposal that fails to satisfy such requirements to be a Qualified Bid.

## Credit Bid

28. The Credit Bid Party will be submitting the Credit Bid, which Credit Bid when submitted shall, as set out above, be deemed to be a Qualified Indication of Interest and Qualified Bid for the purpose of these Sale Procedures and in the event that the Credit Bid is deemed to be the Successful Bid (as a result of no other Qualified Indications of Interest having been received that satisfies the Qualified Consideration Requirement and the Secured Debt Repayment Requirement or no Qualified Bid received (other than the Credit Bid)), the Company may forthwith terminate these Sale Procedures and proceed to seek implementation of the Credit Bid.

29. The Credit Bid Party shall not be entitled to increase the consideration of its Credit Bid. No members of the *Ad Hoc* Committee of Second Lien Noteholders or any of their Affiliates (other than the Credit Bid Party) shall be permitted to submit a Sale Proposal. For greater certainty, nothing in this Section 29 shall restrict the ability of the Credit Bid Party to, as agreed to by the Company, make amendments to the assets to be acquired and/or liabilities to be assumed pursuant to the Credit Bid.

30. If the Credit Bid is terminated at any time during the Sale Process, and there is no Sale Proposal received that satisfies the Qualified Consideration Requirement and the Secured Debt Repayment Requirement, the Company shall apply to the Court to seek advice and directions as to the continuation, modification or termination of the Sale Process.

## Assessment of Qualified Bids

31. The Company, in consultation with the Sale Advisor and the Monitor, will assess Qualified Bids received (other than the Credit Bid), if any, and will determine whether it is likely that the transactions contemplated by such Qualified Bids are likely to be able to be consummated and whether proceeding with these Sale Procedures is in the best interests of the Company and its stakeholders. Such assessments will be made as promptly as practicable after the Phase II Bid Deadline.

32. If the Company, in consultation with the Sale Advisor and the Monitor, in accordance with section 31 above, determines that (i) no Qualified Bid has been received (other than the Credit Bid); and (ii) there is no reasonable prospect of obtaining a Qualified Bid (other than the Credit Bid), the Credit Bid shall be deemed to be the "**Successful Bid**"

and the Credit Bid Party shall be the "**Successful Bidder**" and the Company may forthwith terminate these Sale Procedures and seek to implement the Credit Bid.

33. If the Company, in consultation with the Sale Advisor and the Monitor, in accordance with section 31 above, determines that only one Qualified Bid was received (other than the Credit Bid) (which could be a combination of non-overlapping Qualified Parcel Bids), such Qualified Bid shall be a "**Successful Bid**", and the Qualified Bidder(s) making the Successful Bid shall be a "**Successful Bidder**" or "**Successful Bidders**", as the case may be) and Company may take such steps as are necessary to finalize, complete and seek Court approval of the Successful Bid. For greater certainty, the Company may accept a combination of non-overlapping Qualified Parcel Bids which commit to provide consideration of no less than the Qualified Consideration at closing (collectively, an "**Aggregated Qualified Bid**") to create one "**Successful Bid**" and in such case, the applicable Qualified Parcel Bidders will become "**Successful Bidders**".

34. If the Company, in consultation with the Sale Advisor and the Monitor, in accordance with section 31 above, determines that more than one Qualified Bid (and/or more than one Aggregated Qualified Bid, in each case other than the Credit Bid) was received with respect to one or more Parcels by the Phase II Bid Deadline, then these Sale Procedures will not be terminated and the Company may, in consultation with the Monitor and the Sale Advisor, choose (i) in consultation with the Sale Advisor, to continue negotiations with a select number of Qualified Bidders, with a view to selecting one or more non-overlapping Qualified Bids (which could be new or amended Qualified Bids, including a combination of new or amended non-overlapping Qualified Parcel Bids) as the "**Successful Bid**" and the Qualified Bidder(s) making the Successful Bid shall be a "**Successful Bidder**" or "**Successful Bidders**", as the case may be, and (ii) to take such steps as are necessary to finalize, seek Court approval of the Successful Bid.

## Selection Criteria

35. In selecting the Successful Bid(s), the Company, in consultation with the Sale Advisor and the Monitor, will review each Qualified Bid.

36. Evaluation criteria with a Sale Proposal may include, but are not limited to items such as: (i) the proposed purchase price and new value (including assumed liabilities and other obligations to be performed by the bidder) and the form of such new value; (ii) the firm, irrevocable commitment for financing the proposed transaction; (iii) the claims likely to be created by such bid in relation to other bids; (iv) the counterparties to the proposed transaction; (v) the terms of proposed transaction documents; (vi) other factors affecting the speed, certainty and value of the proposed transaction (including regulatory approvals required to close the proposed transaction); (vii) proposed treatment of stakeholders; (viii) the assets proposed to be included and excluded from the bid; (ix) proposed treatment of employees; (x) any transition services required from Lightstream post-closing and related restructuring costs; and (xi) the likelihood and timing of consummating the proposed transaction.

## Definitive Agreements

37. The Company and/or any Lightstream Entity, as applicable, will finalize Definitive Agreements in respect of any Successful Bidder, conditional upon approval of the Court, by no later than 5:00 p.m. (Mountain Time) on Friday, December 2, 2016 or such later

date or time as the Company may determine appropriate in consultation with the First Lien Lenders, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor.

## Approval Hearing

38. As soon as reasonably possible after the execution of a Definitive Agreement by the Company and the Successful Bidder, the Company shall apply to the Court (the "**Approval Hearing**") for: (i) an Order approving each Successful Bid(s) and authorizing the Company and/or any Lightstream Entity, as applicable, to enter into any and all necessary agreements with respect to a Successful Bidder; and (ii) any Order that may be required vesting title to Lightstream Property or any of the Parcels in the name of any Successful Bidder(s).

39. The Approval Hearing will be held on a date to be scheduled by the Court upon application by the Company, and in any event, not later than Thursday , December 15, 2016 or such later date as the Company, in consultation with the First Lien Agent, the *Ad Hoc* Committee of Second Lien Noteholders, the Sale Advisor and the Monitor, and the Successful Bidder may agree.

40. All Qualified Bids (other than any Successful Bid(s)) shall be deemed rejected on and as of the date of closing of the Successful Bid or date upon which all Successful Bids have closed, as the case may be.

## Deposits

41. All Deposits shall be retained by the Monitor and deposited in a non-interest bearing trust account. If there is/are Successful Bid(s), the Deposit paid by a Successful Bidder whose bid is approved at the Approval Hearing shall be applied to the Purchase Price to be paid by that Successful Bidder upon closing of the approved transaction and will be non-refundable. The Deposits of Qualified Bidders not selected as a Successful Bidder shall be returned to such bidders within five (5) Business Days after the date on which their Qualified Bid is no longer irrevocable in accordance with section 22(b), as applicable. If there is no Successful Bid, all Deposits shall be returned to the bidders within five (5) Business Days of the date upon which these Sale Procedures are terminated.

