COURT FILE NUMBER 2001-05630

COURT OF QUEEN'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

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 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.

APPLICANTS DDJ CAPITAL MANAGEMENT, LLC, BARINGS LLC and

BRIGADE CAPITAL MANAGEMENT, LP

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DDJ CAPITAL MANAGEMENT, LLC, BARINGS LLC and

BRIGADE CAPITAL MANAGEMENT, LP

DOCUMENT BRIEF OF LAW AND ARGUMENT

ADDRESS FOR

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CONTACT

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Torys LLP

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PART I – OVERVIEW

- The ad hoc committee comprised of DDJ Capital Management. LLC, Barings LLC, and Brigade Capital Management. LP (the "Note Committee") holds more than 50% of Dominion Diamond Mines ULC's ("Dominion Diamond" or the "Company") 7.125% senior secured second lien notes (the "Notes") and is representing the interests of Note holders collectively owed the equivalent of approximately CAD\$800,000,000, being by far the largest creditor group in these proceedings.
- 2. The Note Committee is seeking an order directing and authorizing Dominion Diamond and its affiliates that are the subject of these proceedings under the Companies' Creditors Arrangement Act ("CCAA") to promptly pay and reimburse the reasonable legal and financial advisory expenses incurred and to be incurred in these proceedings by the Note Committee for the period up to the date on which any debtor-in-possession financing is approved by this Court, subject to further Court order.
- The Note Committee submits that the order is necessary and appropriate for both (a) the
 effective representation of Note holder interests in these CCAA proceedings, and (b) the
 fairness and integrity of the CCAA process.

PART II - FACTS

- 4. The Notes were issued in 2017 to largely fund the acquisition of Dominion Diamond by its current owner, the Washington Diamond Investments LLC, and are governed by a trust indenture dated as of October 23, 2017 (as amended or supplemented, the "Trust Indenture") among Dominion Diamond, as successor to Northwest Acquisition ULC, and Dominion Finco Inc., as co-issuers, and Wilmington Trust, National Association, as trustee.
- 5. The Notes constitute senior secured second lien obligations of Dominion Diamond and certain of its affiliates, enjoying rights and privileges typically associated with secured debt indebtedness and ranking senior to the rights of various unsecured trade, bond and other creditors.

- 6. To secure the obligations under the Trust Indenture the holders of Notes enjoy the benefit of security granted by Dominion Diamond, Dominion Diamond Canada ULC, Washington Diamond Investments LLC ("Washington Diamond"), Dominion Diamond Holdings, LLC ("Dominion Holdings"), and Dominion Finco Inc. ("Dominion Finco") (collectively, the "Diamond Group"), including a second ranking security interest in all of the Diamond Group's present and future personal property pursuant to various general security agreements and trademark and copyright security agreements.
- 7. Washington Diamond is, directly or indirectly, the parent of all the other members of the Diamond Group.
- 8. On May 1, 2020, following commencement of these CCAA proceedings, the Diamond Group failed to make an interest payment due in respect of the Notes. Accordingly, the amount owing to the Note holders is now approximately CAD\$800,000,000 based on the exchange rate as of May 7, 2020.

Note Committee

- The Note Committee is comprised of DDJ Capital Management, LLC, Barings LLC and Brigade Capital Management, LP. Collectively, the three members of the Note Committee hold more than 50% of the issued and outstanding US\$550,000,000 principal amount of Notes.
- 10. Quickly following its initial organization, the Note Committee sought to engage experienced Canadian restructuring counsel. It proceeded to interview, select and engage the law firm of Torys LLP and, pursuant to this engagement, has incurred and will continue to incur legal fees. The Note Committee then proceeded to engage experienced financial advisors. It interviewed, selected and engaged the firm of Houlihan Lokey, Inc. and, pursuant to this engagement, has incurred and will continue to incur financial advisory fees.
- 11. The Note Committee also engaged with representatives of Dominion Diamond and its affiliates to seek access to information and documents not previously made available to them. As an initial step in this regard, the Note Committee negotiated, settled and executed

- confidentiality agreements with Dominion Diamond and its representatives for the members of the Note Committee and its advisors.
- 12. As a result of restrictions imposed by the Company and its representatives, most of the Company's confidential information is available only to the Note Committee's legal and financial advisors and not to the members of the Note Committee themselves. Accordingly, the Note Committee's advisors are playing a crucial role in the diligence and communications process.
- 13. The Note Committee has also, directly and through its advisors, engaged in multiple discussions with representatives of Dominion Diamond, the court-appointed Monitor, their respective advisors, and other major stakeholders in these proceedings.

Proposed DIP Funding

- 14. Dominion Diamond and its affiliates who are subject to these proceedings have advised this Court and interested parties of their intention to seek debtor-in-possession ("DIP") financing to fund its activities during these proceedings.
- 15. The Note Committee is of the view that any such DIP funding, and the terms and conditions attached thereto, may critically impact the direction of these proceedings and the ability of all stakeholders to ensure a fair and reasonable process and outcome. Preliminary concerns have been raised by, among other things, the disclosure by Dominion Diamond of its receipt of a DIP funding proposal from its current equity owner that would be conditional on agreement to essentially re-sell itself to an affiliate of the owner.
- 16. The Note Committee is working diligently to ensure that Dominion Diamond has viable DIP funding alternatives. It has engaged with the Company and its advisors in this respect and has advised them of its intention to offer its own alternate DIP funding facility. This will be a substantial focus of the Note Committee's activities in the near term before this Court approves any DIP facility.
- 17. The Note Committee is starting from a disadvantaged position, not having been notified or consulted in advance about these proceedings and the issues that gave rise to them while at

- the same time facing logistical challenges and information deficiencies not suffered by other major stakeholders.
- 18. Dominion Diamond's disclosure reveals sufficient cash-on-hand to fund the Note Committee's reasonable out-of-pocket advisory expenses for the period up to the date on which the proposed DIP facility is approved by the Court.
- 19. The Note Committee is well-positioned to make a critically important contribution to these proceedings, including potentially with respect to DIP funding and a restructuring or sales process, and their effective representation will promote the fairness and integrity of this process.

PART III – ISSUE AND LAW

- 20. Section 11.52(1)(c) of the CCAA provides for the ability and right for an interested person to request a security or charge, affecting all or part of a debtor's property, to cover the fees and expenses of its financial, legal or other experts necessary to its "effective participation" in the CCAA proceedings.
- 21. Requests under section 11.52(1)(c) of the CCAA must be made early in the proceedings. "After-the-fact" requests for security protecting any such fees and expenses, or for the payment or reimbursement thereof, must be discouraged and avoided as it would directly affect the distribution to the creditors.
- 22. The issue in the within Application is whether the Note Committee is entitled to an Order pursuant to section 11.52(1)(c) of the CCAA and, specifically, whether the remedy sought is necessary for the effective participation of the Note Committee in the within proceedings.
- 23. With respect to the authority to grant a charge to secure the fees and disbursements of a representative counsel pursuant to s. 11.52(1)(c), the Court must be satisfied that the security or charge is necessary for the effective participation of representative counsel in the proceedings, and factors to be considered include: (a) the size and complexity of the

¹ Re Homburg Invest Inc., 2011 QCCS 4989.

business being restructured; (b) the proposed role of the beneficiaries of the charge; (c) whether there is an unwarranted duplication of roles; (d) whether the quantum of the proposed charge appears to be fair and reasonable; (e) the position of the secured creditors likely to be affected by the charge; and (f) the position of the monitor.²

- 24. The Note Committee submits that the relief sought is necessary for the effective participation of the Note Committee's counsel and financial advisor in these proceedings. In particular, the relief sought is granted often in CCAA proceedings.
- 25. With respect to the factors considered by the Court in Canwest, the Note Committee submits that, firstly, the within proceedings are complex and the size of the Diamond Group's business is large the Diamond Group's liabilities are well over US\$1.2 billion. The Diamond Group's business involves complexities relating to, among other things, the international nature of its operations, governmental and employee relationships, and a critical joint venture interest.
- 26. Second, with respect to the proposed role of the beneficiaries of the charge, the Note Committee submits that it would play an integral role in the within proceedings; a role that requires it to engage experienced legal counsel and a skilled financial advisor. Specifically, the Note Committee is:
 - (a) comprised of secured creditors of Dominion Diamond and who represent the interests of the largest creditor and stakeholder group in the within proceedings from a monetary perspective;
 - (b) intensively engaged in efforts to develop a DIP funding proposal to Dominion Diamond; and
 - (c) well-positioned to play a direct role in supporting or backstopping any potential restructuring or sales process.

² Re Canwest Publishing Inc. 2010 ONSC 222 ("Canwest") at para 54 [TAB 1]

³ Lightstream Resources Ltd., Calgary 1601-12571 (ABQB) (Order pronounced 26 September 2016) at para 30 **[TAB 2]**; Essar Steel Algoma Inc., Toronto CV-15-000011169-00CL (Order pronounced 25 February 2016) at para 3 **[TAB 3]**; Jaguar Mining Inc., Toronto CV-13-1038300CL (ONSC) (Order pronounced 23 December 2013) at para 31 **[TAB 4]**; "To Canwest and Beyond: A Look at Priority Charges Securing Professional Fees", Katie Mak and Claire Wheldon, Annual Review of Insolvency Law, Ed: Janis P. Sarra **[TAB 5]**

- 27. The members of the Note Committee are sophisticated institutions whose direct engagement in these proceedings will be of extensive benefit to this Court and to all stakeholders their proper representation is critical not only to their own interests, but to ensuring the fairness and integrity of these proceedings and all activities related to them, which justifies and sets the foundation at law for the relief sought.
- 28. These issues are heightened in this situation in view of the disclosure by the current ownership group, which no longer holds any economic interest in Dominion Diamond and its affiliate applicants in these proceedings, that it intends to tie proposed DIP funding to its re-purchase of the Companies on currently undisclosed terms as to the treatment of the Notes and other stakeholders. Particularly in a debtor-in-possession process in which the very board of directors appointed by the current ownership group will be reviewing, assessing and selecting alternative paths, serious process and conflicts of interest issues are raised.
- 29. The Note Committee is also starting from a disadvantaged position, not having been notified or consulted in advance about these proceedings and the issues that gave rise to them. Other persons, including the current ownership group, have had access for a far longer period of time.
- 30. The logistical challenges inherent in the nature of ad hoc committees can also give rise to relative disadvantages. Multi-party groups need to overcome issues of coordination, information flow, and sharing of costs. For investment institutions of the kind represented by the members of the Note Committee, access to funding for the benefit of their managed accounts can be a highly complex, administratively burdensome and uncertain task.
- 31. In addition, the Note Committee would be further disadvantaged if it was denied the requested funding even though a very large provision has been made in Dominion Diamond's 13-week cash flow projections for funding the costs of various other professionals.
- 32. Further, since most of the Company's confidential information is available only to the Note Committee's legal and financial advisors and not to the members of the Note Committee

- themselves, the Note Committee must engage legal and financial experts to ensure effective representation of Note holder and other stakeholder interests in these proceedings.
- 33. The Note Committee is uniquely positioned to represent the interests of the Diamond Group's largest creditor group without duplication to the activities of any other participant in these proceedings. The Note Committee holds in its accounts more than 50% of all issued and outstanding Notes and has the decision-making authority and institutional capability to engage in all activities relating to the CCAA process in a fast and responsive manner. The Note Committee is also uniquely positioned to participate directly and centrally in the proposed DIP funding and a restructuring or sales process.
- 34. It is very important that the Note Committee be effectively represented in this critical stage, and the limited time period and requirement of reasonableness inherently impose parameters around the quantum of the costs that are fair and reasonable.
- 35. The quantum of the proposed charge is fair and reasonable in the circumstances. In particular, the Note Committee is asking only for payment of its advisory expenses up to the date on which the proposed DIP facility is approved by this Court, which is a critically important period of time that may determine the direction of these proceedings.
- 36. Other secured creditors in these proceedings are enjoying protections and privileges which have not been made available to the Note Committee. The Company has provided for, in its 13-week cash flow projections, the payment of ongoing interest to its first lien lenders while a large interest payment due to the Note holders on May 1, 2020 was not made. The Company has also not confirmed whether it will be paying the expenses of the first lien lenders.
- 37. Based on all of the foregoing, the Note Committee submits that the relief sought will promote the fairness and integrity of this restructuring process. Particularly given the uniquely sensitive issues being raised at an early stage in these proceedings, it would be of great benefit and improve the fact, and appearance, of fairness for both involved parties and capital market observers.

PART IV - RELIEF SOUGHT

38. For the foregoing reasons, the Note Committee is seeking an order directing and authorizing payment and reimbursement of its reasonable out-of-pocket legal and financial advisory expenses incurred and to be incurred for the period up to the date on which a DIP facility is approved by this Court.

ALL OF WHICH IS RESPECTFULLY SUBMITTED on May 7, 2020 at Calgary, Alberta.

TORYS LLP

Per: Kyle Kashuba

Counsel for DDJ Capital Management, LLC, Barings LLC, and Brigade Capital Management, LP

TAB 1

2010 ONSC 222 Ontario Superior Court of Justice [Commercial List]

Canwest Publishing Inc. / Publications Canwest Inc., Re

2010 CarswellOnt 212, 2010 ONSC 222, [2010] O.J. No. 188, 184 A.C.W.S. (3d) 684, 63 C.B.R. (5th) 115

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, C-36, AS AMENDED AND IN THE MATTER OF A PROPOSED PLAN OF COMPROMISE OR ARRANGEMENT OF CANWEST PUBLISHING INC./PUBLICATIONS CANWEST INC., CANWEST BOOKS INC. AND CANWEST (CANADA) INC.

Pepall J.

Judgment: January 18, 2010 Docket: CV-10-8533-00CL

Counsel: Lyndon Barnes, Alex Cobb, Duncan Ault for Applicant, LP Entities
Mario Forte for Special Committee of the Board of Directors
Andrew Kent, Hilary Clarke for Administrative Agent of the Senior Secured Lenders' Syndicate
Peter Griffin for Management Directors
Robin B. Schwill, Natalie Renner for Ad Hoc Committee of 9.25% Senior Subordinated Noteholders
David Byers, Maria Konyukhova for Proposed Monitor, FTI Consulting Canada Inc.

Related Abridgment Classifications

Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by creditors
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Miscellaneous

Headnote

Bankruptcy and insolvency -- Companies' Creditors Arrangement Act -- Miscellaneous

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business.

Bankruptcy and insolvency — Companies' Creditors Arrangement Act — Arrangements — Approval by creditors

CMI, entity of C Corp., obtained protection from creditors in Companies' Creditors Arrangement Act ("CCAA") proceedings in October 2009 — CPI, newspaper entities related to C, sought similar protection — CPI brought application for order pursuant to CCAA and for stay of proceedings and other benefits of order to be extended to CPI — Application granted — CPI was clearly insolvent — Community served by CPI was huge — Granting of order premised on anticipated going concern sale of newspaper business, which would serve interests of CPI and stakeholders and also community at large — Order requested would provide stability and enable CPI to pursue restructuring and preserve enterprise value for stakeholders — Without benefit of stay, CPI

would have been required to pay approximately \$1.45 billion and would have been unable to continue operating business — In circumstances, it was appropriate to allow CPI to file and present plan only to secured creditors.

