

Court File No. _____

**ONTARIO
SUPERIOR COURT OF JUSTICE**

COMMERCIAL LIST

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

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

Applicants

FACTUM OF THE APPLICANTS

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FACTUM OF THE APPLICANTS
(CCAA Application)

PART I – INTRODUCTION

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

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

2. Nelson Education and its parent company, Nelson Education Holdings Ltd. (“**Holdings**” and together with Nelson Education, the “**Applicants**”) are seeking an initial order (the “**Initial Order**”) pursuant to the *Companies’ Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the “**CCAA**”).

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

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

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

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

4. As further discussed below, the Company currently has, in the aggregate, over US\$430 million (or over \$544 million in Canadian dollars²) of secured first and second lien debt (including accrued interest) outstanding under its Credit Agreements, resulting in an unsustainable leverage ratio of debt to EBITDA, net of pre-publication expenditures, of approximately 17:1 for the fiscal year ending March 31, 2015. In addition, Nelson Education's First Lien Credit Agreement matured on July 3, 2014 and has not been repaid, and the Company is in default under its Second Lien Credit Agreement.

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

5. Commencing in April 2013, with the assistance of its professional advisors, Nelson Education had begun engaging in discussions and exploring a variety of transaction alternatives with the Second Lien Agent and the First Lien Steering Committee in an effort to achieve a transaction that would, among other things, address the Company's obligations under its Credit Agreements, protect value, improve the financial position of the Company, and create stability for the business, including the Company's employees, customers, lenders and other key stakeholders.

Nordal Affidavit at para. 7; Application Record, Tab 2.

6. These negotiations ultimately resulted in a transaction framework on the terms set out in the First Lien Term Sheet dated September 10, 2014 (the "**First Lien Term Sheet**") for a

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

sale or restructuring of the business, as discussed in greater detail below. In connection with the First Lien Term Sheet, Nelson Education and Holdings entered into a support agreement (the “**First Lien Support Agreement**”) with First Lien Lenders representing approximately 88% of the principal amounts outstanding under the First Lien Credit Agreement (the “**Consenting First Lien Lenders**”). The Consenting First Lien Lenders comprise 21 of the 22 First Lien Lenders, or approximately 95% of all of the First Lien Lenders. The only First Lien Lender that is not a Consenting First Lien Lender is also a Second Lien Lender.

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

7. Pursuant to the terms of the First Lien Term Sheet and the First Lien Support Agreement, the Company, with the assistance of its financial advisor, Alvarez & Marsal Canada Securities ULC (“**A&M**”), commenced on September 22, 2014, a sale and investment solicitation process (the “**SISP**”) to identify one or more potential purchasers of, or investors in, the Nelson Business. The Company and A&M conducted a thorough canvassing of the market and are satisfied that all alternatives and expressions of interests were properly and thoroughly pursued.

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

8. The SISP ultimately did not result in an executable transaction that would result in proceeds to repay the obligations under the First Lien Credit Agreement in full or would otherwise be acceptable to the First Lien Lenders holding at least 66 2/3% of the outstanding obligations under the First Lien Credit Agreement (a “**Superior Offer**”). Accordingly, pursuant to the First Lien Support Agreement and consistent with the Company’s view that the Transaction is the best option available to Nelson Education, the Company is proceeding at this time with the Transaction pursuant to which the First Lien Lenders will exchange and release all of the indebtedness owing under the First Lien Credit Agreement for: (i) 100% of the common shares of a newly incorporated entity that will own 100% of the common shares of the Purchaser to which substantially all of the Company’s assets would be transferred, and (ii) the obligations under a new US\$200 million first lien term facility to be entered into by the Purchaser.

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

9. As further discussed in the Nordal Affidavit, the Transaction includes, among other things:
- (a) the transfer of substantially all of the Company's assets to the Purchaser;
 - (b) the assumption by the Purchaser of substantially all of the Company's trade payables, contractual obligations (other than certain obligations in respect of former employees, obligations relating to matters in respect of the Second Lien Credit Agreement, and the Nelson Education Promissory Note) and employment obligations incurred in the ordinary course and as reflected in the Company's balance sheet; and
 - (c) an offer of employment by the Purchaser to all of the Company's employees.