42. If (i) a Successful Bidder breaches any of its obligations under any Definitive Agreements, or (ii) a Qualified Bidder breaches its obligations under the terms of the Sale Procedures or fails to complete the transaction contemplated by its Qualified Bid if required by any Lightstream Entity to complete such transaction, then, in each case, such Qualified Bidder's Deposit will be forfeited to the applicable Lightstream Entity as liquidated damages and not as a penalty. The Company shall apply and use their share of any forfeited Deposit in a manner agreed upon by the Company and the Monitor.

## Approvals

43. For greater certainty, the approvals required pursuant to the terms hereof are in addition to, and not in substitution for, any other approvals required by the applicable law in order to implement a Successful Bid.

## No Amendment

44. There will be no amendments to the Sale Procedures without the approval of the Court on notice to the Service List in the CCAA Proceedings, subject to such non-material amendments as may be agreed to by the Company and the Monitor.

## General

45. The Initial Order, the Sale Procedures, and any other Orders of the Court made in the CCAA Proceedings relating to the Sale Procedures shall exclusively govern the process for soliciting and selecting bids for the Sale of all of the Lightstream Property or any of the Parcels.

46. These Sale Procedures do not, and will not be interpreted to create any contractual or other legal relationship between any Lightstream Entity and any Qualified Bidder, other than as specifically set forth in any Definitive Agreements that may be signed with Lightstream or any Lightstream Entity.

47. Unless otherwise indicated herein, any event that occurs on a day that is not a Business Day shall be deemed to occur on the next Business Day.

48. All dollar amounts expressed herein, unless otherwise noted, are in Canadian currency.

49. Each Qualified Phase I Bidder, upon being declared as such under the Sale Procedures, shall be deemed to have irrevocably and unconditionally attorned and submitted to the jurisdiction of the Court in respect of any action, proceeding or dispute in relation to the conduct or any aspect of the Sale Procedures and the Sale Process.

50. At any time during these Sale Procedures, the Company, Sale Advisor or Monitor may apply to the Court for advice and directions with respect to their obligations and duties herein.

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## APPENDIX "A"

## Defined Terms

"***Ad Hoc* Committee of Second Lien Noteholders**" means an *ad hoc* committee of Second Lien Noteholders representing approximately 91.5 percent of the total outstanding principal amount of Second Lien Notes.

"**Aggregated Qualified Bid**" has the meaning set out in section 33.

"**Alberta/BC Lightstream Business Unit**" means the portion of the Lightstream Business related to British Columbia and Alberta (excluding the Cardium Lightstream Business Unit).

"**Approval Hearing**" has the meaning set out in section 38.

"**Business Day**" means a day, other than a Saturday, Sunday or a statutory holiday, on which banks are open for business in the City of Calgary.

"**Cardium Lightstream Business Unit**" means the portion of the Lightstream Business related to central Alberta.

"**CCAA**" has the meaning given to it in the recitals to these Sale Procedures.

"**CCAA Proceedings**" has the meaning given to it in the recitals to these Sale Procedures.

"**Company**" has the meaning given to it in the recitals to these Sale Procedures.

"**Confidentiality Agreement**" means a confidentiality agreement in favour of the Company executed by a Prospective Bidder, in form and substance satisfactory to the Company, which shall enure to the benefit of any Successful Bidder.

"**Court**" has the meaning given to it in the recitals to these Sale Procedures.

"**Credit Agreement**" means the Third Amended and Restated Credit Agreement dated May 29, 2012, as amended by a consent and first amending agreement made as of July 2, 2015, and as further amended by a second amending agreement made as of December 2, 2015, as amended, restated, supplemented, replaced or otherwise modified from time to time.

"**Credit Bid**" means any offer to acquire the Lightstream Property submitted by the Credit Bid Party in the form of a Sale Proposal, pursuant to which the consideration offered includes an exchange for, and in full and final satisfaction of, all of the Second Lien Notes Debt, as it may be amended or supplemented from time to time, subject to section 29.

"**Credit Bid Party**" means, the Second Lien Notes Trustee, acting on the direction of the Majority Noteholders under the Second Lien Indenture, or its agent.

"**Data Room**" means a confidential virtual data room which contains documents furnished by the Company and a physical data room providing access to relevant technical information.

"**Definitive Agreements**" means all Definitive Sale Agreements.

"**Definitive Sale Agreement**" has the meaning set out in section 7.

"**Deposit**" has the meaning set out in section 22(l).

"**Filing Date**" means the date the Company obtained protection from its creditors under the CCAA, being September 26, 2016.

"**First Lien Agent**" means The Toronto-Dominion Bank, as administrative agent for the First Lien Lenders.

"**First Lien Debt**" means, as at closing, all amounts owing by Lightstream to the First Lien Lenders under the Credit Agreement, including, without limitation, the aggregate outstanding principal amount (which, as at the date hereof is $370,920,485), together with all swap indebtedness, outstanding letters of credit and all accrued interest, fees, costs, expenses and other charges.

"**First Lien Lenders**" means the syndicate of lenders under the Credit Agreement.

"**Form of Purchase Agreement** " means the form of purchase and sale agreement to be developed by the Company in consultation with the Monitor, the Sale Advisor, the First Lien Lenders and the *Ad Hoc* Committee of Second Lien Noteholders and provided to those Qualified Phase II Bidders that submitted a Qualified Indication of Interest.

"**Indication of Interest**" has the meaning set out in section 13.

"**Initial Order**" has the meaning given to it in the recitals to these Sale Procedures.

"**Lightstream**" has the meaning given to it in the recitals to these Sale Procedures.

"**Lightstream Business**" means the business of the Company.

"**Lightstream Entity**" has the meaning given to it in the recitals to these Sale Procedures.

"**Lightstream Property**" means all property, assets and undertakings of the Company, including, without limitation, all of the Parcels.

"**LTS**" has the meaning given to it in the recitals to these Sale Procedures.

"**Majority Noteholders**" means Second Lien Noteholders holding more than fifty percent (50%) of the total outstanding principal amount of the aggregate Second Lien Notes.

"**Monitor**" means FTI Consulting Canada Inc., in its capacity as monitor in the CCAA Proceedings and not in its personal or corporate capacity.

"**Outside Closing Date**" means December 31, 2016.

"**Parcels**" means any one or more of the (i) property, assets and undertakings of the Company related to the Saskatchewan Lightstream Business Unit, (ii) the property, assets and undertakings of the Company related to the Cardium Lightstream Business Unit, or (iii) the property, assets and undertakings of the Company related to the Alberta/BC Lightstream Business Unit.