Table of Authorities

Cases considered by Pepall J.:

Anvil Range Mining Corp., Re (2002), 2002 CarswellOnt 2254, 34 C.B.R. (4th) 157 (Ont. C.A.) — considered Anvil Range Mining Corp., Re (2003), 310 N.R. 200 (note), 2003 CarswellOnt 730, 2003 CarswellOnt 731, 180 O.A.C. 399 (note) (S.C.C.) — referred to

Canwest Global Communications Corp., Re (2009), 2009 CarswellOnt 6184, 59 C.B.R. (5th) 72 (Ont. S.C.J. [Commercial List]) — followed

Grant Forest Products Inc., Re (2009), 2009 CarswellOnt 4699, 57 C.B.R. (5th) 128 (Ont. S.C.J. [Commercial List]) — considered

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Muscletech Research & Development Inc., Re (2006), 19 C.B.R. (5th) 54, 2006 CarswellOnt 264 (Ont. S.C.J. [Commercial List]) — followed

Philip Services Corp., Re (1999), 13 C.B.R. (4th) 159, 1999 CarswellOnt 4673 (Ont. S.C.J. [Commercial List]) — considered

Sierra Club of Canada v. Canada (Minister of Finance) (2002), 287 N.R. 203, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 18 C.P.R. (4th) 1, 44 C.E.L.R. (N.S.) 161, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 211 D.L.R. (4th) 193, 223 F.T.R. 137 (note), 20 C.P.C. (5th) 1, 40 Admin. L.R. (3d) 1, 2002 SCC 41, 2002 CarswellNat 822, 2002 CarswellNat 823, (sub nom. Atomic Energy of Canada Ltd. v. Sierra Club of Canada) 93 C.R.R. (2d) 219, [2002] 2 S.C.R. 522 (S.C.C.) — followed

Statutes considered:

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

Generally - referred to

- s. 4 considered
- s. 5 considered
- s. 11.2 [en. 1997, c. 12, s. 124] considered
- s. 11.2(1) [en. 1997, c. 12, s. 124] considered
- s. 11.2(4) [en. 1997, c. 12, s. 124] considered
- s. 11.4 [en. 1997, c. 12, s. 124] considered
- s. 11.4(1) [en. 1997, c. 12, s. 124] considered
- s. 11.4(2) [en. 1997, c. 12, s. 124] considered
- s. 11.7(2) [en. 1997, c. 12, s. 124] referred to
- s. 11.51 [en. 2005, c. 47, s. 128] considered
- s. 11.52 [en. 2005, c. 47, s. 128] considered

Courts of Justice Act, R.S.O. 1990. c. C.43

s. 137(2) — considered

Pepall J.:

Reasons for Decision

Clerk's stamp:

COURT FILE NUMBER:

1601-12571

COURT -

COURT OF QUEEN'S BENCH OF ALBE

JUDICIAL CENTRE

CALGARY

I hereby certify this to be a true copy of

the original Order

Dated this 26day of Sent 20

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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Email: kelly.bourassa@blakes.com/

milly.chow@blakes.com 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

- 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;
- 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;
 - 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

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.
- The Monitor, counsel to the Monitor, counsel to the Applicants and the CCAA Parties, 30. 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).
- 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.

- 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");
 - 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;
 - 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:

- 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 I 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;
 - 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 Blds

- 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;
- 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;

- (I) 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 falls 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:
- Solution 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(1).

"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 | 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

ONTARIO SUPERIOR COURT OF JUSTICE (COMMERCIAL LIST)

THE HONOURABLE MR.)	THURSDAY, THE 25 ^{TE}
JUSTICE NEWBOULD)	DAY OF FEBRUARY, 2016

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., ALOMGA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY, AND ESSAR STEEL ALGOMA INC. USA

Applicants

ORDER

THIS MOTION pursuant to the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended (the "CCAA") made by the Ad Hoc Committee of Essar Algoma Noteholders (the "Ad Hoc Committee"), with the support of Wilmington Trust, National Association, in its capacity as trustee (the "Trustee") pursuant to an indenture dated November 14, 2014 (the "Indenture") pursuant to which Essar Steel Algoma Inc. issued certain 9.50% senior secured notes due November 15, 2019 (the "Senior Secured Notes"), was heard this day at 330 University Avenue, Toronto, Ontario.

ON HEARING the submissions of counsel for the Applicants, the Ad Hoc Committee, the Trustee, the Monitor and such other counsel as were present and wished to be heard,

- 1. THIS COURT ORDERS that the time for service of the Notice of Motion and the Motion Record is hereby abridged and validated so that this Motion is properly returnable today and hereby dispenses with further service thereof.
- 2. THIS COURT ORDERS that any payment, consideration or other distribution to be made, directly or indirectly, in respect of the Senior Secured Notes (a "Distribution") in connection with these CCAA proceedings or any other proceedings in respect of the Applicants, including, without limitation, proceedings under the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended shall be made exclusively to the Trustee for further distribution pursuant to the terms of this Order unless, prior to the making of any such Distribution, the Applicants have paid in full all outstanding Trustee Expenses and Ad Hoc Committee Expenses (each as defined herein).

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- 3. THIS COURT ORDERS that any Distribution made to the Trustee in accordance with paragraph 2 of this Order shall be paid out by the Trustee in the following order:
 - (a) First, to the Trustee for amounts due to it under Section 7.7 of the Indenture (the "Trustee Expenses");
 - (b) Second, to counsel to the Ad Hoc Committee, Goodmans LLP, Paul, Weiss, Rifkind, Wharton & Garrison LLP and Young Conaway Stargatt & Taylor, LLP, for their respective reasonable fees and expenses incurred in connection with any matter relating to the Applicants, whether incurred prior to or following the granting of the Amended and Restated Initial Order dated as of November 9, 2015 (the "Ad Hoc Committee Expenses"); and
 - (c) Third, to holders of the Senior Secured Notes for amounts due and unpaid in respect of or pursuant to the Senior Secured Notes or the Indenture.
- 4. 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 (including the United States Bankruptcy Court for the District of Delaware) or any other

jurisdiction to give effect to this Order and to assist the Trustee, the Applicants and 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 Trustee, the Applicants and the Monitor, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Trustee, the Applicants and the Monitor and their respective agents in carrying out the terms of this Order.

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ON / BOOK NO: LE / DANS LE REGISTRE NO.:

FEB 2,5, 2016

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

OF ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

SUPERIOR COURT OF JUSTICE ONTARIO

Proceeding commenced at Toronto

ORDER

GOODMANS LLP

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

L. Joseph Latham LSUC# 32326A E-mail: jlatham@goodmans.ca Robert J. Chadwick LSUC# 35165K E-mail: rchadwick@goodmans.ca

(416) 979-2211 Te]:

(416) 979-1234 Fax:

Lawyers for the Ad Hoc Committee of Essar Algoma Noteholders

TAB 4

Court File No.

CV-13-10383-00CL

ONTARIO SUPERIOR COURT OF JUSTICE COMMERCIAL LIST

THE HONOURABLE) MONDAY, THE 23 RD
JUSTICE MORAWETZ) DAY OF DECEMBER, 2013

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 JAGUAR MINING INC.

Applicant

INITIAL ORDER

THIS APPLICATION, made by the Applicant, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "CCAA") was heard this day at 330 University Avenue, Toronto, Ontario.

ON READING the affidavit of David M. Petroff sworn December 23, 2013 and the Exhibits thereto (the "Petroff Affidavit"), the Pre-Filing Report of FTI Consulting Canada Inc. in its capacity as the Proposed Monitor (as defined in the Petroff Affidavit), dated December 21, 2013, and on being advised that the secured creditors who are likely to be affected by the charges created herein were given notice, and on hearing the submissions of counsel for the Applicant, FTI Consulting Canada Inc., as Proposed Monitor, the Ad Hoc Committee (as defined in the Petroff Affidavit), and Global Resource Fund, no one appearing for any other person although duly served as appears from the affidavit of service of Evan Cobb sworn December 23, 2013 and on reading the consent of FTI Consulting Canada Inc. to act as the Monitor (in such capacity, the "Monitor"),

SERVICE

1. THIS COURT ORDERS that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this Application is properly returnable today and hereby dispenses with further service thereof.

APPLICATION

2. THIS COURT ORDERS AND DECLARES that the Applicant is a company to which the CCAA applies.

PLAN OF ARRANGEMENT

3. THIS COURT ORDERS that the Applicant shall have the authority to file and may, subject to further order of this Court, file with this Court a plan of compromise or arrangement (hereinafter referred to as the "Plan").

POSSESSION OF PROPERTY AND OPERATIONS

- 4. THIS COURT ORDERS that the Applicant shall remain in possession and control of its current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Property"). Subject to further Order of this Court, the Applicant shall continue to carry on business in a manner consistent with the preservation of its business (the "Business") and Property. The Applicant shall be authorized and empowered to continue to retain and employ the employees, consultants, agents, experts, accountants, directors, counsel and such other persons, including counsel to the Special Committee (as defined in the Petroff Affidavit) (collectively "Assistants") currently retained or employed by it, with liberty to retain such further Assistants as it deems reasonably necessary or desirable in the ordinary course of business or for the carrying out of the terms of this Order.
- 5. THIS COURT ORDERS that the Applicant shall be entitled but not required to pay the following expenses whether 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 Applicant in respect of these proceedings or in respect of the Applicant's public listing requirements, at their standard rates and charges.
- 6. THIS COURT ORDERS that, except as otherwise provided to the contrary herein or in the Support Agreement, the Applicant shall be entitled but not required to pay all reasonable expenses incurred by the Applicant 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; and
 - (b) payment for goods or services actually supplied to the Applicant following the date of this Order.
- 7. THIS COURT ORDERS that the Applicant 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, (iii) Quebec Pension Plan, and
 (iv) income taxes;
 - (b) all goods and services or other applicable sales taxes (collectively, "Sales Taxes") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, 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 Applicant.
- 8. THIS COURT ORDERS that until a real property lease is disclaimed in accordance with the CCAA, the Applicant shall 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 to the landlord under the lease) or as otherwise may be negotiated between the Applicant and the landlord from time to time ("Rent"), for the period commencing from and including the date of this Order, twice-monthly in equal payments on the first and fifteenth day of each month, in advance (but not in arrears). On the date of the first of such payments, any Rent relating to the period commencing from and including the date of this Order shall also be paid.
- 9. THIS COURT ORDERS that, except as specifically permitted herein, the Applicant is 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 Applicant to any of its creditors as of this date; (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and (c) to not grant credit or incur liabilities except in the ordinary course of the Business. Notwithstanding the foregoing, the Applicant is authorized and directed until further order of this Court to pay any monthly interest amounts that may become due and owing to Global Resource Fund under the Renvest Facility (as such term is defined in the Petroff Affidavit).

RESTRUCTURING

- 10. THIS COURT ORDERS that the Applicant shall, subject to such requirements as are imposed by the CCAA and the terms of the Support Agreement, have the right to:
 - (a) permanently or temporarily cease, downsize or shut down any of its business or operations:

- (b) terminate the employment of such of its employees as it deems appropriate;
- (c) retain a solicitation agent and an election agent (the "Solicitation/Election Agent") and permit it to obtain proxies and/or voting information and subscription election forms from registered and beneficial holders of the Notes (as defined in the Petroff Affidavit) in respect of the Plan and any amendments thereto; and
- (d) pursue all avenues of refinancing of its 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 Applicant to proceed with an orderly restructuring of the Business (the "Restructuring").

- 11. THIS COURT ORDERS that the Applicant shall provide each of the relevant landlords with notice of the Applicant's 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 and, if the landlord disputes the Applicant's 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 Applicant, or by further Order of this Court upon application by the Applicant on at least two (2) days notice to such landlord and any such secured creditors. If the Applicant disclaims the lease governing such leased premises in accordance with Section 32 of the CCAA, it 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 of the lease shall be without prejudice to the Applicant's claim to the fixtures in dispute.
- 12. THIS COURT ORDERS that if a notice of disclaimer is delivered pursuant to Section 32 of the CCAA, then (a) during the notice period prior to the effective time of the disclaimer, the landlord may show the affected leased premises to prospective tenants during normal business hours, on giving the Applicant and the Monitor 24 hours' prior written notice, and (b) at the effective time of the disclaimer, 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 Applicant in respect of such lease or leased premises and such landlord shall be entitled to notify the Applicant 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.

SUPPORT AGREEMENT AND BACKSTOP AGREEMENT

13. THIS COURT ORDERS that the Applicant is authorized and empowered to take all steps and actions in respect of, and to comply with all of its obligations pursuant to, the Support Agreement and the Backstop Agreement (each as defined in the Petroff Affidavit) and its various obligations thereunder, and that nothing in this Order shall be construed as waiving or modifying any of the rights, commitments or obligations of Jaguar, its Subsidiaries, the Consenting Noteholders (as defined in the Petroff Affidavit) and the Backstop Parties (as defined in the Petroff Affidavit) under the Support Agreement and the Backstop Agreement, as applicable.

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY

- 14. THIS COURT ORDERS that until and including January 22, 2014, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court or tribunal (each, a "Proceeding") shall be commenced or continued against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Proceedings currently under way against or in respect of the Applicant or affecting the Business or the Property are hereby stayed and suspended pending further Order of this Court.
- 15. THIS COURT ORDERS that during the Stay Period, no Proceeding shall be commenced or continued: (i) against or in respect of any of the Applicant's direct or indirect subsidiaries (each a "Subsidiary" and, collectively, the "Subsidiaries") with respect to any guarantee, contribution or indemnity obligation, liability or claim in respect of, or that relates to, any agreement involving the Applicant, or the obligations, liabilities and claims of, against or affecting the Applicant or the Business (collectively, the "Applicant Related Liabilities"); (ii) against or in respect of any of a Subsidiary's current and future assets, undertakings and properties of every nature and kind whatsoever, and wherever situate including all proceeds thereof (the "Subsidiary Property") with respect to any Applicant Related Liabilities (the matters referred to in (i) and (ii) being, collectively, the "Applicant Related Proceedings Against

Subsidiaries"), except with the written consent of the Applicant and the Monitor, or with leave of this Court, and any and all Applicant Related Proceedings Against Subsidiaries currently under way by any Person are hereby stayed and suspended pending further order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

- 16. THIS COURT ORDERS that 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") against or in respect of the Applicant or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Applicant to carry on any business which the Applicant is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.
- 17. THIS COURT ORDERS that during the Stay Period, all rights and remedies of any Person against or in respect of any Subsidiary or Subsidiary Property in respect of any Applicant Related Liabilities are hereby stayed and suspended except with the written consent of the Applicant and the Monitor, or leave of this Court, provided that nothing in this Order shall (i) empower the Subsidiary to carry on any business which the Subsidiary is not lawfully entitled to carry on, (ii) affect such investigations, actions, suits or proceedings by a regulatory body as are permitted by Section 11.1 of the CCAA, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH RIGHTS

18. THIS COURT ORDERS that during the Stay Period, no Person shall 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 Applicant, except with the written consent of the Applicant and the Monitor, or leave of this Court.

CONTINUATION OF SERVICES

19. THIS COURT ORDERS that during the Stay Period, all Persons having oral or written

agreements with the Applicant or statutory or regulatory mandates for the supply of goods and/or services, 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 or the Applicant, are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Applicant, and that the Applicant shall be entitled to the continued use of its current premises, telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Applicant in accordance with normal payment practices of the Applicant or such other practices as may be agreed upon by the supplier or service provider and each of the Applicant and the Monitor, or as may be ordered by this Court.

NON-DEROGATION OF RIGHTS

20. THIS COURT ORDERS that, notwithstanding anything else in this Order, no Person shall be prohibited from requiring immediate payment for goods, services, use of lease or licensed property or other valuable consideration provided on or after the date of this Order, nor shall any Person be under any obligation on or after the date of this Order to advance or readvance any monies or otherwise extend any credit to the Applicant. Nothing in this Order shall derogate from the rights conferred and obligations imposed by the CCAA.

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS

21. THIS COURT ORDERS that during the Stay Period, and except as permitted by subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the Applicant with respect to any claim against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicant 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 Applicant, if one is filed, is sanctioned by this Court or is refused by the creditors of the Applicant or this Court.

DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE

- THIS COURT ORDERS that the Applicant shall indemnify its directors and officers against obligations and liabilities that they may incur as directors or officers of the Applicant after the commencement of the within proceedings, except to the extent that, with respect to any officer or director, the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct.
- 23. THIS COURT ORDERS that the directors and officers of the Applicant 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 \$150,000, as security for the indemnity provided in paragraph 22 of this Order. The Directors' Charge shall have the priority set out in paragraphs 37 and 40 herein.
- 24. THIS COURT ORDERS that, 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 Applicant's 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. THIS COURT ORDERS that FTI Consulting Canada Inc. is hereby appointed pursuant to the CCAA as the Monitor, an officer of this Court, to monitor the business and financial affairs of the Applicant with the powers and obligations set out in the CCAA or set forth herein and that the Applicant and its shareholders, officers, directors, and Assistants shall advise the Monitor of all material steps taken by the Applicant 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. THIS COURT ORDERS that the Monitor, in addition to its prescribed rights and obligations under the CCAA, is hereby directed and empowered to:

- (a) monitor the Applicant's receipts and disbursements:
- (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;
- (c) advise the Applicant in its preparation of the Applicant's cash flow statements:
- (d) advise the Applicant on any amendments to the Plan:
- (e) assist the Applicant, to the extent required by the Applicant, with the holding and administering of creditors' meetings for voting on the Plan;
- (f) 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 Applicant, to the extent that is necessary to adequately assess the Applicant's business and financial affairs or to perform its duties arising under this Order;
- (g) assist the Solicitation/Election Agent to obtain proxies and/or voting information and subscription election forms from registered and beneficial holders of the Notes in respect of the Plan and any amendments thereto;
- (h) assist the Applicant, to the extent required by the Applicant, with its restructuring activities:
- (i) assist the Applicant, to the extent required by the Applicant, with any matters relating to any foreign proceedings commenced in relation to the Applicant, including retaining independent legal counsel, agents, experts, accountants or such other persons as the Monitor deems necessary or advisable respecting the exercise of this power;
- creditors, independent of the Applicant and, to the extent that any written reports with respect to these proceedings are delivered by the Monitor (or its advisors) to the Ad Hoc Committee (or its advisors), copies of those written reports shall be delivered by the Monitor (or its advisors) as soon as

- reasonably practicable following delivery to the Ad Hoc Committee:
- (k) 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; and
- (i) perform such other duties as are required by this Order or by this Court from time to time.
- 27. THIS COURT ORDERS that 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, be deemed to have taken or maintained possession or control of the Business or Property, or any part thereof.
- THIS COURT ORDERS that nothing herein contained shall require the Monitor to 28. occupy or to take control, care, charge, possession or management (separately and/or collectively, "Possession") of any of the Property (or any Subsidiary Property) that might be environmentally contaminated, might be a pollutant or a contaminant, 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 of waste or other contamination including, without limitation, the Canadian Environmental Protection Act, the Ontario Environmental Protection Act, the Ontario Water Resources Act, or the Ontario Occupational Health and Safety Act and regulations thereunder (the "Environmental Legislation"), provided however that nothing herein shall exempt the Monitor from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Monitor shall not, as a result of this Order or anything done in pursuance of the Monitor's duties and powers under this Order, be deemed to be in Possession of any of the Property (or any Subsidiary Property) within the meaning of any Environmental Legislation, unless it is actually in possession.
- 29. THIS COURT ORDERS that the Monitor shall provide any creditor of the Applicant with information provided by the Applicant 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 Applicant 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 Applicant may agree.

- 30. THIS COURT ORDERS that, in addition to the rights and protections afforded the Monitor under the CCAA or as an officer of this Court, 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.
- 31 THIS COURT ORDERS that the Monitor, domestic and foreign counsel to the Monitor, domestic and foreign counsel to the Applicant, counsel to the Special Committee (as defined in the Petroff Affidavit) domestic and foreign counsel to the Ad Hoc Committee and counsel to Global Resource Fund shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges, whether incurred prior to or after the date of this Order, by the Applicant as part of the costs of these proceedings; and (ii) the Financial Advisors (as defined in the Petroff Affidavit) shall be paid their reasonable fees and disbursements, in each case in accordance with the terms of the FA Engagement Letters (as defined in the Petroff Affidavit). whether incurred prior to or after the date of this Order. The Applicant is hereby authorized and directed to pay the accounts of the Monitor, domestic and foreign counsel for the Monitor, domestic and foreign counsel for the Applicant, domestic and foreign counsel for the Ad Hoc Committee and counsel to the Special Committee weekly, or on such basis as otherwise agreed by the Applicant and the applicable payee and, in addition, the Applicant is hereby authorized to pay to the Monitor and counsel for the Monitor retainers in the amounts of \$75,000 and \$40,000, respectively, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.
- 32. THIS COURT ORDERS that the Monitor and its legal counsel shall pass their accounts from time to time, and for this purpose the accounts of the Monitor and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.
- 33. THIS COURT ORDERS that the Monitor, domestic and foreign counsel to the Monitor, the Applicant's domestic and foreign counsel, counsel to the Special Committee, domestic and foreign counsel to the Ad Hoc Committee and the Financial Advisors shall be entitled to the benefit of and are hereby granted a charge (the "Administration Charge") on the Property, which

charge shall not exceed an aggregate amount of \$5,000,000, as security for their professional fees and disbursements incurred at their standard rates and charges, and in the case of the Financial Advisors, professional fees and disbursements incurred pursuant to the terms of the FA Engagement Letters, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall consist of two separate charges (the Primary Administration Charge and the Subordinate Administration Charge (each as defined below)) with the priorities set out in paragraphs 37 and 40 hereof.

APPROVAL OF FINANCIAL ADVISORS' ENGAGEMENT

- 34. THIS COURT ORDERS that the Applicant is authorized to continue the engagement of the Financial Advisors on the terms and conditions set out in the FA Engagement Letters.
- 35. THIS COURT ORDERS that the FA Engagement Letters be and are hereby ratified and confirmed and the Applicant is authorized to perform its obligations thereunder.
- 36. THIS COURT ORDERS that any claims of the Financial Advisors under the FA Engagement Letters shall be treated as unaffected in any Plan.

VALIDITY AND PRIORITY OF CHARGES CREATED BY THIS ORDER

37. THIS COURT ORDERS that the priorities of the Directors' Charge, the Primary Administration Charge, the Renvest Security (as defined below) and the Subordinated Administration Charge, as among them, shall be as follows:

First – Administration Charge (to the maximum amount of \$500,000) (the "Primary Administration Charge");

Second - Directors' Charge (to the maximum amount of \$150,000);

Third - Renvest Security: and

Fourth — the Administration Charge (to a maximum of \$4,500,000) (the "Subordinated Administration Charge").

38. THIS COURT ORDERS that notwithstanding anything to the contrary herein, each of the Financial Advisors shall only be entitled to the benefit of the Primary Administration Charge with

respect to their respective monthly work fees as set out in the terms and conditions of their respective FA Engagement Letters.

- 39. THIS COURT ORDERS that the filing, registration or perfection of the Directors' Charge, or the Administration Charge (collectively, the "Charges") shall not be required, and that 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.
- 40. THIS COURT ORDERS that each of the Directors' Charge and the Administration Charge (all as constituted and defined herein) shall constitute a charge on the Property and, except as provided in Paragraph 37, with respect to the Subordinated Administration Charge, 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, with the exception of any Encumbrances ranking in priority to the security granted by the Applicant to secure the obligations under the Renvest Facility prior to the date hereof (the "Renvest Security").
- 41. THIS COURT ORDERS that except as otherwise expressly provided for herein, or as may be approved by this Court, the Applicant shall not grant any Encumbrances over any Property that rank in priority to, or *pari passu* with, any of the Directors' Charge, the Administration Charge, or the Renvest Security unless the Applicant also obtains the prior written consent of the Monitor, and the beneficiaries of the Directors' Charge and the Administration Charge, and (if such Encumbrances rank in priority to, or *pari passu* with, the Renvest Security) Global Resource Fund, or further Order of this Court.
- 42. THIS COURT ORDERS that the Directors' Charge and the Administration Charge 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") thereunder shall not otherwise be limited or impaired in any way by (a) the pendency of these proceedings and the declarations of insolvency made herein; (b) any application(s) for bankruptcy order(s) issued pursuant to 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 Applicant, and notwithstanding any provision to the contrary in any Agreement:

- the creation of the Charges shall not create or be deemed to constitute a breach by the Applicant of any Agreement to which it is a party;
- (b) 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
- (c) the payments made by the Applicant 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.
- 43. THIS COURT ORDERS that any Charge created by this Order over leases of real property in Canada shall only be a Charge in the Applicant's interest in such real property leases.

SERVICE AND NOTICE

- 44. THIS COURT ORDERS that the Monitor shall (i) as soon as practicable after the granting of this Order, publish in the Globe and Mail (National Edition) and the Wall Street Journal a notice containing the information prescribed under the CCAA, (ii) within five 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 Applicant of more than \$1000, 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. The list included in subparagraph (C) above shall not include the names, addresses or estimated amounts of the claims of those creditors who are individuals or any personal information in respect of an individual.
- 45. THIS COURT ORDERS that the Applicant and the Monitor 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 or electronic transmission to the Applicant's creditors or other interested parties at their respective addresses as last shown on the records of the Applicant and that any such service or notice by courier, personal delivery or electronic transmission 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.

46. THIS COURT ORDERS that the Applicant, the Monitor, the Ad Hoc Committee, Global Resource Fund and any party who has filed a Notice of Appearance may serve any court materials in these proceedings by e-mailing a PDF or other electronic copy of such materials to counsels' email addresses as recorded on the Service List from time to time, and the Monitor may post a copy of any or all such materials on its website at:

http://cfcanada.fticonsulting.com/jaguar.

47. THIS COURT ORDERS that all written reports delivered by the Applicant (or its advisors) to the Ad Hoc Committee (or its advisors) with respect to these proceedings shall also be delivered by the Applicant (or its advisors) to Global Resource Fund (or its advisors) as soon as reasonably practicable following delivery to the Ad Hoc Committee.

SEALING OF CONFIDENTIAL EXHIBITS

48. THIS COURT ORDERS that Confidential Exhibits "A" and "B" be and are hereby sealed pending further Order of the Court and shall not form part of the public record.

GENERAL

- 49. THIS COURT ORDERS that the Applicant 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.
- 50. THIS COURT ORDERS that nothing in this Order shall prevent the Monitor from acting as an interim receiver, a receiver and manager, or a trustee in bankruptcy of the Applicant, the Business or the Property.
- 51. THIS COURT HEREBY REQUESTS the aid and recognition of any court, tribunal,

regulatory or administrative body having jurisdiction in Canada, the United States, Brazil or elsewhere to give effect to this Order and to assist the Applicant, 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 Applicant 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 Applicant and the Monitor and their respective agents in carrying out the terms of this Order.

- 52. THIS COURT ORDERS that each of the Applicant 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 proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.
- 53. THIS COURT ORDERS that any interested party (including the Applicant and the Monitor) may apply to this Court to vary or amend this Order on not less than seven (7) days notice to the Applicant, the Monitor, Global Resource Fund, the Ad Hoc Committee and 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.
- 54. THIS COURT ORDERS that this Order and all of its provisions are effective as of 12:01 a.m. Eastern Standard/Daylight Time on the date of this Order.

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DEC 23 2013



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 JAGUAR MINING INC.

(Applicant)

Court File No:

[V-13-10383-00CL

SUPERIOR COURT OF JUSTICE COMMERCIAL LIST ONTARIO

Proceeding commenced at Toronto

INITIAL ORDER

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TAB 5

2019 ANNREVINSOLV 21

Annual Review of Insolvency Law Editor: Janis P. Sarra

21 — To Canwest and Beyond: A Look at Priority Charges Securing Professional Fees

To Canwest and Beyond: A Look at Priority Charges Securing Professional Fees

Katie Mak and Claire Wheldon

I. — INTRODUCTION

Those providing services to insolvent companies are acutely aware of the importance of being paid in a timely manner for the work performed. In proceedings under the Companies' Creditors Arrangement Act (CCAA), ensuring payment for services rendered is at the forefront of every engagement. Payment may be assured by having it made up front, retainers, cash flow statements incorporating payment through court-approved interim financing, or the provision of security. Under the CCAA, courts have the statutory power to grant super priority charges under section 11.52, securing the fees and expenses of the monitor and financial, legal and other experts involved in the restructuring.

In *Re Timminco Ltd*, the Ontario Superior Court of Justice noted that the objectives of the *CCAA* would be frustrated if the Court was unable to grant super priority and protection to professionals to secure their fees and expenses, and that it is not reasonable to expect that professionals would take the risk of not being paid for their services. ² This was reiterated in *Re US Steel*, where the Ontario Superior Court of Justice agreed with the necessity of providing the security as a precondition to the success of any possible restructuring. ³

It is customary for the monitor, counsel to the monitor and counsel to the petitioner to have their fees and expenses secured by a first-ranking administration charge over all of the assets and undertaking of the debtor companies. These three professionals (hereinafter referred to as the "usual three") are included in the form of model initial orders for those provinces which have such a prescribed form. ⁴

The authors observed that there is a number of circumstances where a broad range of parties, beyond the usual three, are granted charges and were interested in understanding whether there were any patterns or trends that have developed in the jurisprudence and in practice. The authors' initial discussions with insolvency practitioners on this topic raised questions as to whether the priority charges sought were necessary or appropriate in all circumstances.

This article begins by outlining the various types of professionals, other than the usual three, who have benefited from charges under section 11.52 of the CCAA. This article then reviews the courts' considerations when granting priority charges securing professional fees prior to and after the enactment of section 11.52, including a discussion on the application of the factors that emerged from Canwest Publishing. ⁵

The second part of this article considers circumstances under which priority charges have been granted and discusses whether there have been any observable trends or concepts that have emerged when it comes to the considerations of parties and the courts. As the vast majority of orders granted in *CCAA* proceedings are not accompanied by corresponding reported decisions of the court, observations were also drawn from materials filed in *CCAA* proceedings commenced between 2012 to 2018, to the extent such materials were available for review by the authors, and discussions with industry professionals.

Finally, this article concludes with a discussion of additional considerations which the authors hope will assist both practitioners and courts when considering whether a priority charge is necessary and appropriate in the circumstances.

II. — BENEFICIARIES OF PRIORITY CHARGES

There are approximately 40 reported decisions that have cited section 11.52 of the CCAA, which are listed in Appendix A. Below are examples from the case law of the different parties that have received priority charges securing their fees and expenses pursuant to section 11.52 of the CCAA: ⁶

- monitors;
- counsel to the monitor;
- · counsel to the petitioners;
- financial advisors to the petitioners and counsel to the financial advisors;
- investment bankers of the petitioners; 8
- chief restructuring officers ("CRO") and their counsel;
- counsel to interim lenders ("DIP Lender"); 10
- financial advisors to DIP Lenders; 11
- representative counsel to investors; ¹²
- counsel to ad hoc committees of noteholders; ¹³
- advisors to groups of noteholders: 14
- counsel to the manager of group of secured noteholders; ¹⁵
- representative counsel to employees: ¹⁶
- independent counsel to the board of directors or the special committee of the board of directors; 17
- financial advisor to the board of directors; 18
- counsel to directors; ¹⁹ and
- forensic accountant. 20

It is not unusual that a *CCAA* proceeding will have a single charge or multiple charges that secure the fees and expenses for a large number of the professionals listed above. For example, in *Re Cinram*, the petitioners obtained a \$3.5 million administration charge which secured the fees of twelve professionals, including the monitor and its counsel, the petitioners' Canadian and US counsel, the petitioners' investment banker, the Canadian and US counsel to the agent to the DIP Lender, the DIP Lender, the administrative agent and the lenders under the credit agreements, the financial advisor to the DIP Lender, and the lenders under the credit agreements. ²¹ Another example can be seen in the *Pacific Exploration* proceedings, where the fees of approximately 20 professionals were secured, including those of the monitor and its counsel, legal advisors to the company in Canada, the

US and Columbia, the financial advisors to the company in various jurisdictions, and the legal and financial advisors to: the independent committee of the board of directors, the ad-hoc committee of noteholders, each of the administration agents under the banking credit facilities, and the plan sponsor of funds for a recapitalization. ²² The authors are not aware of there being any opposition to the charges sought in *Re Cinram* and *Pacific Exploration*.