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

10. Under the Transaction, the Purchaser will not assume the Company's obligations to the Second Lien Agent or the Second Lien Lenders under the Second Lien Credit Agreement and certain other liabilities, as further discussed in the Nordal Affidavit.

Nordal Affidavit at para. 11; Application Record, Tab 2.

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

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

12. The Transaction represents a transaction that will eliminate uncertainty, significantly reduce the Company's debt levels and improve its balance sheet, and provide stability to the Nelson Business in a process that is fair and reasonable to all stakeholders. Nelson Education believes that the implementation of the Transaction, which will result in a stronger financial foundation, will enable Nelson Education to solidify its position as

Canada's leading education publisher and take advantage of improved market and industry conditions.

Nordal Affidavit at para. 116; Application Record, Tab 2.

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

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

14. In connection with the Transaction, the Applicants intend to bring a motion in conjunction with the within application to be heard on a date to be set by this Court to, among other things, approve the Transaction (the "**Sale Approval Motion**").

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

PART II – THE FACTS

A. THE APPLICANTS ARE DEBTOR COMPANIES

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

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

16. As discussed in greater detail in the Nordal Affidavit, in July 2007 the business and assets of Nelson Education were acquired by entities owned by OMERS Administration

Corporation and certain funds of APAX Partners from The Thomson Corporation together with the U.S. business and assets of Thomson Learning for a combined total value of approximately US\$7.75 billion, of which approximately \$550 million was attributed to the Canadian business (the “**2007 Acquisition**”).

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

17. In connection with the 2007 Acquisition, the Company was financed by way of (i) first lien debt in the initial aggregate principal amount of US\$311,438,278.60 and a revolver facility³ in an initial aggregate principal amount of \$50 million pursuant to a First Lien Credit Agreement dated as of July 5, 2007 among Nelson Education, Holdings, the First Lien Agent and the First Lien Lenders; and (ii) second lien debt in an initial aggregate principal amount of US\$171,291,053.23 pursuant to a Second Lien Credit Agreement dated as of July 5, 2007 among Nelson Education, Holdings, the Second Lien Agent and the Second Lien Lenders.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

B. STAY OF PROCEEDINGS

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

- (a) the First Lien Lenders enforcing on their security in respect of the obligations under the First Lien Credit Agreement;
- (b) potential termination of contracts by key suppliers and content providers; and
- (c) potential termination of contracts by customers.

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

C. PAYMENTS DURING THE CCAA PROCEEDINGS

25. During the course of these CCAA proceedings, subject to the terms of the Supplemental Support Agreement, the Applicants intend to make payments for goods, content and services supplied pre-filing and post-filing in the ordinary course as set out in the Cash Flow Forecast prepared by Alvarez & Marsal Canada Inc., an affiliate of A&M, as the proposed Monitor and as permitted by the Initial Order. It is also contemplated by the Cash Flow Forecast that all employee obligations owing to current employees will be paid in the ordinary course, whether such obligations are incurred pre-filing or post-filing.

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

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

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

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

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

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

D. CHARGES

(1) Proposed Monitor and Administration Charge

28. Alvarez & Marsal Canada Inc., an affiliate of A&M, has been retained to, among other things, act as Monitor in potential CCAA proceedings. A&M has been engaged as Nelson Education's financial advisor since March 2013 to, among other things, assist the Company in improving its financial and operational performance and developing a five-year business plan, and to assist the Company with the SISP since September 2014.

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

29. Alvarez & Marsal Canada Inc. has consented to act as the Monitor of the Applicants in the within proceedings, subject to Court approval.

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

(2) Directors' Charge

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

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

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

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

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

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

(3) Retention Payments and the KERP Charge

33. In January 2014, Nelson Education developed a key employee retention program (the "**KERP**") with the principal purpose of providing an incentive for certain key existing employees critical to the preservation of the Company's enterprise value to remain with the Company despite the financial difficulties that the Company is currently facing. The Company consulted with the First Lien Steering Committee in connection with the KERP. The KERP was reviewed and approved by the Company's Board of Directors.