"**Phase I Bid Deadline**" has the meaning set out in section 14.

"**Phase II Bid Deadline**" has the meaning set out in section 21.

"**Process Letter**" means a letter from the Sale Advisor to Qualified Phase I Bidders outlining, among other things, the Sale Process and the Sale Procedures timelines.

"**Prospective Bidders**" has the meaning set out in section 2(a).

"**Purchase Price**" has the meaning set out in section 15(b)(i).

"**Qualified Bid**" and "**Qualified Bids**" have the meaning set out in section 23.

"**Qualified Bidder**" has the meaning set out in section 23 and for greater certainty, includes all Qualified Parcel Bidders and "**Qualified Bidders**" means more than one of them.

"**Qualified Consideration**" means consideration sufficient to repay immediately on closing (a) in full and in cash (A) the First Lien Debt and (B) so long as the Credit Bid has not been terminated in accordance with its terms, the Second Lien Notes Debt, and (b) in full and in cash or through an assumption of liabilities (i) any claims ranking senior in priority thereto that are or would be payable in the CCAA Proceedings, and (ii) any amounts owing by the Company in respect of goods and services provided to the Company on or after the Filing Date and prior to closing of the Successful Bid, and (c) any other amounts incurred by the Company in compliance with the Initial Order or any other Orders granted in the CCAA Proceedings.

"**Qualified Consideration Requirement**" means the requirement that any Sale, whether on its own, or in combination with one or more non-overlapping Sale Proposal for different Parcels, provides for consideration of at least the Qualified Consideration.

"**Qualified Indication of Interest**" has the meaning set out in section 15.

"**Qualified Phase I Bidder**" has the meaning set out in section 9 and "**Qualified Phase I Bidders**" means all of them.

"**Qualified Phase II Bidder**" has the meaning set out in section 20, and "**Qualified Phase II Bidders**" means all of them.

"**Qualified Parcel Bid**" means a Qualified Bid for Parcel, and "**Qualified Parcel Bid**" means more than one of them.

"**Qualified Parcel Bidder**" has the meaning set out in section 24.

"**Qualified Purchase Bid**" has the meaning set out in section 22.

"**Representative**" means, with respect to a particular person, any director, officer, employee, agent, consultant, advisor or other representative of such person, including legal counsel, accountants and financial advisors.

"**Sale**" "means the acquisition of all of the Lightstream Property or any of the Parcels.

"**Sale Advisor**" means means TD Securities Inc., in its capacity as sale advisor to the Company.

"**Sale Proposal**" has the meaning set out in section 15(b).

"**Saskatchewan Lightstream Business Unit**" means the portion of the Lightstream Business related to Saskatchewan.

"**Second Forbearance Agreement**" means the Second Forbearance Agreement dated as of September 15, 2016, between each Lightstream Entity and the First Lien Lenders.

"**Second Lien Note Indenture**" means that indenture dated as of July 2, 2015 among LTS, as issuer, and 1863359 Alberta Ltd., 1863360 Alberta Ltd., Bakken Resources Partnership and LTS Resources Partnership, as guarantors, and the Second Lien Notes Trustee.

"**Second Lien Noteholders**" means holders of Second Lien Notes.

"**Second Lien Notes Debt**" means all amounts owed under the Second Lien Notes, including all outstanding principal, accrued and unpaid interest, premiums, make-whole, fees, costs and expenses (which, for clarity, shall be in an amount not less than U.S.$650 million in respect of principal, U.S.$48.2 million in respect of the make-whole, and all other accrued interest, fees, costs, expenses and other amounts owing in respect of the Second Lien Notes), as valued by the Company, in consultation with the Monitor, or the Court on or before the Phase1 Bid Deadline.

"**Second Lien Notes Trustee**" means the trustee under the indenture dated as of July 2, 2015 pursuant to which the Second Lien Notes were issued by Lightstream.

"**Second Lien Notes**" means the 9.875% second lien secured notes due June 15, 2019 and issued by Lightstream pursuant to an indenture dated as of July 2, 2015.

"**Secured Debt**" means, collectively, (i) the First Lien Debt and (ii) so long as the Credit Bid has not been terminated in accordance with its terms, the Second Lien Notes Debt.

"**Secured Debt Repayment Requirement**" means the requirement that any Sale, whether on its own, or in combination with one or more non-overlapping Sale Proposal for different Parcels, provides for cash consideration sufficient to repay to the First Lien Lenders, and if the Credit Bid has not been terminated in accordance with its terms, the Second Lien Noteholders, in full and in cash and immediately on closing, the Secured Debt.

"**Sale Procedures**" has the meaning given to it in the recitals to these Sale Procedures.

"**Sale Process**" has the meaning set out in section 2.

"**Successful Bid(s)**" has the meaning set out in section 19, section 32, section 33 and section 34.

"**Successful Bidder**" has the meaning set out in section 19, section 32, section 33 and section 34.

"**Support Agreement**" means the amended and restated restructuring support agreement between the Company and members of the *Ad Hoc* Committee of Second Lien Noteholders dated August 26, 2016, as may be further amended from time to time.

"**Teaser**" has the meaning given to it section 5.

"**Unsecured Noteholders**" means holders of Unsecured Notes.

"**Unsecured Notes**" means the 8.625% unsecured notes due February 1, 2020 and issued by Lightstream pursuant to an indenture dated as of January 30, 2012 as supplemented by the supplemental indenture dated as of February 25, 2015.

## SCHEDULE "A"

TO THE COMPANY:

**Lightstream Resources Ltd.**
2800-525 8th Avenue SW
Calgary, Alberta T2P 1G1
Canada

Attention: Peter Scott and Annie Belecki

Telephone: (403) 775-9771/(403) 234-4169
Fax: (403) 218-6075
Email: pscott@lightstreamres.com / abelecki@lightstreamres.com

TO THE SALE ADVISOR:

**TD Securities Inc.**
36th Floor, 421-7th Avenue S.W.
Calgary, Alberta T2P 4K9
Canada

Attention: Ruben Contreras and Michael Charron
Telephone: (403) 503-4853 / (403) 299-8505
Email: Ruben.Contreras@tdsecuriites.com / Michael.Charron@tdsecurities.com

WITH COPY TO:

**Blake, Cassels & Graydon LLP**
3500-855 2nd Street SW
Calgary, Alberta T2P 4J8
Canada

Attention: Kelly Bourassa and Milly Chow

Telephone: (403) 260-9697/(416)-863-2594
Fax: (403) 260-9700/416-863-2653
Email: kelly.bourassa@blakes.com / milly.chow@blakes.com

WITH A COPY TO:

**FTI Consulting Canada Inc.**
in its capacity as Court-Appointed Monitor of Lightstream Resources Inc., et al.
Ernst & Young Tower
440 2nd Avenue SW, Suite 720
Calgary, Alberta T2P 5E9
Canada

Attention: Deryck Helkaa, Senior Managing Director

Telephone: (403) 545-6031
Facsimile: (403) 444-6699
Email: Deryck.Helkaa@fticonsulting.com

# TAB 3

SENIOR SECURED, PRIMING AND SUPERPRIORITY DEBTOR-IN-POSSESSION AMENDED AND RESTATED CREDIT AGREEMENT

among

ALGOMA HOLDINGS B.V.,

ESSAR TECH ALGOMA INC.,

ESSAR STEEL ALGOMA INC.,

CERTAIN SUBSIDIARIES OF ESSAR STEEL ALGOMA INC.,

VARIOUS LENDERS

and

DEUTSCHE BANK AG NEW YORK BRANCH,
as ADMINISTRATIVE AGENT and as COLLATERAL AGENT

Dated as of November 9, 2015
As Amended and Restated as of November 13, 2015

DEUTSCHE BANK SECURITIES INC.,
as SOLE LEAD ARRANGER AND BOOK RUNNER

or lieu of foreclosure or the like) on any assets of the Credit Parties which have an aggregate value in excess of $250,000 or in respect of purchase money security interests or equipment leases existing on the Petition Date without the prior written consent of the Administrative Agent; or

(g) Orders. (i) The Initial Order, the Provisional Relief Order or the Recognition Order, as the case may be, shall cease to be in full force and effect; (ii) entry of an order amending or varying any of the Orders without the prior written consent of the Administrative Agent or the Lenders; or (iii) the Borrower or any of the other Credit Parties shall fail to comply with the terms of any of the Orders or any other orders issued in the CCAA Proceedings or the Chapter 15 Cases; or

(h) Appointment of Receiver, Etc. The appointment of a receiver, receiver and manager, interim receiver, trustee in bankruptcy or similar official in respect of any of the Credit Parties or any of their property; or

(i) Invalid Plan. Entry of an order sanctioning (or the filing of any motion or pleading requesting a sanction of) a plan which does not provide for (i) either (A) the payment in full in cash of all obligations under the Prepetition Senior Facilities or (B) alternative treatment of the DIP Facilities and Prepetition Senior Facilities on terms acceptable to the Administrative Agent, the Lenders, the Prepetition Agents and the Prepetition Lenders; (ii) the termination of the unused Commitments and payment in full in cash of all Credit Document Obligations; and (iii) releases for the Administrative Agent, the Lenders, the Prepetition Agents and the Prepetition Lenders to the fullest extent Applicable Law; or

(j) Adverse Orders. The issuance of an order adversely impacting the rights and interest of the Administrative Agent or the Lenders or the rights hereunder of the Prepetition Lenders, without the prior written consent of the Administrative Agent or the Requisite DIP Lenders, including any order that relieves any of the Credit Parties from compliance with the terms of this Agreement or the other Credit Documents; or

(k) Supportive Actions. Any Holding Company, the Borrower or any of the other Credit Parties shall take any action in support of any matter set forth in Section 12.01(e), (g), (h) or (i) above or any other Person shall do so and such application is not contested in good faith by the Credit Parties; or

(l) Security Documents. Any of the Security Documents shall cease to be in full force and effect, or shall cease to give the Collateral Agent for the benefit of the Secured Parties the Liens, rights, powers and privileges purported to be created thereby (including, without limitation, a perfected super-priority security interest and charge in, and Lien on, all of the Collateral, in favor of the Collateral Agent, superior to and prior to the rights of all third Persons (except as contemplated by the definition of First Priority), and subject to no other Liens (except as permitted by Section 11.01), or any Credit Party shall default in the due performance or observance of any term, covenant or agreement on its part to be performed or observed pursuant to any such Security Document and such default shall continue beyond the period of grace, if any, specifically applicable thereto pursuant to the terms of such Security Document; or

(m) Guaranties. The Guaranty or any provision thereof shall cease to be in full force or effect as to any Guarantor (except as a result of a release of any Subsidiary Guarantor in accordance with the terms thereof), or any Guarantor or any Person acting for or on behalf of such Guarantor shall deny or disaffirm such Guarantor's obligations under the Guaranty or any Guarantor shall default in the due performance or observance of any term, covenant or agreement on its part to be performed or observed pursuant to the Guaranty; or

(n) Judgments. One or more Postpetition judgments or decrees shall be entered against any Holding Company, the Borrower or any other Subsidiary of a Holding Company involving in the aggregate for the Credit Parties and their Subsidiaries a liability (not paid or to the extent not covered by a reputable and solvent insurance company) and such judgments and decrees either shall be final and non-appealable or shall not be vacated, discharged or stayed or bonded pending appeal for any period of 60 consecutive days, and the aggregate amount of all such judgments equals or exceeds $10,000,000; or

(o) Change of Control. A Change of Control shall occur; or

(p) DB Plans. (i) Any Holding Company, the Borrower or any of their respective Subsidiaries shall have given notice of an intention to wind-up any DB Plan; (ii) the Borrower terminates or winds up any DB Plan; (iii) the Ontario Superintendent of Financial Services shall have issued a notice of intended decision to make an order requiring the wind-up of any DB Plan; or (iv) the Ontario Superintendent of Financial Services shall have ordered the wind-up of any DB Plan or any such plan shall be wound-up or terminated; or

(q) Invalidity of Credit Documents. Any Credit Documents at any time after its execution and delivery and for any reason other than as expressly permitted hereunder or thereunder or the satisfaction in full in cash of all the Credit Document Obligations (other than contingent obligations not then due and payable), ceases to be in full force and effect; or any Holding Company or any of their Subsidiaries contests in writing the validity or enforceability of the Credit Documents, taken as a whole; or Holding Company or any of their Subsidiaries denies in writing that it has any or further liability or obligation under the Credit Documents to which it is a party, taken as a whole (other than as a result of repayment in full in cash of the Credit Document Obligations (other than contingent obligations not then due and payable) and termination of the Commitments), or purports in writing to revoke or rescind the Credit Documents, taken as a whole; or

(r) [Reserved]; or

(s) Port Agreements, Cogen Agreements and Counter Parties. (i) Failure of any of the Counter Parties or any, receiver, receiver and manager, monitor, interim receiver, trustee in bankruptcy or similar official appointed over any of the Counter Parties or their property, to perform their respective obligations under any of the Port Agreements or the Cogen Agreements, as applicable which could reasonably be expected to have a Material Adverse Effect or (ii) termination of any of the Port Agreements or the Cogen Agreements, as applicable.