III. — SECTION 11.52 OF THE CCAA

1. - History

Section 11.52 of the *CCAA* came into force on 18 September 2009. Prior to its enactment, courts relied upon their inherent jurisdiction to grant priority charges and, although charges for professional advisors' fees were granted, from our review of the jurisprudence, they were less commonplace. While the courts have a wide scope to interpret the *CCAA* and apply its jurisdiction, it is a well-established principle that a *CCAA* court is not entitled to disregard the general statutory scheme of priorities without good reason. Accordingly, any decision to alter the existing pre-filing priorities by creating super-priority status should not be taken lightly. ²³ Appendix B provides a summary of the decisions where charges were granted prior to the enactment of section 11.52.

The term "monitor" appears to have originated in *Re Northland Properties*, ²⁴ and was subsequently given statutory recognition by Parliament in a 1997 amendment to the *CCAA*. ²⁵ The 1997 amendments to the *CCAA* did not provide any specific direction as to how the monitor would be compensated for its services.

The first instance of a charge being granted over a debtor's assets in favour of the monitor occurred in 1989, in *Icor Oil & Gas Co.* In *Icor Oil & Gas Co.* the Alberta Court of Queen's Bench confirmed that the proposed monitor's account would form a charge against the assets, similar to that for a court-appointed receivership, in the event the debtor company was unable to pay monthly accounts out of cash flow. ²⁷

In a number of cases that followed *Icor Oil & Gas Co*, the courts began to recognize that granting monitors priority for their fees and expenses was an appropriate exercise of the courts' inherent jurisdiction in the circumstances, ²⁸ particularly because the monitor's efforts are for the benefit of all creditors and practicality demands that they be paid first to ensure the future health of the company. ²⁹ By requiring the appointment of a monitor, Parliament made it necessary for the court to provide for the monitor's costs. ³⁰

In Re Starcom International Optics Corp, the British Columbia Supreme Court confirmed that, while priority for the monitor was appropriate, there were no materials before the Court in regard to the super priority for the fees of other professional advisors that indicated the priority was required to enable operations to continue and that the cash flow provided was sufficient for payments to other professionals. ³¹ However, in subsequent cases the courts did not make such a distinction and granted administration charges in favour of the usual three and the professional advisors of company ³² or other advisors. ³³

With respect to the affect the granting of a super priority charge has on the position of the existing secured creditors, the British Columbia Court of Appeal in *Re United Used Auto* noted that while a super priority charge could erode the security of creditors, requiring the consent of creditors before ordering such a charge would effectively give creditors a veto over effective *CCAA* relief. ³⁴ In contrast, the Superior Court of Québec in *Re MEI Computer Technology Group* made it clear that the lack of opposition is not a good enough reason for the Court to be lenient in a situation where the criteria recognized in the jurisprudence for the granting of priority charges are not otherwise met. ³⁵

Section 11.52 of the CCAA provides that the court may make an order providing that the property of the debtor is subject to a priority charge over existing security to pay the expenses of professional advisors of any interested party. The provision provides courts with discretion to grant the charge in an amount that the court considers appropriate and requires that notice be given to secured creditors that are likely to be affected by the order.

Section 11.52 of the CCAA provides in full:

Court may order security or charge to cover certain costs

11.52 (1) On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate -- in respect of the fees and expenses of

- (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
- (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
- (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.

Priority

(2) The court may order that the security or charge rank in priority over the claim of any secured creditor of the company. 36

The beneficiaries of the priority charges listed in section II of this article serve as examples of the broad range of advisors that may fall under subsections 11.52(1)(a), (b) and (c). In the reported decisions where courts have considered the criteria set out in section 11.52 alone, the courts' commentary has largely been limited to whether or not the secured creditors had been given notice. ³⁷

Shortly following the enactment of section 11.52, the Superior Court of Québec in *Mecachrome* ³⁸ considered whether the administration charge should cover professionals other than the advisors of the monitor and the debtor company. The Court denied extending the administration charge to legal counsel to the lending syndicate and legal and financial counsel to the noteholder committee as these advisors did not establish that extending the administration charge to their counsel would benefit the restructuring. Further, there was no reason to believe that these advisors' participation in the process would be jeopardized without the granting of the priority charge. The Court noted that the objective of the administration charge is not to protect as many professionals as possible; rather, it is to facilitate the goal of arriving at the best outcome at the best price for creditors. ³⁹

Not long thereafter, Pepall J, as she then was, in the decision in *Canwest Publishing*, set out six specific additional factors for the Court to consider in its assessment of applications under section 11.52, which are discussed below. 40

IV. — THE CANWEST FACTORS

In Canwest Publishing, the companies and their related limited partnerships applied for and were granted protection under the CCAA. Included in the relief granted was a \$3 million administration charge to secure the fees of the monitor, its counsel, counsel to the companies and limited partnerships, the financial advisor and counsel to the committee of the board of directors, and the restructuring advisor of the entities and its counsel (the "Canwest administration charge"). The Ontario Superior Court also granted a \$10 million charge in favour of the financial advisor ranking behind the Canwest administration charge and the DIP lender's charge. 41

In considering section 11.52, Peppall J noted that section 11.52 does not contain any specific criteria for a court to consider in its assessment of whether or not to grant the priority professional charges and accordingly, provided the following six factors that might be considered:

- a. the size and complexity of the businesses being restructured;
- b. the proposed role of the beneficiaries of the charge;
- c. whether there is an unwarranted duplication of roles;
- d. whether the quantum of the proposed charge appears to be fair and reasonable;
- e. the position of the secured creditors likely to be affected by the charge; and
- f. the position of the monitor. 42

Pepall J noted that the above factors (the "Canwest factors") were "not an exhaustive list and no doubt other relevant factors will be developed in the jurisprudence." 43

Since the *Canwest Publishing* decision, the Canwest factors have often been considered in applications under section 11.52. Between 2009 to 2019, there were approximately 40 reported court decisions that have cited and considered section 11.52. Of the decisions which considered section 11.52, 12 cases expressly cited and considered the Canwest factors. Appendix A provides a list of the cases and notes those that considered section 11.52 and the Canwest factors.

Although there were over 200 CCAA proceedings between 2009 and 2018, the small number of reported decisions that expressly considered section 11.52 and the Canwest factors suggest that some decisions may be unreported.

Where section 11.52 was applied and the Canwest factors were not explicitly considered by the court, the court's commentary was often limited to a strict consideration of the provisions within section 11.52; namely, whether the secured creditors had been given notice. 44 More often than not, some but not all of the Canwest factors were specifically considered. We further found that there are a number of decisions that expressly noted that there was no opposition to the charge. 45

Pursuant to Canadian Imperial Bank, 46 the court is not required to expressly consider each Canwest factor raised in opposition to a proposed order, as the order is a discretionary decision requiring the balancing of competing stakeholders' interests.

Despite Justice Pepall's statement that the Canwest factors were not an exhaustive list, we have not identified any concrete additional factors that have emerged since *Canwest Publishing* was decided in 2010.

The following sections of this article examine how each of the Canwest factors have been developed through the case law.

1. — "The Size and Complexity of the Businesses Being Restructured"

There is no criteria in the jurisprudence that specify how a court should consider whether a business is sufficiently large or complex enough to satisfy the first of the Canwest factors. The following are examples in which the courts have found this factor to have been satisfied:

- the business had a large corporate structure involving a number of companies, a limited partnership entity and subsidiaries, with operations across Canada in different sectors, employing approximately 5,300 employees, and a high value of assets in the hundreds of millions of dollars, with liabilities in the billions; ⁴⁷
- the business spanned several jurisdictions across different continents and countries; 48
- there were significant regulatory, environmental and employment issues present, and any transaction in relation to the assets and operations would be anything but straightforward;

the business operations were far reaching and technical in nature.

We have not identified any reported decisions where a court concluded that a business was not sufficiently large and complex enough to satisfy this first Canwest factor.

2. — "The Proposed Role of the Beneficiaries of the Charge"

The case law suggests that the consideration of this factor is whether the beneficiaries seeking the charge are "critical" to the restructuring process. ⁵¹

The case law also suggests that consideration is given to whether the proposed beneficiaries were involved in the restructuring proceedings pre-CCAA filing. In Camvest Publishing, the Ontario Superior Court of Justice provided that "[e]ach of the professionals whose fees are to be secured has played a critical role in the [entities'] restructuring activities to date and will continue to be integral to the solicitation and restructuring process." ⁵² In Re Cinram, the Petitioners argued that the beneficiaries of the administration charge had each played a critical role in the restructuring efforts to date and would continue to be pivotal in the pursuit of a successful restructuring going forward, including the investment banker's involvement in the completion of the proposed transaction, which had been entered into pre-filing. ⁵³

The rationale of retaining a financial advisor who had been involved pre-filing was discussed in *Canadian Imperial Bank*, ⁵⁴ where the *CCAA* judge held that:

- the sales process that was already underway was the best option to complete a sales process in a tight timeframe, and the DIP Lender wasn't going to fund if the financial advisor was not approved;
- the financial advisor was a leader in the field and the applicant would have been aware that its fees would be commensurate with its position in the industry; and
- as the safe process was already underway, it was too late to terminate the financial advisor and engage another financial advisor with no certainty of cost savings.

Further, the Ontario Superior Court of Justice in *Re Performance Sports* noted that while the language in section 11.52 does not expressly state whether an administration charge can or cannot cover past outstanding fees or disbursements, the language would appear to imply that it is only to cover current fees and disbursement. ⁵⁵ The Court further held that a charge under section 11.52 should only cover work done by the professionals in connection with a *CCAA* proceeding. Specifically, the Court held that a section 11.52 charge in favour of legal counsel does not operate to protect counsel engaged by the debtor company in other jurisdictions, even for foreign insolvency proceedings in the US, or any class action or other suit brought against any of the petitioners. ⁵⁶

In *Re Urbancorp Toronto Management Inc*, the Ontario Superior Court declined to grant a charge in favour of the representative counsel to a group who had purchased pre-sale units in the debtors' real estate development. A large number of the purchasers wanted to participate in the negotiations with prospective buyers of the raw land to negotiate an arrangement that would result in the purchasers obtaining some consideration for the equity. In declining the charge, the Court noted that consideration should be given as to whether the beneficiary's involvement is contrary to the interest of the insolvent estate. In the circumstances, the purchasers' position would likely reduce the amount a buyer would be willing to bid for the raw land, to the detriment of the estate as a whole. ⁵⁷

3. — "Whether There Is an Unwarranted Duplication of Roles"

There are only a few circumstances where courts have expressly considered whether the appointment of the respective beneficiary is warranted, or would not result in any unwarranted duplication. Some examples are where:

- the appointment of the CRO was found to be warranted in light of the withdrawal of management shortly prior to the commencement of the proceedings; 58
- a forensic accountant was engaged to assist with an independent review of claims, which was necessary, as the monitor was not in the position to complete the work; ⁵⁹
- the sale process was structured such that it recognized the respective roles of the monitor, financial and CRO involved but also allowed for a coordinated effort between the three parties; ⁶⁰ and
- the two financial advisors were engaged with different mandates, where one was to seek a refinancing and the other
 to seek a purchaser for the assets, and this resulted in a coordination of efforts, rather than a duplication of efforts.

4. — "Whether the Quantum of the Proposed Charge Appears to be Fair and Reasonable"

To ensure that the remedial purpose of the CCAA is met, the quantum of the charge must be clearly defined to ensure that secured creditors know the effect the CCAA process will have on their security. ⁶² While a charge is not meant to be a de facto cap on payment, although it could be depending on the terms of the relevant order, it does operate as a cap on the amounts given priority. ⁶³

Courts do not generally engage in their own independent analysis on the appropriate *quantum* of a proposed charge. Rather, where this factor is considered, the discussion is typically limited to reference to the monitor's analysis and opinion on the assessment of the *quantum* being fair and reasonable in the circumstances. ⁶⁴

5. — "The Position of the Secured Creditors Likely to be Affected By the Charge"

The granting of an initial order under the CCAA, and the associated super priority charges, is highly discretionary in nature, requiring the court to consider and balance the competing interests of the various economic stakeholders, particularly the interests of secured creditors who would be most directly impacted by the priority charges. In some instances, the granting of the priority charge can be the difference between a secured creditor being fully repaid or suffering a shortfall.

Section 11.52 expressly requires that notice be given to the secured parties. The courts confirmed very early in their application of section 11.52 that it is only the position of the secured creditors, and not that of other stakeholders, that will be considered. 65 The courts frequently referenced the secured creditors' support of the priority charge as being a factor in their decision to approve one. 66 Consequently, courts have, on a number of occasions, declined to provide a super priority charge when notice has not been provided to the secured creditors 67 or, alternatively, granted a charge priming the secured creditor that had received notice but not those that had not received notice. 68 In these instances, courts indicated that they would reconsider the issue of priority at a future date following the requisite notice having been provided.

There are not many reported decisions where secured creditors have challenged the granting of a super priority charge ranking ahead of them. In a number of instances, the secured creditors have opposed the process generally, arguing that they would be better served pursuing recovery of their loans via their own processes. ⁶⁹

The following are examples of the courts' considerations where the secured creditors have opposed a super priority charge:

A secured creditor argued that the charge priming it would result in prejudice and risk to its prospect of realization.
 This argument was rejected by the Ontario Superior Court of Justice, which noted that the secured creditor would be minimally affected as the appointment of a receiver would come with its own set of significant costs.

- In declining to grant a super priority charge in favour of representative counsel to investors, which had been opposed by the DIP Lender and other secured creditors, the Alberta Court of Queen's Bench considered the risks to the investors and concluded that the investors would likely receive their costs even without the super priority charge. 71
- The Ontario Superior Court of Justice considered the practical circumstances facing the debtor entities when priority charges were opposed by a pension plan, and held that the entities were clearly insolvent and did not have sufficient reserves to address the funding requirements of the pension plans and the role of the advisors was critical to the ability of the debtor entities to restructure. ⁷²
- Where a pension plan opposed the appointment of financial advisors on the basis that their involvement would be expensive, the British Columbia Supreme Court approved the priority charges for the financial advisors as the pension plan did not suggest any alternate way of proceeding with the sales and investment solicitation process (the "SISP") and the operations generally, and acknowledged that a further delay was not warranted to canvas other options.

6. — "The Position of the Monitor"

The monitor's support of an application for a super priority charge is very important. There are no reported decisions where an application was successful without the support of the monitor. The authors are, however, aware that there are instances where charges being sought are challenged by the monitor prior to a hearing, but are ultimately resolved out of court prior to the hearing.

V. — OBSERVATIONS AND ANALYSIS

While it is not unreasonable for those providing services to an insolvent company to seek assurances that they will be paid for their work, the case law and publicly filed materials indicate that professionals often take the position that they are unlikely to participate absent a charge securing their fees and disbursements. ⁷⁴ It is also common for professionals to include in their engagement agreement the condition that a court ordered charge be obtained. ⁷⁵

This article now considers the circumstances under which priority charges have been granted, to determine whether there are any trends or concepts that have emerged beyond the Canwest factors.