Nordal Affidavit at para. 159; Application Record, Tab 2.

34. Under the KERP, the eligible employees will become eligible to receive a retention payment if such employees remain with the Company until their applicable retention date (collectively, the “**Retention Payments**”). The maximum aggregate amount of the Retention Payments is approximately \$340,000. A detailed summary of the individual Retention Payments will be provided to the Court in a confidential supplement to the Nordal Affidavit (the “**Confidential Supplement**”).

Nordal Affidavit at paras. 160 and 165; Application Record, Tab 2.

E. FURTHER BACKGROUND FACTS

35. The facts relating to the Applicants, the Nelson Business and the requested relief are more fully set out in the Nordal Affidavit.

PART III – ISSUES AND THE LAW

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

36. The CCAA applies in respect of a “debtor company” or affiliated debtor companies if the total of claims against the debtor company or affiliated debtor companies exceeds \$5 million.

CCAA, Section 3(1).

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

(1) The Applicants are Debtor Companies

38. The term “debtor company” is defined in Section 2 of the CCAA as follows:

“debtor company” means any company that:

- (a) is bankrupt or insolvent;
- (b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the

meaning of the *Winding-Up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts;

- (c) has made an authorized assignment or against which a receiving order has been made under the *Bankruptcy and Insolvency Act*; or
- (d) is in the course of being wound up under the *Winding-Up and Restructuring Act* because the company is insolvent.

CCAA, Section 2 (“debtor company”).

39. For the reasons described below, each of the Applicants is a “debtor company” within the meaning of this definition.

(a) *Each of the Applicants is a “Company”*

40. The term “company” is defined in Section 2 of the CCAA as follows:

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

CCAA, Section 2 (“company”).

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

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

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

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

(b) *The Applicants are Insolvent*

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

- (a) is for any reason unable to meet his obligations as they generally become due;
- (b) has ceased paying his current obligations in the ordinary course of business as they generally become due; or
- (c) the aggregate of whose property is not, at a fair valuation, sufficient, or if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

BIA, Section 2 (“insolvent person”).

Re Stelco Inc. (2004), 48 C.B.R. (4th) 299 (WL) (Ont. Sup. Ct. J. [Commercial List]) at para. 4; leave to appeal to CA refused [2004] OJ No 1903; leave to appeal to SCC refused [2004] SCCA No 336 [*Stelco*]; Book of Authorities, Tab A.

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

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

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

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

46. The Applicants meet both the test for insolvency under the BIA and the test for insolvency based on a looming liquidity condition given:
- (a) the Applicants currently have, in the aggregate, over US\$430 million (or over \$544 million in Canadian dollars⁴) of secured first and second lien debt outstanding under the Credit Agreements;
 - (b) Nelson Education does not currently have sufficient funds to repay its obligations under the First Lien Credit Agreement, which matured on July 3, 2014;
 - (c) Nelson Education is in default under the Second Lien Credit Agreement and has not paid in full the interest payment due under the Second Lien Credit Agreement on March 31, 2014 and has not paid the interest payments due on June 30, 2014, September 30, 2014, December 31, 2014 or March 31, 2015;
 - (d) despite their comprehensive efforts to address their financial difficulties, the Applicants have been unable to find an out-of-court solution that would enable them to repay or refinance the amounts owing under the Credit Agreements;
 - (e) Holdings is likewise unable to satisfy its guarantee obligations under the Credit Agreements;
 - (f) the Applicants, with the assistance of their advisors, conducted a comprehensive SISP which did not result in an executable transaction that would result in proceeds sufficient to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders;
 - (g) in light of the financial circumstances of the Applicants, it is not possible to obtain additional financing that could be utilized to repay the amounts owing under the Credit Agreements;

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

- (h) there is no reasonable expectation that the Applicants' financial condition will improve absent these restructuring proceedings; and
- (i) the value of the Applicants' assets, property and undertaking, taken at fair value, is not sufficient to enable the Applicants to pay all of their obligations under the Credit Agreements, as evidenced by the results of the SISP.