(t) Dutch Holdings. Dutch Holdings shall have failed to execute and deliver this Agreement and any other Credit Document to which it is a party, or any opinion of counsel, certificate or other deliverable expressly required by Section 6.01, Section 6.02 or Section 7 with respect to Dutch Holdings, in each case, by 5.00 p.m. New York time on November 20, 2015 (or such later time as the Administrative Agent may agree in its reasonable discretion).

then, and in any such event, and at any time thereafter, if any Event of Default shall then be continuing, the Administrative Agent may, and upon the written request of the Requisite DIP Lenders (or, in the case of clause (i) below in respect of the Revolving Loan Commitments, the Requisite Revolving DIP Lenders), shall take any or all of the following actions (provided, that with respect to the enforcement of Liens or other remedies with respect to the Collateral under clause (v) below, the Administrative Agent shall provide the Credit Parties and Monitor with four (4) Business Days' written notice prior to taking the action contemplated thereby and in any hearing after the giving of the aforementioned notice, the only issue that may be raised by any party in opposition thereto being whether, in fact, an Event of Default has occurred and is continuing; provided, further, that any such exercise of remedies under clause (v) shall be subject to the CCAA Court's approval), without prejudice to the rights of the Administrative Agent, any Lender or the holder of any Note to enforce its claims against any Credit Party: (i) cease making loans to

the Borrower, (ii) declare the Commitments terminated, whereupon all Commitments of each Lender shall forthwith terminate immediately and any Commitment Commission shall forthwith become due and payable without any other notice of any kind; (iii) make demand and/or declare the principal of and any accrued interest in respect of all Loans and the Notes and all Credit Document Obligations (including, without limitation, Exit Fees) owing hereunder and thereunder to be, whereupon the same shall become, immediately due and payable without presentment, demand, protest or other notice of any kind, all of which are hereby waived by each Credit Party; (iv) set off and/or consolidate any amounts owing by any Agent or Lender to any Credit Party against the Credit Document Obligations, including applying any cash collateral held by any Agent pursuant to this Agreement to the repayment of the Credit Document Obligations; (v) enforce, as Collateral Agent, all of the Liens and security interests created pursuant to the Security Documents (including without limitation (A) foreclosure on all or any portion of the Collateral; (B) apply to the CCAA Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Credit Parties and for the appointment of a trustee in bankruptcy; (C) exercise any rights of a secured party under the PPSA, the UCC or any legislation of similar effect); and (D) charge interest at the Default Rate (vi) enforce each Guaranty in accordance with the terms therein; and (vii) exercise all other rights and remedies available to it under the Credit Documents and Applicable Law. Notwithstanding the foregoing or anything to the contrary herein, if an Event of Default specified in Section 12.01(a) shall occur as a result of a failure to pay any amount due and payable under any Loan Document on the Maturity Date, the consequences set forth in clauses (ii) and (iii) of the immediately preceding sentence shall occur automatically without the giving of any notice contemplated therein, except to the extent required by the Initial Order, the Provisional Relief Order or the Recognition Order).

12.02. Application of Proceeds. Following an Event of Default the proceeds received by either the Administrative Agent or the Collateral Agent in respect of any sale of, collection from or other realization upon all or any part of the Collateral, whether pursuant to the exercise by the Administrative Agent or the Collateral Agent of its remedies or otherwise (including any payments received with respect to adequate protection payments or other distributions relating to the Credit Document Obligations during the pendency of any reorganization or insolvency proceeding) shall be applied, in full or in part, together with any other sums then held by the Administrative Agent and the Collateral Agent pursuant to this Agreement and the other Credit Documents, promptly by the Administrative Agent or the Collateral Agent as follows:

(i) first, to the payment of all costs and expenses, fees, commissions and taxes of such sale, collection or other realization including compensation to the Administrative Agent and the Collateral Agent and their agents and counsel, and all expenses, liabilities and advances made or incurred by such Agents in connection therewith and all amounts (including any fees, indemnities, expenses and other amounts incurred in connection with enforcing the rights of the Secured Parties under the Credit Documents) for which the Administrative Agent and the Collateral Agent, as applicable, are entitled to indemnification pursuant to the provisions of any Credit Document, together with interest on each such amount at the highest rate then in effect under this Agreement from and after the date such amount is due, owing or unpaid until paid in full;

(ii) second, [reserved];

(iii) third, without duplication of amounts applied pursuant to clauses (i) and (ii) above, to the payment in full in cash, pro rata, of interest and other amounts constituting Credit Document Obligations (other than principal and other than Credit Document Obligations owed to Defaulting Lenders), in each case equally and ratably in accordance with the respective amounts thereof then due and owing;

# TAB 4

Court File No. CV-15-000011169-00CL

**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**

**ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY, AND ESSAR STEEL ALGOMA INC. USA**

Applicants

**UNOFFICIAL TRANSCRIPT OF ENDORSEMENT OF THE HONOURABLE MR. JUSTICE NEWBOULD DATED NOVEMBER 16, 2015**

**Counsel: See Counsel Slip**

On this comeback motion, some things can be settled, primarily the DIP loan, which is critical to the debtors efforts to restructure.

The timing of this comeback motion has been tight, as has this whole process due to the filing under the CCAA at such a critical time for Essar Algoma. It is clear that the drafting of the documentation is a work in progress.

In reviewing the DIP terms, I have the following comments:

1. The process should be open to persons to come to court. The DIP agreement is lengthy and the parties have not had a great deal of time to consider it – ie other than the debtors, the DIP agent and the Monitor. Some provisions should be changed:

   – the events of default in section 12.01(i) should delete the portions in parenthesis;
   – the provisions on p. 109 as to what may happen in the event of default states that the only issue that may be raised by any party being whether an event of default has occurred and continuing. That language should be removed;
   – Section 12.01(i) is to be amended to delete any reference to payments, as per the affidavit of Mr. Marwah and the statement of counsel to the DIP agent;

– the milestones should be amended as per the statements of counsel to the DIP agent regarding a 10 day moratorium before an event of default could occur and as per the other concessions recently negotiated.

The information flow must be even handed and the DIP lenders or the ABL or term lenders are to be in no privileged position regarding all relevant information. The language is to be settled before any approval of the DIP loan. Counsel for other interested parties should have the ability to participate in the discussions.

The parties are directed to attempt to work out appropriate language for these issues and any other issues regarding the DIP loan. This is not to be an open-ended discussion. If the terms are not agreed by Thursday morning, the parties are to attend before RSJ Morawetz on Thursday afternoon at 2 pm for a determination of the terms of the DIP.

Regarding the DIP in general, it is clearly needed in order for the debtors to pursue a restructuring. I am satisfied that generally the court's hands will not be tied as to what can or cannot be done if there is a default of the terms of the DIP, so long as the changes I have referred to are made. Nor will the other secured lenders me materially prejudiced by the DIP loan.