The vast majority of orders granted by the courts within CCAA proceedings are not accompanied by corresponding reported decisions. Consequently, the foregoing review of the decisions in relation to section 11.52 represents only a portion of the circumstances where professionals are granted charges. Accordingly, in order to increase the scope of circumstances, the authors reviewed CCAA proceedings commenced between 2012 to 2018, which provided a six-year period of proceedings across the country of various sizes and complexity.

Between 2012 to 2018, there were over 200 *CCAA* proceedings commenced across Canada. ⁷⁶ The authors reviewed all the accessible materials filed in proceedings, which amounted to approximately 80% of the proceedings in this time period. ⁷⁷ In the course of the review, the following was observed:

- · in every proceeding, members of the usual three were granted a priority charge; and
- there were approximately 70 instances, accounting for approximately 40% of the proceedings reviewed, where professionals other than the usual three were granted priority charges pursuant to section 11.52.

The distribution of the files amongst the provinces was as follows:

- 46% Ontario;
- 24% Alberta;

- 14% British Columbia;
- 13% Québec; and
- 1% each in Manitoba and Saskatchewan.

As insolvency practitioners will appreciate, reported decisions and publicly filed materials tell only part of the story: insolvency proceedings are fast paced and time sensitive, and the reality is that much happens outside the courtroom. Accordingly, the authors also spoke to industry professionals from across the country to obtain further insight, commentary and opinions with respect to the observations. ⁷⁸

The review and discussions resulted in the observations set out and discussed below.

1. — The Usual Three Are Always Granted a Charge

In the period reviewed, the authors did not identify any proceedings where a member of the usual three was denied a charge when sought. It is interesting to note that, as discussed earlier in this article, prior to the enactment of section 11.52, even the granting of a charge in favour of the monitor was viewed by the courts as extraordinary relief.

Prior to and following the enactment of section 11.52, courts have particularly acknowledged the importance of granting the monitor the protection of the charge. In *Re Canada North Group Inc*, the Alberta Court of Queen's Bench acknowledged that the monitor, as an officer of the Court, does not have the option to resign even if its fees are unpaid. 79

Inherent in the monitor's role is independence, free of any influence which impairs, or could be perceived to impair, its professional judgment or objectivity. ⁸⁰ It is difficult for the monitor to retain the perception of independence the moment it becomes an unsecured creditor with an economic stake in the outcome of the proceedings.

As one practitioner noted to the authors, the success of a restructuring should not be exposed to the risk of the usual three ceasing work because their fees are not paid on time. For example, there may be circumstances that result in a delay in the payment of professional fees, such as where cash flow is inconsistent as a result of the particular industry the company operates in or where the sale of assets is required to generate proceeds. In such circumstances, there may be no doubt that the restructuring process should move forward for the benefit of stakeholders, which accordingly warrants the granting of a priority charge.

2. - Multiple Parties Frequently Share in the Administration Charge

Frequently, multiple professionals share in the administration charge with the usual three. ⁸¹ While it is obvious that a first ranking, priority charge is the most desirable position to be in, it does raise a question of whether it is appropriate to have numerous professionals lumped into one charge with a large, singular cap on *quantum*, particularly when one considers the Superior Court of Québec's comments in *Mecachrome* that the objective of the administration charge is not to protect as many professionals as possible. ⁸²

Some practitioners are of the view that it is more appropriate to have separate charges and cap amounts for each of the professionals involved. Alternatively, a single charge could be shared by multiple professionals, where each professional would have a cap on their *quantum*, either by agreement or order of the court. Practitioners have suggested that this would provide clarity and oversight over the fees charged. The authors have not come across any jurisprudence that reflects such a structure, however we understand on some occasions parties agree amongst themselves on an allocation.

Although the concept of shared charges is evidently commonplace, the authors are of the view that practitioners should endeavour to come to an agreement as to the *quantum* and allocation and provide each professional with their own distinct charge and amount. However, we recognize that the time constraints, urgency and relationships involved in these types of proceedings may make this concept difficult to achieve in practice.

3. — Professional Fees may be Secured by a Charge

The charges obtained by most professionals secure amounts that will be incurred in the regular provision of their ongoing services ("professional fees"). There are few examples of where professionals involved did not receive charges securing their professional fees. 83

The monitor's assessment of the appropriate quantum of a charge securing professional fees is often the result of the monitor's own analysis, the position of the party benefiting from the charge and the input of the other stakeholders. While variances in quantum of the charge are to be expected due to the differing complexity and nature of a specific proceeding, the research revealed that the basis for the quantum calculation is inconsistent. For example, from the authors' review of cash flow forecasts provided to the court, in some instances the quantum sought appears to represent the equivalent of one to two weeks' worth of professional fees. In other proceedings, the quantum sought appears to cover closer to three months' worth of professional fees.

To provide context on what was influencing these differences, the authors reviewed the details of the engagement letters for a number of the professionals involved, where available, and have made the following observations:

- Typically, legal counsel, including counsel to stakeholders, ⁸⁴ bondholders, ⁸⁵ noteholder committees, ⁸⁶ directors, ⁸⁷ and secured lenders, ⁸⁸ incur costs based on their regular rates at the hours worked.
- Professionals such as the CRO might be on a fixed retainer, with some requiring payment to be made in advance, 89 on the first of the month, 90 weekly, 91 the fifth of the month in advance, 92 or on a time and materials basis. 93
- Financial advisors and sales agents might be entitled to both professional fees and success fees. In these instances, the courts' treatment of these fee structures has differed. There are a number of instances in which the order provides that the fees and disbursements payable to the party are secured by the single charge, ⁹⁴ regardless of whether the fees are professional fees or success fees. In other instances, the charge specifically limits coverage to professional fees only, ⁹⁵ while in some cases, success fees are secured by a separate lower ranking charge. ⁹⁶ The authors' observations with respect to success fees are discussed in further detail in the next section of this article.
- Professionals may defer payment of their professional fees until a transaction has completed, either by agreement or necessity due to cash flow constraints. There are examples of this approach taken by a CRO who agreed that both his professional fees and success fee would be paid out of a transaction, ⁹⁷ and a financial advisor who agreed that, in light of the debtor's financial circumstances and limited access to funding, it would not to seek payment of its professional fees until the debtor had completed a transaction. ⁹⁸

The payment structure affects a professional's credit risk. For example, the credit risk taken by a CRO who has negotiated professional fees payable in advance is significantly less than a CRO who has agreed to be paid after services have been rendered and invoiced. The CRO in the former situation will have no credit risk while a CRO in the latter situation will have credit risk for his unpaid work in progress and accounts receivable. Arguably, a charge would be unnecessary for a professional who assumes no credit risk by arranging for his or her professional fees to be paid in advance.

As one can appreciate, assessing cash flows and engagement letters may not reveal the full extent of the circumstances leading to a charge or its *quantum*. Through discussions with industry professionals, the authors have identified the following additional considerations:

- whether the business is operating or non-operating;
- whether the debtor companies are in a position to provide a reasonable retainer;
- whether cash flow is steady or sporadic due to the nature of the business;

- · whether the debtor companies have access to interim financing; and
- · whether the professionals have other means of getting paid.

Although these considerations inform practitioners' analysis of payment structure, there is little, if any, specific commentary included in publicly available materials that expressly reference the risk profile created by the specific terms of an engagement or of the source of payment.

Below, the article discusses examples of different circumstances and considerations that have arisen in CCAA proceedings with respect to charges securing professional fees.

i. - Re Urbancorp

The decision in *Re Urbancorp* is an example of a situation where the court considered the ability to pay the proposed beneficiary absent a charge. ⁹⁹ In *Re Urbancorp*, the group of debtor entities were engaged in the business of real estate development. In the *CCAA* proceedings, a group of purchasers sought an order that their representative counsel be granted a charge securing their fees and expenses against the properties they had purchased residential units in. The monitor opposed the appointment of representative counsel and the charge as it did not believe that the money would be well spent seeing that it was likely that all the purchasers would get their deposits back. ¹⁰⁰ Although the Ontario Superior Court of Justice approved the appointment of the representative counsel, it declined to grant the charge because it was not satisfied that the charge was necessary for the purchasers' effective participation in the proceedings. There was no evidence of any financial inability of the purchaser to jointly engage the counsel to represent them, particularly as the purchasers of other developments were able to retain their own counsel without the necessity of a charge. ¹⁰¹

ii. — Re Steels Industrial Products

In Re Steels Industrial Products, a group of creditors retained a forensic accountant to perform an independent review of a disputed intercompany debt and sought a charge securing the forensic accountant's fees and expenses. In approving the charge, the British Columbia Supreme Court considered whether it would be appropriate for the estate as a whole to bear the costs payable to the professional. The Court concluded that it was fair, as the costs of the investigation would normally be performed by the monitor which would be borne by the estate. In the circumstances, it would be unfair for an individual party to bear the costs that would be for the benefit of the estate as a whole. ¹⁰²

iii. Tepper Holdings Inc

In Re Tepper Holdings Inc, the New Brunswick Court of Queen's Bench, Trial Division set out a number of factors to consider with respect to taxation of the petitioner's legal counsel's fees. In addition to the Canwest factors, the Court set out additional considerations including (a) the fund out of which the fees are to be paid, and (b) the company's ability to pay. ¹⁰³ Although this case was in the context of taxation of fees, the additional factors suggest that, when it comes to payment of the professionals, consideration should be given to whether there are alternative sources of payment and the effect payment would have on the proceedings. ¹⁰⁴

4. — Success Fees may be Secured by a Charge

In addition to professional fees, priority charges may also secure success fees. A success fee is an incentive payment payable to a professional upon meeting the milestone of its engagement. This typically involves successfully closing a sale or investment transaction, although there are instances where the payment of a success fee is structured with different milestones. ¹⁰⁵

From our review of the CCAI proceedings, we have observed financial advisors, 106 investment bankers 107 and CRO receive charges securing their success fees. However, this does not occur in every instance in which a success fee is payable to a professional. 109

Other professionals involved in CC.4.4 proceedings who are paid based on the completion of a transaction include real estate agents ¹¹⁰ and liquidators. ¹¹¹ In none of the proceedings reviewed did such professionals obtain a charge. The authors are aware that some monitors have been approached by real estate agents seeking a charge, but understand that these requests were not supported by the monitor and accordingly, no applications were made to court.

Some practitioners have raised the concern that there are circumstances where success fees are being secured by a charge when there is no real risk that the success fee will not be paid. Examples of situations where the risk is low or unsubstantiated include where:

- the contractual terms of the engagement agreement are clear that the success fee is to be paid out of the proceeds of a successful transaction ahead of any other priority charges;
- there is little concern over the value of the assets being sold and that there will be sufficient equity after payment of secured lenders to fund the payment of the success fee; or
- the approval and vesting order granted pursuant to section 36 of the CCAA clearly provides for the payment of the success fee.

Below, this article discusses some proceedings where success fees were sought by professionals and the issues that should be considered when determining whether a charge should be sought and supported.

i. - Cow Harbour Construction

The decision in Cow Harbour Construction is an example of a situation where a financial advisor had to rely on a charge for payment of its success fee when the restructuring went from a CCAA proceeding to a receivership proceeding. 112

In Cow Harbour Construction, the financial advisor's fees and disbursements were secured under an administration charge, which also secured the fees and disbursements of the usual three. The administration charge was capped at \$2 million. The financial advisor's engagement agreement provided for payment of both professional fees and success fees. After the CCAA turned into a receivership proceeding, the financial advisor applied to be paid its success fee which it argued was secured by the administration charge. The Alberta Court of Queen's Bench found that the financial advisor was entitled to its success fee based on contractual interpretation of the engagement agreement. On the question of whether the success fee was secured by the administration charge, the Court held that the ordinary meaning and broad and liberal interpretation of the words used in the initial order were clear, and that the financial advisor was entitled to have its fees and disbursements, including the success fee, secured by the administration charge.

In other instances, success fees can be secured by a separate charge in favour of the professional, typically subordinate to any administration charge, professional fees charges, directors and officers charges, and DIP Lender charges. When the charges are structured this way, the *quantum* of the success fee charge is often very large, as it reflects the maximum amount that could be paid as the success fee. In the *Cow Harbour Construction* situation, the financial advisor's success fee, which could have been up to \$1.65 million, was secured by the \$2 million administration charge. However, it seems that the financial advisor could have been exposed to financial risk in the event the other professionals also made a claim to the charge, potentially incurring aggregate fees over the \$2 million cap.

ii. — Re Sanjel

Re Sanjel is an example of a situation where the Alberta Court of Queen's Bench determined that the balance of a success fee over the cap amount of the charge was not a transaction cost payable to the secured lender.

In Re Sanjel, the initial order approved the engagement of the financial advisors and granted a single charge in the maximum amount of USD \$500,000 to secure all of the obligations under the engagement letter. ¹¹⁶ The charge was not large enough to secure the full amount of fees payable under the engagement letter, which ultimately included a success fee of \$2.5 million. Unfortunately, the sale did not generate sufficient proceeds to repay the debt owing to the senior secured creditor. The financial advisor argued that the order, which approved its engagement letter, should be interpreted as a direction to pay the entirety of its success fee pursuant to the court approved engagement letter, in priority to the amount owing to the senior secured lender. ¹¹⁷

The Alberta Court of Queen's Bench rejected the financial advisor's position and held that the language in the order approving the engagement letter did not constitute a direction to pay that would require payment of the success fee in priority to the claims of the secured creditor. The Court reiterated the necessity of clear language when altering general statutory priority schemes.

While initially the decision in *Re Sanjel* appears to support the need to always secure a success fee, many practitioners have observed that *Re Sanjel* contained a specific fact scenario and unique circumstances. The petitioners in *Re Sanjel* had entered into the engagement letter with the financial advisor pre-filing, and there was a question as to whether the financial advisor had done any work post-filing. ¹¹⁹ At the time of the approval of the engagement letter, there was opposition by the secured creditor against the *quantum* of any charge. ¹²⁰ Although the engagement letter was approved by the Court, the terms did not clearly specify that payment of the success fee would flow from the proceeds of a successful sales transaction. ¹²¹

iii. — Veris Gold

Veris Gold is an example of a situation where the payment of a success fee did not flow directly from the funds of a transaction and was payable regardless of success. In Veris Gold, ¹²² two financial advisors were retained simultaneously, one to run a refinancing process and the other a sales process. ¹²³ The first financial advisor shared in the administration charge, which was capped at \$250,000, with the usual three for its professional fees and success fee. The second financial advisor received a charge for its professional fees ranking pari pasu with the administration charge, and a subsequent ranking charge to secure its fees and expenses in addition to the professional fees. It is interesting to note that this order expressly provided that the charge would attach only to the proceeds of a transaction and only to the extent that the second financial advisor was entitled to the fee in connection with its engagement letter. ¹²⁴

The circumstances in *Veris Gold* were unique in that there were two financial advisors involved and the result of the SISP was uncertain. The monitor in *Veris Gold* acknowledged that the circumstances were unique to the situation mainly due to the negotiated agreement with the senior secured creditor, who required that the second financial advisor be retained. ¹²⁵ As a result, there was overlap where both financial advisors could be entitled to payment of success fees.