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

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

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

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

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

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

(1) The CCAA is Flexible, Remedial Legislation

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

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

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

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

Re Sulphur Corporation of Canada Ltd., 2002 ABQB 682, [2002] A.J. No. 918 (QL) at para. 28 [cited to A.J.]; Book of Authorities, Tab D.

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

(2) Entitlement to Make Pre-Filing Payments

52. To ensure the continued operation of the Nelson Business, limit any disruption and preserve the value of the Nelson Business as part of the transition to the Purchaser, which is expected to occur prior to June 2, 2015, subject to approval of the Court, and in the interests of the Applicants' stakeholders, the Applicants are seeking authorization (but not a requirement) to make certain pre-filing payments, including: (a) payments to current employees in respect of wages, benefits and related amounts; (b) payments to independent contractors in respect of services provided to the Nelson Business; (c) payments to consultants, agents, experts, accountants, counsel or other persons retained by the Applicants in respect of the restructuring proceedings and related corporate matters; (d) payments to directors of the Applicants and payments to counsel to the directors in respect of reasonable fees and disbursements up to an amount agreed to by the Applicants and the Majority Initial Consenting First Lien Lenders; (e) payments to suppliers, service providers and content providers in connection with the operation of the business; (f) payments and the application of credits in connection with certain existing customer programs; and (g) such other amounts as may be agreed to by the Applicants

and the Majority Initial Consenting First Lien Lenders. The Consenting First Lien Lenders have agreed to and the Monitor is supportive of such requested relief.

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

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

54. There have been many instances since the 2009 amendments in which courts have authorized applicants to pay certain pre-filing amounts where the applicants were not seeking a charge in respect of critical suppliers. In granting this authority, the courts have considered a number of factors, including:
- (a) whether the goods and services were integral to the business of the applicants;
 - (b) the applicants' need for the uninterrupted supply of the goods or services;
 - (c) the fact that no payments would be made without the consent of the Monitor;
 - (d) the Monitor's support and willingness to work with the applicants to ensure that payments to suppliers in respect of pre-filing liabilities were appropriate;
 - (e) whether the applicants had sufficient inventory of the goods on hand to meet their needs; and
 - (f) the effect on the debtors' ongoing operations and ability to restructure if they were unable to make pre-filing payments to their critical suppliers.

Re Cinram International Inc., 2012 ONSC 3767, 91 C.B.R. (5th) 46 at para. 37 and Sch. C. paras. 66-71 (Commercial List) [*Cinram*]; Book of Authorities, Tab F.

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

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

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

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

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

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

(3) The Charges are Appropriate

57. The Applicants are seeking approval of certain Court-ordered charges over their assets and property relating to certain administrative costs of the restructuring proceedings, the indemnification of their directors and officers, and the KERP (the "**Charges**"). The proposed Initial Order contemplates that the Charges would rank in priority to all other

Encumbrances in favour of any person, notwithstanding the order of perfection or attachment, except for any validly perfected security interest in favour of a “secured creditor” as defined in the CCAA other than any validly perfected security interest in favour of the First Lien Agent, the First Lien Lenders, the Second Lien Agent and the Second Lien Lenders under the Credit Agreements. Counsel to the First Lien Agent, the First Lien Lenders, the Second Lien Agent and the Second Lien Lenders that are affected by the Charges have been given notice of these CCAA proceedings.

Nordal Affidavit at para. 174; Application Record, Tab 2.

(a) *Administration Charge*

58. The Applicants are seeking a Court-ordered charge over the assets and property of the Applicants to secure the fees and disbursements of the Monitor, its legal counsel, the Applicants’ Canadian and U.S. counsel, the First Lien Agent, the Supplemental Agent, and Canadian and U.S. counsel to the First Lien Steering Committee, the First Lien Agent and the Supplemental Agent incurred at their standard rates and charges, and the fees and disbursements of the financial advisor to the First Lien Steering Committee pursuant to the engagement letter dated June 24, 2014 (the “**Administration Charge**”), which Administration Charge is to be in an aggregate amount of \$1 million. The Administration Charge is to rank in priority to all of the other Charges set out in the proposed Initial Order.

Nordal Affidavit at paras. 135 and 174; Application Record, Tab 2.