The DIP terms are supported by the Monitor. The terms are far from ideal and I do not see the DIP lenders as being merely altruistic. Like any DIP lender, it is in their interest to take what they can get. Their interest, of course, in a situation such as this in which they are all ABL or Term lenders, is to see the business successfully restructure, but to be sure they work it on their terms as much as possible.

In this case, the Monitor will have an important role to play in dealing with budgets and I am confident will play a large part in that and bring to the Court any issue that needs to be dealt with. In this connection, the extra terms of the Monitor's duties sought by the *ad hoc* committee of the junior noteholders are approved and are to be added to the amended initial order.

The request by the various parties for payment by the debtors of their pre-filing and post-filing fees and expenses are to be dealt with at a later date, as are the fees and expenses of Evercore.

Whether the special payments regarding pension liability shortfalls are to be made is an open question to be dealt with at a later date without restriction regarding the court's jurisdiction.

Whether the terms of the DIP are contrary to section 347(2) of the Criminal Code or contravene section 8 of the Interest Act are matters to be dealt with at a later date on proper material. The DIP lenders cannot be paid something contrary to these provisions. Para 45 of the draft order provided by the *ad hoc* committee of the senior and junior noteholders (clients of Goodmans) should be included in the amended initial order, as should a similar provision regarding section 8 of the Interest Act.

Regarding the request of the USW, the proposed tolling clauses should be added to the amended initial order, as should the clauses that any termination of employees should be in accordance with the collective agreements and applicable laws.

Regarding the issues raised by Mr. Bish, on behalf of the owner of Portco and Genco, I would not require a change in the DIP terms requiring the services to be provided to the debtors. These services are essential. The parents owe $20 million to these companies against $3 million costs per month.

Paragraphs 9(b), 14(b), 34(k) (recognizing the issue of fees to a number of persons in paragraph 39 have not yet been dealt with), 34(l), 52 and 66 to 70 as drafted by Mr. Chadwick are approved and to be included in this amended initial order.

The court's discretion or any issue raised by the parties is not to be hampered or limited in any way by the terms of the amended initial offer or of the DIP loan. I understand no one generally takes a different view.

*"Original Signed"*

The Honourable Mr. Justice Newbould

# TAB 5

AMENDED AND RESTATED SENIOR SECURED, PRIMING AND SUPERPRIORITY DEBTOR-IN-POSSESSION CREDIT AGREEMENT

among

ESSAR TECH ALGOMA INC.,

ESSAR STEEL ALGOMA INC.,

CERTAIN SUBSIDIARIES OF ESSAR STEEL ALGOMA INC.,

VARIOUS LENDERS

and

DEUTSCHE BANK AG NEW YORK BRANCH,
as ADMINISTRATIVE AGENT and as COLLATERAL AGENT

Dated as of November 9, 2015,

Amended and Restated as of November 13, 2015

and

further Amended and Restated as of September [●], 2016

DEUTSCHE BANK SECURITIES INC.,
as SOLE LEAD ARRANGER AND BOOK RUNNER

any Prepetition Payment, or any payment of any other obligations out of the ordinary course of business, in each case, other than as expressly permitted in the Approved Budget or as may otherwise be permitted by an Order and which has been consented to in writing by the Administrative Agent and the Requisite DIP Lenders; provided that, the Borrower shall pay in cash to the Prepetition ABL Agent for the ratable benefit of the Prepetition ABL Lenders under the Prepetition ABL Credit Agreement monthly in arrears all interest and letter of credit, unused commitment and other fees that accrue on and after the Petition Date at the non-default rate and on terms (other than as provided herein) provided for under the Prepetition ABL Credit Agreement; provided, further, that the Borrower shall be permitted to capitalize and add to the unpaid principal amount of the Loans (as defined in the Prepetition ABL Credit Agreement) outstanding thereunder, the portion of interest and fees that accrue on and after the Petition Date at the default rate; or (b) waive, amend, supplement, modify, terminate or release the provisions of (i) any Prepetition Indebtedness (including, without limitation, the Prepetition Senior Facilities, the Prepetition Senior Secured Notes and the Prepetition Junior Priority Notes) or (ii) any document, agreement or instrument evidencing, creating or governing any Postpetition Indebtedness or any other material Prepetition or Postpetition agreement if, in the case of clauses (i) and (ii), the same is materially adverse to the interests of the Agents or the Lenders.

11.17. Repudiation or Termination of Material Contracts. Canada Holdings and the Borrower will not, and will not permit any of their respective Subsidiaries to, repudiate, disclaim or terminate any material contract, if such repudiation, disclaimer or termination would reasonably be expected to have a Material Adverse Effect, without the prior written consent of the Administrative Agent and the Requisite Lenders.

11.18. Certain Orders. None of Canada Holdings, the Borrower nor any of their respective Subsidiaries will seek an order sanctioning any plan of compromise or arrangement or approving any other restructuring transaction or sale that (a) purports to affect the rights of the Lenders under this Agreement or the other Credit Documents; (b) does not provide for treatment of the DIP Facilities and Prepetition Senior Facilities on terms acceptable to the Administrative Agent, the Requisite DIP Lenders, the Prepetition Agents and the Prepetition Lenders; or (c) is not consistent with or contravenes any provision of this Agreement or the other Credit Documents.

11.19. Port Agreements and Cogen Agreements. Without the prior written consent of the Administrative Agent and the Requisite DIP Lenders, the Credit Parties shall not (a) amend, restate, waive any provision of or otherwise modify any Port Agreement or Cogen Agreement or (b) repudiate, terminate, assign or disclaim any Port Agreement or Cogen Agreement.

SECTION 12. Events of Default.

12.01. Events of Default. Upon the occurrence of any of the following specified events (each, an "Event of Default"):

(a) Payments. The Borrower shall (i) default in the payment when due of any principal of any Loan or any Note or (ii) default, and such default shall continue unremedied for three or more Business Days, in the payment when due of any interest on any Loan or Note or any Fees or any other amounts owing hereunder or under any other Credit Document; or

(b) Representations, etc. Any representation, warranty or statement made or deemed made by any Credit Party herein or in any other Credit Document or in any certificate delivered to the Administrative Agent or any Lender pursuant hereto or thereto shall prove to be untrue in any material respect (or, in the case of any representation, warranty or statement qualified by materiality, in any respect) on the date as of which made or deemed made; or