It is also interesting to note the engagement letter of the first financial advisor expressly provided that fees would be paid immediately out of the proceeds of a successful financing placement, ¹²⁶ suggesting that there was sufficient clarity in the engagement agreement to provide that the success fee would be paid out as a transactional costs in priority to any secured claims. On the other hand, the engagement letter of the second financial advisor did not provide for how payment of the success fee would be made. It did, however, provide that the "Alternative Transaction Fee" would be payable "promptly at the closing of the Alternative Transaction." ¹²⁷

iv. — Carillion Canada Inc

The circumstances in the Carillion Canada Inc proceedings suggest that, in the absence of a charge, it would be prudent for professionals to have their engagement approved by the court and to adequately characterize a success fee as a transaction cost. In the Carillion Canada Inc proceedings, the sale advisor found itself in a dispute over the calculation of the quantum

of its success fee pursuant to the terms of the engagement agreement. ¹²⁸ The engagement agreement had been entered into pre-CCAA filing and the sale advisor continued to provide its services post-CCAA filing. The engagement letter was not signed by the monitor nor approved by the Court. Further, the financial advisor had not sought a priority charge for its success fees. The monitor filed a motion to the Ontario Superior Court of Justice for directions as to the *quantum*. ¹²⁹ The matter was settled outside of Court and did not proceed to a hearing, consequently the specific circumstances that led to the settlement are unknown. This case also raises the question of timing and whether the sale advisor's entitlement to a success fee could have been dealt with earlier in the proceedings by either approving the engagement agreement or by seeking a priority charge.

v. - Ascent Industries Corp

The Ascent Industries proceedings are an example of how the prospect of payment changed as the restructuring progressed, thereby changing the professional's risk exposure. In Ascent Industries, the financial advisor did not obtain a charge securing its fees, which included a success fee. Upon completion of the transaction, the financial advisor took the position that its fee was due and payable from the proceeds of the transaction and issued an invoice to the debtor company. ¹³⁰

At the time of the closing of the transaction, there were sufficient proceeds from the sale to pay all known creditors, including the financial advisor, in full. However, following the closing, a significant claim arose which, if accepted, would result in unsecured creditors only receiving a partial payment of their claims. The financial advisor brought an application seeking a direction to pay its fees in full on the basis that it was a post-filing obligation. The British Columbia Supreme Court granted an order directing the payment of the fees. ¹³¹

vi. - Real Estate Agent Commissions

As seen in Ascent Industries and in Carillion Canada Inc, where there are no charges granted, issues with respect to priority of payment may arise where it is unclear whether a success fee is payable directly from the proceeds of sale as a transactional cost, or whether the success fee becomes an unsecured post-filing obligation.

It is interesting to note that the authors did not observe such disputes arising when the professional involved was a real estate agent. It appears that it is accepted practice that upon the closing of the sale of real property, the real estate broker's commission is paid out of the sale proceeds ahead of other secured claims. This is in line with the process in a sale outside of a *CCAA* proceeding, where the commission would be paid ahead of secured creditors, even in a foreclosure where the secured creditor may not be recovering the entirety of its secured claim.

However, the authors are aware that there are some instances where real estate agents may be entitled to commissions regardless of whether a sale generates proceeds, such as where a secured creditor credit bids for the property. It would appear that in those circumstances, a real estate agent may be at risk of funds not being available to pay its commission, although we are not aware of any proceedings where a real estate agent has been denied its commission.

5. — Relationships with Major Stakeholders Could Influence Whether or Not a Charge is Sought

The position taken by secured creditors, including DIP Lenders, may influence whether or not a charge is sought by other professionals. Parties providing professional services are often wary of the relationships with the debtor company and the secured parties. Insolvency practitioners have suggested that there is greater justification for seeking priority charges to secure professional fees where there is tension with the major secured parties. At the same time, it may also be more difficult to prime a secured creditor where the secured creditor opposes the charge and/or the proceedings. What is not always evident in publicly filed materials is that each proceeding involves unique relationships that should be taken into account. Publicly filed materials do not always reveal the often complicated relationships between the parties and their histories.

If the restructuring is not supported by the secured creditors, or supported reluctantly by them, it is typically because the secured creditors are concerned over asset values and that there may be insufficient funds to pay their secured debt at the end of the

proceedings. If this concern exists near the commencement of a SISP, the secured creditors may choose to oppose a charge that primes their security, with opposition predominantly taking place outside the courtroom.

Veris Gold, which is discussed above, is an example of where the senior secured creditor had significant influence over the engagement of a financial advisor and the charges sought. In Veris Gold there was no dispute at the hearing over the charges and priorities sought and it was acknowledged that the unique circumstance of having two financial advisors was due to the negotiated agreement with the senior secured creditor.

A secured creditor's assessment of its prospect of recovery may also change during the restructuring proceedings as asset values become evident as the SISP progresses.

6. — Prospect of Recovery to the Professional Could Influence Whether a Charge is Sought

Like secured creditors, professionals' decisions to seek charges are often informed by the prospect of recovery and by their risk assessment. Professionals are more inclined to ask for a charge where there is greater uncertainty over asset values or where there is greater risk that a process will be tipped into receivership or bankruptcy.

Sometimes these risks are not obvious from the outset. What may start off as a proceeding where it appears that everyone will be paid in full for both pre and post-filing amounts may change. For example, in the *Ascent Industries CCAA* proceedings, discussed above, the debtor companies had engaged an advisor to assist with a SISP pre-filing, which continued post-filing. There was no dispute over the amount due to the advisor, which took the position that the success fee is a post-filing obligation due and payable by the companies. The financial advisor noted that it did not seek a priority charge to protect its fees because all parties believed that there would be more than enough proceeds to pay the petitioners pre- *and* post-filing obligations. However, the question of payment to the advisor was called into question when a post-filing unsecured claim arose. 132

Recently, Québec's Court of Appeal overturned the Québec Superior Court's decision to give post-filing claims priority over secured creditors claims in *Gestion Éric Savard*. ¹³³ In *Gestion Éric Savard*, the monitor applied to the Québec Superior Court for directions on whether, upon the sale of certain assets of the debtor, the proceeds of sale would be distributed to post-filing unsecured creditors, whose claims arose after the initial order, ahead of secured creditors, including the DIP Lender who had obtained a priority charge over other secured creditors. The Court of Appeal overturned the decision of the Québec Superior Court, finding that while section 11.01 of the *CCAA* provides that no order made under sections 11 or 11.02 have the effect of prohibiting a person from requiring immediate payment for goods, services, use of leases or licensed property or other valuable consideration provided after the initial order is made, it does not provide post-filing creditors with a priority *per se*. If post-filing creditors want to obtain priority over security creditors, they must obtain a charge for such. The decision in *Gestion Éric Savard* will no doubt inform service providers, including professionals, in their risk assessment.

7. — Charges Can be Secured Against Specific Property

In the vast majority of circumstances, charges are secured against all of the petitioners' property. However, in some proceedings charges are limited to covering more specific property.

As described above, in *Veris Gold* the order expressly provided that the second financial advisor's charge securing its "Alternative Transaction Fee" only attached to the proceeds of a transaction. ¹³⁴ In the *BuildDirect* proceedings, the order specified that, as security for the financial advisor's fees, the financial advisor would be the beneficiary of a charge over the proceeds of any transaction, ranking ahead of all other charges or encumbrances attached to those funds, including the administration charge in favour of the usual three. ¹³⁵

The Re Hush Homes proceedings involved a number of real estate developments, where each project had its own set of creditors and investors. ¹³⁶ The priority charges were secured on a project-specific basis and subject to further court approval. Accordingly, to the extent that a secured creditor had any concerns about the allocation, the Ontario Superior Court of Justice found that the matter could be addressed in a future court proceeding. ¹³⁷

In attaching the professional fees to the proceeds of a transaction only, the orders above are, in a manner, characterizing the payments as transactional costs that are paid ahead of any other priority charges. This level of clarity may be prudent given the priority dispute observed in *Re Sanjel*.

8. — Stakeholders Other than Secured Creditors Rarely Oppose Charges in the Courtroom

Although the Canwest factors include a consideration of the position of the monitor and affected secured creditors, there is no express factor that considers the position of other stakeholders.

There are very few reported decisions or filed pleadings where charges were opposed in court by monitors, secured creditors or other stakeholders. From the authors' experience and from the experience of those practitioners canvassed, charges are often sought, disputed and resolved outside of the courts. Accordingly, the scarcity of jurisprudence and publicly filed opposition to charges may be misleading and should not be taken to mean that the position of other stakeholders will not be considered by the courts when determining whether or not to grant charges.

9. — Disputes Over the Quantum of Charges Being Sought Rarely Take Place in Court

One of the express Canwest factors is whether the *quantum* of the proposed charge is fair and reasonable. As discussed earlier in this article, the *quantum* discussion by the court is typically limited to adopting the monitor's analysis and opinion on the amount sought.

The review of publicly filed materials, including applications, affidavits and monitor's reports, revealed that there is little analysis or discussion available outlining how the *quantum* of the proposed charges are derived. Where there is discussion, the rationale pertained largely to the how the professionals will not work absent the charge and how such charges are usual and routine.

As with the observations with respect to stakeholder opposition, it should not be assumed from the dearth of jurisprudence or publicly filed opposition that the *quantum* is routinely accepted by all parties involved. Negotiations to reduce the proposed *quantum* largely take place outside the courtroom, with disputes resolved consensually prior to the hearing.

10. — Challenges to Charges After they are Granted are Rare

As many insolvency practitioners are aware, orders made in CCAA proceedings are rarely appealed. It is often difficult for an opposing party to overturn a discretionary order made in a CCAA proceeding.

The decision in Canadian Imperial Bank is an example of how the time constraints and urgency in a CCAA proceeding can impact the ability of a stakeholder to oppose a charge granted at its initial application. ¹³⁸ In Canadian Imperial Bank, the debtors had entered into a pre-filing engagement agreement with a financial advisor, which the secured creditors requested a copy of shortly thereafter. However, the engagement letter was not produced at that time and two months later, the company applied for an initial order. The engagement letter was then produced in the CCAA proceeding, where the secured creditor made known its objections to the quantum of the fees payable to the financial advisor and the priority of those fees to their secured claim and put forward alternatives, noting that the monitor had assessed that the fees payable to the financial advisor were in excess of the range of fees historically paid to financial advisors. However, while the dispute was making its way to court, the financial advisor continued to work and, although the monitor commented that the steps taken by the financial advisor were limited, the Alberta Court of Queen's Bench determined that the financial advisor would remain in place and its priority charge would continue. ¹³⁹

Re Sanjel also illustrates that the most appropriate and effective time to dispute a charge is when it is applied for. ¹⁴⁰ The Alberta Court of Queen's Bench considered the circumstances that gave rise to the order granting the initial charge, including the position of the secured creditor, who had only agreed to the USD \$500,000 charge, ¹⁴¹ and the monitor, who had expressed

concerns over the large size of the fee, ¹⁴² which would have been addressed had the Court intended to order the success fee as a priority payment. ¹⁴³

VI. — FURTHER CONSIDERATIONS

Prior to the enactment of section 11.52, the courts granted priority charges under their inherent jurisdiction and were more critical when altering the pre-filing scheme of priorities. The enactment of section 11.52 provided professionals with the ability to seek a statutory priority charge, which has subsequently been frequently relied upon. Between 2012 to 2018, every CCAA proceeding included an administration charge for the usual three, while approximately every two out of every five CCAA proceedings involved a priority charge for a professional outside of the usual three.

It seems to the authors that the provisions of section 11.52 are easily met, as the primary requirement is whether or not the secured creditors have been provided with notice. While the Canwest factors provide a useful list of factors to consider our review of the case law suggests that the Canwest factors are met with ease in most circumstances.

The authors understand that some professionals feel that charges are being too readily sought and granted, in circumstances where the beneficiary is exposed to minimal, if any, risk. Although section 11.52 provides professionals involved with the ability to ask the court for a charge, practitioners have asked whether it's appropriate to call on the court's jurisdiction to reorder priorities purely because there is the statutory authority to do so.

For example, where a professional is being paid its professional fees up front on a regular basis through cash flow, the professional's risk exposure is minimal. If the debtor company is unable to make payment, then the professional will cease work. When the company has insufficient cash flow to support professional payments, the debtor company, the monitor and stakeholders must consider whether it is appropriate to continue with a restructuring proceeding. If, however, the professional had the benefit of a charge, the professional might continue to work, possibly relying on the charge to the detriment of all stakeholders.

With respect to securing fees, whether they be professional fees or success fees, the concern is that charges inherently create the perception that a party is entitled to payment, regardless of their ultimate effort or involvement, thereby tipping the negotiating power in favour of the professionals in the event of a dispute over what is due and owing to them at the end of an engagement.

Other practitioners, however, are less concerned with the frequency in which charges are sought and granted. In their view, charges securing success fees provide clarity to all stakeholders by confirming, through a court order, the priority of payments. In addition, the involvement of the courts provides more accountability and transparency when assessing amounts actually due and payable to a professional.

Although some practitioners concede that charges are not always necessary, they serve as an added safety mechanism which does not ultimately affect what is contractually due and payable to the professional. Even though debtor companies are expected to meet their post-filing obligations, they may fail to do so if the proceedings transition into receivership or bankruptcy, which then exposes the service providers to the risk of being left as an unsecured creditor. Further, it is inequitable to expect that any professional could simply stop working that easily.

VII. — CONCLUSION

As outlined in this article, through the review of CCAA proceedings commenced between 2012 to 2018, the authors have identified a broad range of circumstances in which super priority charges are being obtained for a variety of different professionals. Discussions with insolvency professionals revealed diverging views as to whether charges are necessary in each circumstance, reminding us that every restructuring proceeding is unique and there is no "one size fits all" approach to be taken when applying for a priority charge under section 11.52.

In the authors' view, it is insufficient to rely solely on the fact that charges are routinely granted to similar professionals when seeking a charge. Simply because one professional in a proceeding received a charge based on one method of risk assessment

does not mean that the same approach is necessarily appropriate for a professional in another proceeding, even though the two may have similar titles or roles. Although proceedings may on the surface appear similar, the factual matrix of each warrants a tailored approach and different results. Equally, as the court stated in *Re MEI Computer*, a lack of opposition to charges being sought is not a sufficient reason for the court to grant a priority charges if the circumstances otherwise do not warrant it, ¹⁴⁴

The authors are of the opinion that, after determining that a proposed beneficiary is essential to the restructuring, the overarching consideration should be that of risk: are the circumstances such that the proposed beneficiary would be subject to undue risk that would inhibit its effective participation in the proceedings?

In establishing the Canwest factors, Pepall J made clear that the factors were not an exhaustive list and left the door open for other factors to develop. However, to date no additional factors have been added to those seminal ones. That is not to say that other factors should not be considered. The following are possible additional considerations for practitioners and the court when conducting a risk assessment to determine whether a charge is warranted:

- The proposed payment structure This would involve consideration of the anticipated method of payment for the professionals' fees and expenses throughout the proceeding. Does the engagement agreement provide for ongoing payment up front, or will payment be made after invoices are rendered? Will the professional be exposed to any credit risk?
- The source of funds out of which the fees are to be paid This would require an analysis of the terms of the engagement letter to determine the source of funds that the professionals' payment is expected to come from and consequently what, if any, risk of nonpayment the professional might be exposed to as a result. Is the engagement agreement sufficiently clear that the fees are to be paid out of the proceeds of a successful transaction? Is the professional contractually entitled to payment regardless of the outcome of the process? Is the professional entitled to payment in the event of a non-cash transaction and, if so, what alternative protection is there that the professional will be paid what it is owed?
- The company's ability to pay This would involve an analysis of the company's cash flow and potential alternative sources of cash. Will there be sufficient funds to pay the professional? Do the business operations provide for a steady cash flow? Does the company have an interim financing facility in place and what ability does the interim financier have the ability to restrict access to the facility? Are asset values such that there are no concerns that all creditors will be paid from the restructuring?
- <u>Is it appropriate for the debtor companies to be funding the professional's fees and expenses</u> -- Does the professional represent a group that has other means of retaining the professional?
- Alternative professionals Consideration of this factor arises where the professionals state that they will not or are unlikely to work absent a charge. It is appropriate to consider whether their position is warranted in the circumstances. Are there alternative professionals with the same or similar expertise and experience that is prepared to provide service without a charge?
- Support for the quantum of the charge This would involve an analysis that outlines the basis for the quantum of the charge sought, including but not limited to, what is the assumed period of work that is being used to determine the quantum of the charge. Is the period reasonable and appropriate based on the terms of the professional's engagement and the payments contemplated in the debtor's cash flow?
- <u>Position of other stakeholders</u> -- It may be appropriate to consider the position of other stakeholders, or to at least provide them with information so that they may have a better understanding of the financial circumstances. Can the impact of the proposed super priority on the other stakeholders be reliably quantified?