(c) Covenants. Canada Holdings, the Borrower or any of their respective Subsidiaries shall (i) default in the due performance or observance by it of any term, covenant or agreement contained in Sections 2.15, 8.02, 8.04(a), 10.01(g), 10.03, 10.04 (as to a Credit Party only), 10.07, 10.11, 10.18, 10.19, 10.22, 10.24, 10.25 or 11, (ii) [reserved], or (iii) default in the due performance or observance by it of any other term, covenant or agreement contained in this Agreement (other than those set forth in clauses (a), (b) and (c)(i) above) and such default shall continue unremedied for a period of 30 days after the earlier of (x) the date on which such default shall first become known to any officer of the Borrower or any other Credit Party or (y) the date on which written notice thereof is given to the defaulting party by the Administrative Agent or the Requisite DIP Lenders (for the avoidance of doubt, the obligation of any Lender to make any Loans or to release any moneys from the Term Loan Blocked Account shall cease immediately upon the occurrence of either date referred to in the foregoing clauses (c)(iii)(x) and (c)(iii)(y) and no Lender shall have any such obligation while such default continues unremedied); or

(d) Default Under Other Agreements. (i) Canada Holdings, the Borrower or any of their Subsidiaries shall (x) default in any payment of any Indebtedness (other than the Credit Document Obligations and other than, in the case of any Credit Party, Prepetition Indebtedness) beyond the period of grace, if any, provided in an instrument or agreement under which such Indebtedness was created or (y) default in the observance or performance of any agreement or condition relating to any Indebtedness (other than the Credit Document Obligations and other than, in the case of any Credit Party, Prepetition Indebtedness) or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event shall occur or condition exist, the effect of which default or other event or condition is to cause, or to permit the holder or holders of such Indebtedness (or a trustee or agent on behalf of such holder or holders) to cause (determined without regard to whether any notice is required), any such Indebtedness to become due prior to its stated maturity, or (ii) any Indebtedness (other than the Credit Document Obligations and other than, in the case of any Credit Party, Prepetition Indebtedness) of the Credit Parties or any of their Subsidiaries shall be declared to be (or shall become) due and payable, or required to be prepaid other than by a regularly scheduled required prepayment, prior to the stated maturity thereof; provided that it shall not be a Default or an Event of Default under this Section 12.01(d) unless the aggregate principal amount of all Indebtedness as described in preceding clauses (i) and (ii) is at least $10,000,000; or

(e) Dismissal or Conversion of Cases. (i) Any of the Cases shall be dismissed or converted to a case under the BIA or Chapter 7 or Chapter 11 of the Bankruptcy Code or any proceedings or case (other than the Cases) shall be commenced (whether voluntary or involuntary) under any chapter of the Bankruptcy Code, or any insolvency proceedings under state or federal laws, by or in respect of any Credit Party, or any Credit Party shall file a motion or other pleading seeking the dismissal or conversion of any of the Cases under the CCAA the Bankruptcy Code or otherwise; (ii) a trustee under the BIA or under the Bankruptcy Code or a responsible officer or an examiner with enlarged powers relating to the operation of the business shall be appointed in any of the Cases and the order appointing such trustee, responsible officer or examiner shall not be reversed or vacated within 30 days after the entry thereof; (iii) the Board of Directors of the Borrower shall authorize a liquidation of the Borrower's business; or (iv) an application shall be filed by any Credit Party for the approval of any super-priority claim or lien (other than the Permitted Superpriority Encumbrances) in any of the Cases which is pari passu with or senior to the claims of the Administrative Agent and the Lenders against any Borrower or any Guarantor hereunder or under any of the other Credit Documents (including the Initial Order), or there shall arise or be granted any such *pari passu* or senior claim or lien (in the case of this clause (iv), without the prior written consent of the Administrative Agent and the Requisite DIP Lenders); or

(f) Relief from Automatic Stay. The CCAA Court or the Bankruptcy Court shall enter an order granting relief from the stay of proceedings to a creditor or party in interest (other than the Prepetition Term Loan Agent as contemplated herein) or to permit foreclosure (or the granting of a deed

or lieu of foreclosure or the like) on any assets of the Credit Parties which have an aggregate value in excess of $250,000 or in respect of purchase money security interests or equipment leases existing on the Petition Date without the prior written consent of the Administrative Agent; or

(g) Orders. (i) The Initial Order, the Provisional Relief Order or the Recognition Order, as the case may be, shall cease to be in full force and effect; (ii) entry of an order amending or varying any of the Orders without the prior written consent of the Administrative Agent or the Lenders; or (iii) the Borrower or any of the other Credit Parties shall fail to comply with the terms of any of the Orders or any other orders issued in the CCAA Proceedings or the Chapter 15 Cases; or

(h) Appointment of Receiver, Etc. The appointment of a receiver, receiver and manager, interim receiver, trustee in bankruptcy or similar official in respect of any of the Credit Parties or any of their property; or

(i) Invalid Plan. Entry of an order sanctioning a plan which does not provide for (i) treatment of the DIP Facilities and Prepetition Senior Facilities on terms acceptable to the Administrative Agent, the Requisite DIP Lenders, the Prepetition Agents and the Prepetition Lenders; (ii) the termination of the unused Commitments and payment in full in cash of all Credit Document Obligations; and (iii) releases for the Administrative Agent and the Lenders to the fullest extent Applicable Law; or

(j) Adverse Orders. The issuance of an order adversely impacting the rights and interest of the Administrative Agent or the Lenders or the rights hereunder of the Prepetition Lenders, without the prior written consent of the Administrative Agent or the Requisite DIP Lenders, including any order that relieves any of the Credit Parties from compliance with the terms of this Agreement or the other Credit Documents; or

(k) Supportive Actions. Canada Holdings, the Borrower or any of the other Credit Parties shall take any action in support of any matter set forth in Section 12.01(e), (g), (h) or (i) above or any other Person shall do so and such application is not contested in good faith by the Credit Parties; or

(l) Security Documents. Any of the Security Documents shall cease to be in full force and effect, or shall cease to give the Collateral Agent for the benefit of the Secured Parties the Liens, rights, powers and privileges purported to be created thereby (including, without limitation, a perfected super-priority security interest and charge in, and Lien on, all of the Collateral, in favor of the Collateral Agent, superior to and prior to the rights of all third Persons (except as contemplated by the definition of First Priority), and subject to no other Liens (except as permitted by Section 11.01), or any Credit Party shall default in the due performance or observance of any term, covenant or agreement on its part to be performed or observed pursuant to any such Security Document and such default shall continue beyond the period of grace, if any, specifically applicable thereto pursuant to the terms of such Security Document; or

(m) Guaranties. The Guaranty or any provision thereof shall cease to be in full force or effect as to any Guarantor (except as a result of a release of any Subsidiary Guarantor in accordance with the terms thereof), or any Guarantor or any Person acting for or on behalf of such Guarantor shall deny or disaffirm such Guarantor's obligations under the Guaranty or any Guarantor shall default in the due performance or observance of any term, covenant or agreement on its part to be performed or observed pursuant to the Guaranty; or