• <u>Separate or individual caps on charges</u> -- It is desirable for beneficiaries to have a clear understanding of their maximum charge amounts. Would it be beneficial to the proceedings if there was clarity as to how much each beneficiary was entitled to as a priority? Would this act as a form of checks and balances?

The authors acknowledge that some or all of these additional factors may currently be considered by practitioners when determining whether to support an application for a super priority charge. However, based on the authors' review of *CCA4* proceedings, such considerations have not been set out in publicly filed materials.

In the end, the analysis will likely come down to a balancing of the Canwest factors, additional considerations discussed above and the interest of stakeholders. Regardless, in the authors' view, legal practitioners, monitors and the courts should remain vigilant when assessing whether a charge is warranted as, after all, these charges reorder pre-established priorities and are an extraordinary remedy that should be granted with care.

Appendix A

	Province	Year	Style of Cause	Canwest Cited?	Canwest Factors Considered?
1.	Alberta	2019	Canada v Canada North Group Inc, 2019 ABCA 314	No	No
2.	British Columbia	2019	Miniso International Hong Kong Limited v Migu Investments Inc, 2019 BCSC 1234	Yes	No
3.	Ontario	2019	Re JTI-Macdonald Corp, 2019 ONSC 1625	Yes	Yes
4.	Ontario	2018	Re Kraus Brands Inc, 2018 ONSC 5418	Yes	Yes
5.	Québec	2017	Bridging Finance Inc v Beton Brunet 2001 Inc, 2017 QCCA 138	Yes	Yes
6.	Ontario	2017	Re TOYS "R" US (CANADA) LTD, 2017 ONSC 5571	No	No
7.	Alberta	2017	Canada North Group Inc (Companies' Creditors Arrangement Act), 2017 ABQB 550	No	No
8.	Alberta	2017	Re Canada North Group Inc, 2017 ABQB 508	Yes	No
9.	Alberta	2017	Re Sanjel Corporation, 2017 ABQB 69	No	No
10.	Québec	2016	Arrangement relative à Les Investissements Hexagone Inc, 2016 QCCS 6792	No	No
11.	Alberta	2016	Canadian Imperial Bank of Commerce v Endurance Energy Ltd, 2016 ABCA 217	Yes	No
12.	Ontario	2016	Re GuestLogix Inc, 2016 ONSC 1348	Yes	No
13.	Ontario	2016	Re Performance Sports Group Ltd, 2016 ONSC 6800	No	No
14.	Ontario	2016	Re PT Holdco, Inc., 2016 ONSC 495	Yes	Yes
15.	Ontario	2016	Re Urbancorp Toronto Management Inc, 2016 ONSC 5426	Yes	Yes
16.	Ontario	2015	Re Victorian Order of Nurses for Canada, 2015 ONSC 7371	No	No
17.	Québec	2015	Re Strateco Resources Inc, 2015 QCCS 4671	No	No
18.	Ontario	2015	Re Hush Homes Inc, 2015 ONSC 370	Yes	No
19.	British Columbia	2015	Re Veris Gold Corp, 2015 BCSC 399	No	No

20.	Ontario	2014	Re Cline Mining Corp, 2014 ONSC 6998	Yes	No	
21.	British Columbia	2014	Re Worldspan Marine Inc, 2014 BCCA	No	No	
22.	Ontario	2014	Re US Steel Canada Inc, 2014 ONSC 6145	Yes	Yes	
23.	Ontario	2014	Re Canasea Petrogas Group Holdings Ltd, 2014 ONSC 5467	No	No	
24.	Ontario	2014	Re Cash Store Financial Services, 2014 ONSC 4326	No	No	
25.	Ontario	2014	Re Redstone Investment Corp, 2014 ONSC 2004	Yes	Yes	
26.	Ontario	2014	Re Jaguar Mining Inc, 2014 ONSC 494	Yes	Ven	
27.	Ontario	2013			Yes	
	Omario	2013	Re Comstock Canada Ltd, 2013 ONSC 4756	No	No	
28.	British Columbia	2013	Re League Assets Corp, 2013 BCSC 2043	Yes	No	
29.	British Columbia	2013	Re Worldspan Marine Inc, 2013 BCSC 1593	No	No	
30.	Ontario	2012	Re 0487826 BC Ltd, 2012 BCSC 1501	No	No	
31.	Ontario	2012	Re Cinram International Inc, 2012		-	
32.	Ontario	2012	ONSC 3767 Re Futura Loyalty Group Inc, 2012	Yes No	Yes	
	O.I.Lai 10	2012	ONSC 5896	NO	No	
33.	Ontario	2012	Re Northstar Aerospace Inc, 2012 ONSC 3953	No	No	
34.	Ontario	2012	Re PCAS Patient Care Automation Services Inc, 2012 ONSC 2022	No	No	
35.	Оптагіо	2012	Re Sino-Forest Corp, 2012 ONSC 2063	Mo	Ma	
36.	Ontario	2012	Re First Leaside Wealth Management Inc, 2012 ONSC 1299	No	No No	
37.	Ontario	2012	Re Timminco Ltd, 2012 ONSC 506	No	No	
38.	Ontario	2012	Re Timminco Ltd, 2012 ONSC 106	Yes		
39.	Ontario	2011		•	Yes	
40.	New Brunswick		Re Clothing for Modern Times Ltd, 2011 ONSC 7522	No	No	
		2011	Re Tepper Holdings Inc, 2011 NBBR	Yes	Yes	
41.	Ontario	2010	Re Canwest Publishing Inc, 2010 ONSC 222	Yes	Yes	
42.	Ontario	2009	Re Brainhunter Inc, 183 ACWS (3d) 28	No	No	
43.	Ontario	2009	Re Canwest Global Communications Corp, 181 ACWS (3d) 853, 59 CBR (5 th) 72	No	No	
Append	lix B					
	Province	Year	Style of Cours	Daniel D	61	
1.	Québec	2009	Style of Cause Re AbitibiBowater Inc, 2009 QCCS	Parties Receiving Charge Monitor, monitor's counsel, counsel to company and other advisors Unsecured creditors; parties receiving administration charge not stated		
2.	Ontario	2008	6453 Re InterTAN Canada Ltd, 2008 CarswellOnt 8040, 49 CBR (5th) 248			
3.	Québec	2008	Re Quebecor World Inc, 2008 CarswellQue 118, 52 CBR (5th) 270	Monitor, monitor'		
4,	Nova Scotia	2008	Re ScoZinc Ltd, 2008 NSSC 398	to company and or Monitor and other reasonably require	professionals	

5.	Ontario	2007	Re Brute Manufacturing Ltd, 2007 CarswellOnt 10038,	Not stated
6.	Québec	2005	Re MEI Computer Technology Group Inc, [2005] RJQ 1558, 19 CBR (5th) 257	Monitor, monitor's counsel, counsel to company and other advisors
7.	Alberta	2002	Re Sulphur Corp of Canada Ltd, 2002 ABQB 682	Not stated
8.	Alberta	2001	Re Hunters Trailer & Marine Ltd, 2001 ABOB 546	Monitor and professional advisors of company
9.	British Columbia	1998	Starcom International Optics Corp, Re, [1998] BCJ No 506, 3 CBR (4th) 177	Monitor
10,	Alberta	1989	Icor Oil & Gas Co v Canadian Imperial Bank of Commerce, 1989 CarswellAlta 693, 102 AR 161	Monitor

Footnotes

- * Katie Mak is a partner with Clark Wilson LLP. Claire Wheldon is a Vice President of PricewaterhouseCoopers Inc. The authors would like to thank Christopher Ramsay of Clark Wilson LLP, Mike Vermette and Neil Bunker of PricewaterhouseCoopers Inc, and the other professionals who provided their insight and assistance for the completion of this article. The authors would also like to thank articled students, Alison Colpitts and Sarah Tradewell of Clark Wilson LLP, for their research assistance.
- 1 Companies' Creditors Arrangement Act, RSC 1985, c C-36 [CCAA].
- 2 Re Timminco Ltd, 2012 ONSC 506, [2012] OJ No 472, 2012 CarswellOnt 1263, 85 CBR (5th) 169, 95 CCPB 48 (Ont SCJ [Commercial List]) at para 66 [Re Timminco].
- 3 Re US Steel Canada Inc, 2014 ONSC 6145, 20 CBR (6th) 116, 2014 CarswellOnt 16465 (Ont SCJ) at para 9 [Re US Steel]; see also Re Walter Energy Canada Holdings Inc, 2016 BCSC 107, [2016] BCWLD 844, 2016 CarswellBC 158, 33 CBR (6th) 60, 23 CCPB (2nd) 201 (BCSC) at para 41 [Re Walter Energy].
- The courts in British Columbia, Ontario, Québec, Alberta, Saskatchewan, Nova Scotia and Québec have prescribed forms of model initial orders.
- 5 Re Canwest Publishing Inc, 2010 ONSC 222, [2010] OJ No 188, 2010 CarswellOnt 212, 63 CBR (5th) 115 (Ont SCJ [Commercial List]) [Canwest Publishing].
- We note that these examples have been compiled from our review of the reported decisions only. It is therefore not exhaustive and in practice there may be other parties who have received priority charges for their fees and disbursements.
- See Canwest Publishing, supra note 5; Re Tamerlane Ventures Inc, 2013 ONSC 5461, 2013 CarswellOnt 12213, 6 CBR (6th) 328 (Ont SCJ [Commercial List]); Re Sanjel Corporation, 2017 ABQB 69, 2017 CarswellAlta 925, 48 CBR (6th) 328 (Alta QB), leave to appeal refused 2017 ABCA 120, 2017 CarswellAlta 648, 47 CBR (6th) 289 (Alta CA) [Re Sanjel].
- 8 See Re Cinram International Inc, 2012 ONSC 3767, 217 ACWS (3d) 11, 2012 CarswellOnt 8413, 91 CBR (5th) 46 (Ont SCI [Commercial List]) [Re Cinram].
- 9 Canwest Publishing, supra note 5; Re First Leaside Wealth Management Inc, 2012 ONSC 1299, 213 ACWS (3d) 266, 2012 CarswellOnt 2559 (Ont SCJ [Commercial List]) [First Leaside]; Re Northstar Aerospace Inc, 2012 ONSC 3953 [Northstar Aerospace].
- 10 See Re Cinram, supra note 8.
- 11 *Ibid*.
- 12 See Re League Assets Corp, 2013 BCSC 2043, 2013 CarswellBC 3408, 7 CBR (6th) 74 (BCSC) [League Assets].

- 13 See Re Jaguar Mining Inc, 2014 ONSC 494, 12 CBR (6th) 290, 2013 CarswellOnt 18630 (Ont SCJ [Commercial List] [Jaguar Mining].
- 14 See Re Sino-Forest Corp, 2012 ONSC 2063, 2012 CarswellOnt 4117 (Ont SCJ [Commercial List]).
- 15 See Re Cline Mining Corp, 2014 ONSC 6998, 2014 CarswellOnt 18943, 22 CBR (6th) 278 (Ont SCJ).
- 16 See Re Target Canada Co, 2015 ONSC 303, 2015 CarswellOnt 620, 22 CBR (6th) 323, [2015] OJ No 247 (Ont SCJ).
- 17 See Northstar Aerospace, supra note 9; Jaguar Mining, supra note 13; Canwest Publishing, supra note 5.
- 18 See Canwest Publishing, supra note 5.
- See Re Comstock Canada Ltd, 2013 ONSC 4756, 230 ACWS (3d) 355 2013 CarswellOnt 9796, 4 CBR (6th) 47, 25 CLR (4th) 175 (Ont SCJ) [Re Comstock Canada].
- See Re Steels Industrial Products Ltd, 2012 BCSC 1501, 2012 CarswellBC 3079, 97 CBR (5th) 105 (BCSC) [Re Steels Industrial Products].
- 21 Re Cinram, supra note 8 at para 81.
- For a list of the professionals see *Pacific Exploration & Production Corp.* (27 April 2016), Ontario CV-16-11363-00CL (Ont SCJ) (Schedule A, Initial Order, 27 April 2016) [*Pacific Exploration*].
- 23 Re Smoky River Coal Ltd, 2000 ABQB 621. [2000] 10 WWR 147, 2000 CarswellAlta 830, 297 AR 1, 83 Alta LR (3d) 127, 19 CBR (4th) 281, [2000] AJ No 925 (Alta QB) at para 34, reversed in part on other grounds 2001 ABCA 209, 2001 CarswellAlta 1035, 299 AR 125, 95 Alta LR (3d) 1, 28 CBR (4th) 127, 205 DLR (4th) 94, [2001] 10 WWR 204, 266 WAC 125, [2001] AJ No 1006 (Alta CA) [Re Smoky River Coal].
- 24 Re Northland Properties Ltd, [1988] BCWLD 2663, [1988] CLD 1460, 1988 CarswellBC 531, 29 BCLR (2d) 257. 73 CBR (NS) 146, 69 CBR (NS) 266, [1988] BCJ No 1210 (BCSC).
- 25 CCAA, supra note 1, s 124.
- 26 Icor Oil & Gas Co v Cdn Imperial Bank of Commerce (1989), 102 AR 161, [1989] AJ No 1388, 1989 Carswell Alta 693 (Alta QB).
- 27 Ibid.
- See: Re Starcom International Optics Corp, [1998] BCJ No 506, 3 CBR (4th) 177. 1998 CarswellBC 477 (BCSC [In Chambers]) at para 48 [Re Starcom International Optics Corp]; Re United Used Auto & Truck Parts Ltd, 2000 BCCA 146, [2000] 5 WWR 178, 2000 CarswellBC 414, 73 BCLR (3d) 236, 16 CBR (4th) 141, 135 BCAC 96, 26 BCTC 75, 221 WAC 96, [2000] BCJ No 409 (BCCA), leave to appeal allowed 2000 CarswellBC 2132, 2000 CarswellBC 2133, 149 BCAC 160 (note). 261 NR 196 (note), 244 WAC 160 (note), [2000] SCCA No 142 (SCC) at paras 1, 15, 31 [Re United Used Auto]; Re Hunters Trailer & Marine Ltd, 2001 ABQB 546, [2001] 9 WWR 299, 2001 CarswellAlta 964, 295 AR 113, 94 Alta LR (3d) 389, 27 CBR (4th) 236, [2001] AJ No 857 (Alta QB) [Re Hunters Trailer], as cited in Re ScoZinc Ltd, 2008 NSSC 398, 173 ACWS (3d) 685, 2008 CarswellNS 743, 272 NSR (2d) 302, 50 CBR (5th) 36, 869 APR 302 (NSSC) at para 24.
- 29 Canadian Asbestos Services Ltd v Bank of Montreal, [1992] OJ No 2320, [1993] 1 CTC 48, 1992 CarswellOnt 936, 11 OR (3d) 353, 16 CBR (3d) 114, 5 CLR (2d) 54, 93 DTC 5001, [1992] GSTC 15, 5 TCT 4328 (Ont Gen Div), additional reasons 1993 CarswellOnt 816, 13 OR (3d) 291, 10 CLR (2d) 204, [1993] GSTC 23, 1 GTC 6169 (Ont Gen Div) at paras 23, 26.
- 30 Re United Used Auto, supra note 28 at paras 1, 15.
- 31 Re Starcom International Optics Corp, supra note 28 at para 52.