(n) Judgments. One or more Postpetition judgments or decrees shall be entered against Canada Holdings, the Borrower or any other Subsidiary of Canada Holdings involving in the aggregate for the Credit Parties and their Subsidiaries a liability (not paid or to the extent not covered by a reputable and solvent insurance company) and such judgments and decrees either shall be final and non-

appealable or shall not be vacated, discharged or stayed or bonded pending appeal for any period of 60 consecutive days, and the aggregate amount of all such judgments equals or exceeds $10,000,000; or

(o) Change of Control. A Change of Control shall occur; or

(p) DB Plans. (i) Canada Holdings, the Borrower or any of their respective Subsidiaries shall have given notice of an intention to wind-up any DB Plan; (ii) the Borrower terminates or winds up any DB Plan; (iii) the Ontario Superintendent of Financial Services shall have issued a notice of intended decision to make an order requiring the wind-up of any DB Plan; or (iv) the Ontario Superintendent of Financial Services shall have ordered the wind-up of any DB Plan or any such plan shall be wound-up or terminated; or

(q) Invalidity of Credit Documents. Any Credit Documents at any time after its execution and delivery and for any reason other than as expressly permitted hereunder or thereunder or the satisfaction in full in cash of all the Credit Document Obligations (other than contingent obligations not then due and payable), ceases to be in full force and effect; or Canada Holdings or any of its Subsidiaries contests in writing the validity or enforceability of the Credit Documents, taken as a whole; or Canada Holdings or any of its Subsidiaries denies in writing that it has any or further liability or obligation under the Credit Documents to which it is a party, taken as a whole (other than as a result of repayment in full in cash of the Credit Document Obligations (other than contingent obligations not then due and payable) and termination of the Commitments), or purports in writing to revoke or rescind the Credit Documents, taken as a whole; or

(r) [Reserved]; or

(s) Port Agreements, Cogen Agreements and Counter Parties. (i) Subject to Section 10.26(b), failure of any of the Counter Parties or any, receiver, receiver and manager, monitor, interim receiver, trustee in bankruptcy or similar official appointed over any of the Counter Parties or their property, to perform their respective obligations under any of the Port Agreements or the Cogen Agreements, as applicable which could reasonably be expected to have a Material Adverse Effect or (ii) termination of any of the Port Agreements or the Cogen Agreements, as applicable.

then, and in any such event, and at any time thereafter, if any Event of Default shall then be continuing, the Administrative Agent may, and upon the written request of the Requisite DIP Lenders (or, in the case of clause (i) below in respect of the Revolving Loan Commitments, the Requisite Revolving DIP Lenders), shall take any or all of the following actions (provided, that with respect to the enforcement of Liens or other remedies with respect to the Collateral under clause (v) below, the Administrative Agent shall provide the Credit Parties and Monitor with four (4) Business Days' written notice prior to taking the action contemplated thereby; provided, further, that any such exercise of remedies under clause (v) shall be subject to the CCAA Court's approval), without prejudice to the rights of the Administrative Agent, any Lender or the holder of any Note to enforce its claims against any Credit Party: (i) cease making loans to the Borrower, (ii) declare the Commitments terminated, whereupon all Commitments of each Lender shall forthwith terminate immediately and any Commitment Commission shall forthwith become due and payable without any other notice of any kind; (iii) make demand and/or declare the principal of and any accrued interest in respect of all Loans and the Notes and all Credit Document Obligations (including, without limitation, the Incremental Exit Fees) owing hereunder and thereunder to be, whereupon the same shall become, immediately due and payable without presentment, demand, protest or other notice of any kind, all of which are hereby waived by each Credit Party; (iv) set off and/or consolidate any amounts owing by any Agent or Lender to any Credit Party against the Credit Document Obligations, including applying any cash collateral held by any Agent pursuant to this Agreement to the repayment of the Credit Document Obligations; (v) enforce, as Collateral Agent, all of the Liens and security interests created pursuant to the Security Documents (including without limitation

(A) foreclosure on all or any portion of the Collateral; (B) apply to the CCAA Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against the Credit Parties and for the appointment of a trustee in bankruptcy; (C) exercise any rights of a secured party under the PPSA, the UCC or any legislation of similar effect); and (D) charge interest at the Default Rate (vi) enforce each Guaranty in accordance with the terms therein; and (vii) exercise all other rights and remedies available to it under the Credit Documents and Applicable Law. Notwithstanding the foregoing or anything to the contrary herein, if an Event of Default specified in Section 12.01(a) shall occur as a result of a failure to pay any amount due and payable under any Credit Document on the Maturity Date, the consequences set forth in clauses (ii) and (iii) of the immediately preceding sentence shall occur automatically without the giving of any notice contemplated therein, except to the extent required by the Initial Order, the Provisional Relief Order or the Recognition Order).

12.02. Application of Proceeds. Following an Event of Default the proceeds received by either the Administrative Agent or the Collateral Agent in respect of any sale of, collection from or other realization upon all or any part of the Collateral, whether pursuant to the exercise by the Administrative Agent or the Collateral Agent of its remedies or otherwise (including any payments received with respect to adequate protection payments or other distributions relating to the Credit Document Obligations during the pendency of any reorganization or insolvency proceeding) shall be applied, in full or in part, together with any other sums then held by the Administrative Agent and the Collateral Agent pursuant to this Agreement and the other Credit Documents, promptly by the Administrative Agent or the Collateral Agent as follows:

(i) first, to the payment of all costs and expenses, fees, commissions and taxes of such sale, collection or other realization including compensation to the Administrative Agent and the Collateral Agent and their agents and counsel, and all expenses, liabilities and advances made or incurred by such Agents in connection therewith and all amounts (including any fees, indemnities, expenses and other amounts incurred in connection with enforcing the rights of the Secured Parties under the Credit Documents) for which the Administrative Agent and the Collateral Agent, as applicable, are entitled to indemnification pursuant to the provisions of any Credit Document, together with interest on each such amount at the highest rate then in effect under this Agreement from and after the date such amount is due, owing or unpaid until paid in full;

(ii) second, [reserved]

(iii) third, without duplication of amounts applied pursuant to clauses (i) and (ii) above, to the payment in full in cash, pro rata, of interest and other amounts constituting Credit Document Obligations (other than principal and other than Credit Document Obligations owed to Defaulting Lenders), in each case, equally and ratably in accordance with the respective amounts thereof then due and owing;

(iv) fourth, to the payment in full in cash, pro rata, of principal amount of the Credit Document Obligations (other than Credit Document Obligations owed to Defaulting Lenders);

(v) fifth, [reserved]

(vi) sixth, to the payment in full in cash, pro rata, of any Credit Document Obligations owing to Defaulting Lenders; and

(vii) seventh, the balance, if any, to the Person lawfully entitled thereto (including the applicable Credit Party or its successors or assigns) or as any Court may direct.