- 32 Re Hunters Trailer, supra note 28.
- 33 Re Quebecor World Inc, 2008 CarswellQue 118, 52 CBR (5th) 270, EYB 2008-128639 (Que Bktcy).
- 34 Re United Used Auto, supra note 28 at para 29.
- 35 Re MEI Computer Technology Group Inc, [2005] RJQ 1558, [2005] QJ No 5744, 2005 CarswellQue 3675, EYB 2005-90239, 19 CBR (5th) 257 (CS Que) at para 27 [Re MEI Computer].
- 36 CCAA, supra note 1.
- 37 See for example: Re Canwest Global Communications Corp, 181 ACWS (3d) 853, [2009] OJ No 4286, 2009 CarswellOnt 6184, 59 CBR (5th) 72 (Ont SCJ [Commercial List]) at para 38; Re Brainhunter Inc, 2009 CarswellOnt 7627, [2009] OJ No 5207 (Ont SCJ [Commercial List]) at para 29 [Re Brainhunter]; Re PCAS Patient Care Automation Services Inc, 2012 ONSC 2022, 214 ACWS (3d) 330, 2012 CarswellOnt 4349, 94 CBR (5th) 138 (Ont SCJ [Commercial List]) at para 26 [Re PCAS].
- 38 Re Mecachrome International Inc, 2009 QCCS 1575, [2009] RJQ 1306, 2009 CarswellQue 5141, EYB 2009-159388, 58 CBR (5th) 15 (CS Que) [Mecachrome].
- 39 Ibid at paras 70-88.
- 40 Canwest Publishing, supra note 5.
- 41 *Ibid* at para 52.
- 42 Ibid at para 54.
- 43 Ibid.
- See eg Re Victorian Order of Nurses for Canada, 2015 ONSC 7371, 261 ACWS (3d) 517, 2015 CarswellOnt 19150, 32 CBR (6th) 236 (Ont SCJ) at paras 29-31 [Re Victorian Order of Nurses for Canada].
- See eg Re PCAS, supra note 37 at para 26; Re Clothing for Modern Times Ltd, 2011 ONSC 7522, 210 ACWS (3d) 575, 2011 CarswellOnt 14402, 88 CBR (5th) 329 (Ont SCJ [Commercial List]) at para 23.
- 46 Canadian Imperial Bank of Commerce v Endurance Energy Ltd, 2016 ABCA 217, [2016] AWLD 3481, 2016 CarswellAlta 1355 (Alta CA), leave to appeal to Alta CA refused 2016 ABQB 324, 2016 CarswellAlta 1130, 37 CBR (6th) 261 (Alta QB) [Canadian Imperial Bank].
- 47 Canwest Publishing, supra note 5 at paras 4, 11.
- 48 Re Cinram, supra note 8 at para 85.
- 49 Re Walter Energy, supra note 3 at para 43.
- 50 Re PT Holdco, 2016 ONSC 495, 263 ACWS (3d) 23, 2016 CarswellOnt 1447 (Ont SCJ [Commercial List]) at para 33 [Re PT Holdco].
 Here, the administration charge was in relation to the usual three.
- 51 See Re US Steel, supra note 3 at para 24; Re PT Holdco, supra note 50 at para 34.
- 52 Canwest Publishing, supra note 5 at para 55.
- Re Cinram, supra note 8 at para 85. See also Canadian Imperial Bank, supra note 46 at para 6; Jaguar Mining, supra note 13 at para 44.
- 54 Canadian Imperial Bank, supra note 46 at para 6.

- Re Performance Sports Group Ltd, 2016 ONSC 6800, 272 ACWS (3d) 470, 2016 CarswellOnt 17492, 41 CBR (6th) 245 (Ont SCJ [Commercial List]) at para 29 [Re Performance Sports].
- 56 Ibid at para 32.
- Re Urbancorp Toronto Management Inc, 2016 ONSC 5426, 270 ACWS (3d) 474, 2016 CarswellOnt 13839, 40 CBR (6th) 93 (Ont SCJ [Commercial List]) at paras 23-24 [Re Urbancorp].
- 58 First Leaside, supra note 9 at para 39.
- 59 Re Steels Industrial Products, supra note 20 at para 49.
- 60 Ibid at para 44.
- 61 Re Sanjel, supra note 7 at para 12.
- 62 Re Smoky River Coal, supra note 23 at paras 16-17; Re Sanjel, supra note 7 at para 7.
- 63 Re Sanjel, supra note 7 at para 40.
- See eg Canwest Publishing, supra note 5 at para 55; Re Walter Energy, supra note 3 at para 47; Re PT Holdco, supra note 50 at para 33; Re Sanjel, supra note 7 at para 12.
- 65 Re Brainhunter, supra note 37.
- 66 See eg Canwest Publishing, supra note 5; Re Cinram, supra note 8.
- 67 Re Comstock Canada, supra note 19.
- 68 Re Victorian Order of Nurses for Canada, supra note 44.
- 69 See eg League Assets, supra note 12 at para 18; Re Hush Homes Inc, 2015 ONSC 370, 22 CBR (6th) 67, 2015 CarswellOnt 558 (Ont SCJ) at paras 49-50 [Re Hush Homes].
- 70 Re Hush Homes, supra note 69 at paras 48-49.
- 71 Re Shire International Real Estate Investments Ltd, 2011 ABQB 552, [2011] AWLD 4089, 2011 CarswellAlta 1544 (Alta QB) at paras 5-6.
- 72 Re Timminco, supra note 2 at paras 11, 16-29.
- 73 Re Walter Energy, supra note 3 at para 36.
- See eg Re PT Holdco, supra note 50 at para 34; Re US Steel, supra note 3 at para 24; and Northstar Aerospace, supra note 9.
- See eg Re Sanjel, supra note 7; Veris Gold Corporation (10 June 2014), Vancouver S144431 (BCSC) (Supplement to the Fourth Report of the Monitor, 4 September 2014, Appendix A) [Veris Gold].
- Government of Canada, "CCAA records list Office of the Superintendent of Bankruptcy Canada" (1 March 2019), online: Office of the Superintendent of Bankruptcy Canada < www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/h_br02281.html>.
- Materials were obtained from monitors' websites or requested directly from the firms acting as monitors. Materials reviewed include monitor's reports, application materials, affidavits, orders and reported decisions. Materials filed in approximately 20% of the CC4A proceedings in this time period were not reviewed including: (a) 12 proceedings where materials were only available in the French language; and (b) 28 proceedings where the monitor no longer maintained a publicly accessible website.

- We note that the identity of these professionals has been kept anonymous and that the comments referenced in this article are to provide practical considerations and insight that is not readily apparent or available in case law or publicly filed materials.
- 79 Re Canada North Group Inc, 2017 ABQB 550, [2017] AWLD 4936, 2017 CarswellAlta 1631, 60 Alta LR (6th) 103, 52 CBR (6th) 308, [2018] 2 WWR 731 (Alta QB), affirmed 2019 ABCA 314, 2019 CarswellAlta 1815, 93 Alta LR (6th) 29, 72 CBR (6th) 161, 437 DLR (4th) 122 (Alta CA) at para 104, affirmed 2019 ABCA 314.
- 80 Canadian Association of Insolvency and Restructuring Professionals, CAIRP Rules of Professional Conduct and Interpretation, Toronto.
- See for example: Re Cinram. supra note 8; Re Comstock Canada, supra note 19; Quicksilver Resources Canada Inc, 0942065 BC Ltd and 09422069 BC Ltd (8 March 2016) Calgary 1601-03113 (ABQB) (Initial Order, 8 March 2016, at para 33); RCR International Inc and WJ Dennis & Company (21 November 2017), Montreal, 500-11-053555-179 (QCSC) (Initial Order, 21 November 2017) at para 34.
- 82 Mecachrome, supra note 38 at para 70.
- See eg Farley Windoor Ltd and Farley Windows, USA Inc (30 November 2012), Ontario, CV-12-9924-00CL (Ont SCJ); Landdrill International Inc et al (31 August 2012), Moncton MM114-12 (NBQB); Northstar Aerospace Inc et al (14 June 2012), Toronto CV-12-9761-00CL (Ont SCJ); Verity Energy Ltd (1 May 2015), Calgary 1501-04191 (ABQB).
- See eg First Leaside, supra note 9; League Assets, supra note 12.
- 85 See eg Omniarch Capital Corporation (15 July 2016), Calgary 1601-08730 (ABQB).
- 86 Walton International Group Inc et al (28 April 2017), Calgary 1701-05845 (ABQB).
- 87 See eg Re Comstock Canada, supra note 19.
- See eg Re Quicksilver Resources Canada Inc, 2018 ABQB 653, [2018] AWLD 3903, 2018 CarswellAlta 1894 (Alta QB).
- 89 Re Sanjel, supra note 7.
- 90 See eg Northern Transportation Company Limited (27 April 2016), Calgary 1601-05256 (ABQB) [Northern Transport Company].
- 91 Northstar Aerospace Inc et al (14 June 2012), Toronto CV-12-9761-00CL (Ont SCJ) (Initial Application Record, 14 June 2012).
- Walter Energy Canada Holdings Inc (7 December 2015), Vancouver S1510120 (BCSC) (2nd Affidavit of William G. Harvey, Exhibit E. 31 December 2015) [Walter Energy].
- 93 Re Performance Sports, supra note 55.
- 94 See eg Royal Bank v Cow Harbour Construction Ltd, 2011 ABQB 96, [2011] AWLD 1820, 2011 CarswellAlta 255, 509 AR 25, 50 Alta LR (5th) 1, 76 CBR (5th) 126 (Alta QB) [Cow Harbour Construction].
- 95 Northern Transport Company, supra note 90; Re Comark Inc, 2015 ONSC 2010, 266 ACWS (3d) 541, 2015 CarswellOnt 20810 (Ont SCJ).
- 96 Jaguar Mining, supra note 13: Re US Steel, supra note 3.
- 97 Mongolia Minerals Corporation (16 June 2014) Calgary 1401-06625 (ABQB).
- 98 Yukon Zinc Corp (13 March 2015) Vancouver S152166 (BCSC) (Engagement Letter, Exhibit A of Affidavit #2 of Jing You Lu, 14 April 2015).

- 99 Re Urbancorp, supra note 57.
- 100 Ibid at para 18.
- 101 Ibid at para 22,
- 102 Re Steels Industrial Products, supra note 20 at para 54.
- 103 Re Tepper Holdings Inc, 2011 NBBR 311, [2011] NBJ No 388, 2011 NBQB 311, 2011 CarswellNB 592, 2011 CarswellNB 849, 381 NBR (2d) 1, 82 CBR (5th) 293, 984 APR 1 (NBTD) at paras 35-36.
- 104 Ibid at paras 88-89.
- See eg *Veris Gold, supra* note 75 at paras 51-52, where two separate financial advisors were engaged and one was entitled to an "alternative transaction fee" to compensate it regardless of its success.
- See eg Sears Canada Inc (22 June 2017), Toronto CV-17-11846-00CL (Ont SCJ), (Initial Order, 22 June 2017 paras 23-24); Walter Energy, supra note 92; Essar Steel Algoma Inc (9 November 2015) Ontario CV-15-000011169-00CL (Ont SCJ), (Initial Order, 9 November 2015 at para 28); Nelson Education Ltd (12 May 2015), Toronto CV15-10961-00CL (Ont SCJ) (Court Order re RBC Motion, 8 September 2015); Southern Pacific Resource Corp (21 January 2015), Calgary 1501-00570 (ABQB), (Initial Order, 21 January 2015).
- See eg Aralez Pharmaceuticals Inc (10 August 2018), Mississauga CV-18-603054-00CL (Ont SCJ) (Initial Order, 10 August 2018, at para 37); Veris Gold, supra note 75 at para 4; Canwest Publishing Inc (8 January 2010), Toronto CV-10-8533-00CL (Ont SCJ) (Reasons for Decision of Initial Order, 18 January 2010 at paras 52-54).
- See eg Re Cline Mining Corp, 2014 ONSC 6998, 22 CBR (6th) 278, 2014 CarswellOnt 18943 (Ont SCJ) at para 26; Walter Energy, supra note 92; Parkland Airport Development Corporation (29 November 2016), Edmonton 1603-20319 (ABQB) (Initial Order, 29 November 2016 at paras 26, 34); Performance Sports Group Ltd (31 October 2016), Ontario CV-16-11582-00CL (Ont SCJ) (Amended and Restated Initial Order, 31 October 2016 at paras 23-24).
- See eg Carillion Canada Inc (25 January 2018), Toronto CV-18-590812-00CL (Ont SCJ), (Notice of Motion of the Applicants returnable 27 November 2018), where an advisor's engagement provided for professional fees and success fees and the advisor did not seek or obtain a charge [Carillion Canada Inc]; Re Northstar Aerospace, supra note 9 at para 4, where a sales agent was engaged but no charge was sought.
- See eg League Assets Corp (18 October 2013), Vancouver S137743 (BCSC); Sunrise/Saskatoon Apartments Partnerships (16 December 2016), Vancouver S1611657 (BCSC).
- 111 See eg Express Fashion Apparel Canada Inc and Express (4 May 2017), Ontario CV-17-11785-00CL (Ont SCJ).
- 112 Cow Harbour Construction, supra note 94.
- 113 Cow Harbour Construction, supra note 94 at para 64.
- 114 See eg Veris Gold, supra note 75.
- We note that the starting offer of the transaction was \$165 million, with the ending offer at a lower amount than that. The success fee was based on 1% of the new financing or equity sale (in Cow Harbour Construction, supra note 94 at para 10.). We were unable to confirm the exact quantum of payment from the filed materials.
- 116 Re Sanjel, supra note 7 at para 3.
- 117 Ibid at paras 5-6.

- 118 Ibid at para 42.
- 119 Ibid at paras 26-27.
- 120 Ibid at para 29.
- 121 Sanjel Corporation (4 April 2016), Calgary 1601-03143 (ABQB) (Affidavit of Paul Critly #1, Exhibit 17).
- 122 Veris Gold, supra note 75.
- 123 Ibid (Supplement to the Fourth Report of the Monitor, 4 September 2014).
- 124 Ibid (Order pronounced 4 September 2014).
- 125 Ibid (Supplement to the Fourth Report of the Monitor, 4 September 2014 at paras 53-54).
- 126 Ibid (Supplement to the Fourth Report of the Monitor, 4 September 2014 at Appendix A).
- 127 Ibid (Supplement to the Fourth Report of the Monitor, 4 September 2015, at Appendix B).
- 128 Carillion Canada Inc, supra note 109.
- 129 Ibid (Notice of Motion returnable 27 November 2018).
- Ascent Industries Corp (1 March 2019) Vancouver S-192188 (BCSC) (Affidavit 2 of Edward M Drake at paras 14, 22 July 2019) [Ascent Industries].
- 131 Ibid (Notice of Application, 22 July 2019); Ascent Industries Corp. (Re), 2019 BCSC 1880.
- 132 Ascent Industries, supra note 130 (Notice of Application filed by Clarus Securities Inc, 22 July 2019).
- 133 Arrangement relatif à Gestion Éric Savard Inc, 2019 QCCA 1434, 2019 CarswellQue 7641, EYB 2019-315853 (CA Que).
- 134 Veris Gold, supra note 75 (Order pronounced 4 September 2014).
- 135 BuildDirect.com Technologies Inc (31 October 2017) Vancouver S1710095 (BCSC) (Order pronounced 21 November 2017).
- 136 Re Hush Homes, supra note 69.
- 137 Ibid at paras 29, 46.
- 138 Canadian Imperial Bank, supra note 46.
- The secured creditors in *Canadian Imperial Bank* were unsuccessful in their appeal, as the Alberta Court of Appeal found that the CCAA judge had properly exercised its discretion in granting the order appointing the financial advisor and granting it a charge.
- 140 Re Sanjel, supra note 7.
- 141 Ibid at para 15.
- 142 Ibid at paras 14, 33.
- 143 Ibid at para 33.
- 144 Re MEI Computer, supra note 35.

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