59. Section 11.52 of the CCAA expressly provides the court with the jurisdiction to grant an administration charge:

11.52(1) *Court may order security or charge to cover certain costs*

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.

11.52(2) *Priority*. – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

CCAA, Sections 11.52(1) and (2).

60. Administration charges were granted pursuant to Section 11.52 in numerous cases, including *Canwest Global*, *Canwest Publishing*, *Cinram*, and *SkyLink*.

Canwest Global, *supra* at para. 37; Book of Authorities, Tab E.

Re Canwest Publishing Inc., 2010 ONSC 222, 63 C.B.R. (5th) 115 at para. 55 (Commercial List) [*Canwest Publishing*]; Book of Authorities, Tab I.

Re Cinram International Inc., Initial Order granted June 25, 2012, Court File No. CV12-9767-00CL at para. 48 (Ont. Sup. Ct. J. [Commercial List]) [*Cinram Initial Order*]; Book of Authorities, Tab J.

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

Re Armtec Infrastructure Inc., Initial Order granted April 29, 2015, Court File No. CV15-10950-00CL at para. 34 (Ont. Sup. Ct. J. [Commercial List]) [*Armtec Initial Order*]; Book of Authorities, Tab K.

61. In *Canwest Publishing*, the Court noted that Section 11.52 does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. The list of factors to consider in approving an administration charge include:

- (a) the size and complexity of the business being restructured;
- (b) the proposed role of the beneficiaries of the charge;
- (c) whether there is 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.

Canwest Publishing, supra at para. 54; Book of Authorities, Tab I.

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

- (a) the proposed restructuring of the Applicants is large and complex and requires the extensive involvement of the professional advisors subject to the Administration Charge;
- (b) the professionals that are the proposed beneficiaries of the Administration Charge have each contributed to the Applicants' restructuring efforts to date and will continue to contribute to the successful restructuring of the Applicants going forward, including the implementation of the proposed Transaction;
- (c) there is no unwarranted duplication of roles;
- (d) in connection with the Sale Approval Motion, the Applicants expect to seek to amend the Administration Charge to reduce it to an aggregate amount of \$400,000 for the benefit of the Monitor and the Monitor's counsel only, effective upon the completion of the Transaction;
- (e) the secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
- (f) the Consenting First Lien Lenders have agreed to and the proposed Monitor is supportive of the Administration Charge.

Nordal Affidavit at paras. 135-136 and 174; Application Record, Tab 2.

(b) *Directors' Charge*

63. The Applicants seek a Court-ordered charge in an amount of \$2.2 million over the assets and property of the Applicants to indemnify the directors and officers of the Applicants in respect of liabilities they may incur in such capacities from and after the commencement of these proceedings (the “**Directors’ Charge**”). The Directors’ Charge is to be subordinate to the Administration Charge and in priority to the KERP Charge.

Nordal Affidavit at paras. 171-173; Application Record, Tab 2.

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

11.51(1) *Security or charge relating to director’s indemnification.* – On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge – in an amount that the court considers appropriate – in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

11.51(2) *Priority.* – The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

11.51(3) *Restriction – indemnification insurance.* – The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.

11.51(4) *Negligence, misconduct or fault.* – The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director’s or officer’s gross negligence or wilful misconduct or, in Quebec, the director’s or officer’s gross or intentional fault.

CCAA, Section 11.51.

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

I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

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

Canwest Publishing, supra at paras. 56-57; Book of Authorities, Tab I.

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

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

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

66. The Applicants submit that the Directors' Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Court to exercise its jurisdiction and grant the Directors' Charge given that:
- (a) it is possible for the directors and officers of the Applicants to be held personally liable in connection with these CCAA proceedings and they have expressed their desire for certainty with respect to potential personal liability if they continue in their current capacities;
 - (b) the Applicants' D&O Policy contains several exclusions and limitations to the coverage provided, and there is a potential for there to be insufficient coverage in respect of the potential directors' liabilities for which the directors and/or officers may be found to be responsible;
 - (c) the Directors' Charge applies only to claims or liabilities for which the directors and officers do not have coverage under the D&O Policy;
 - (d) the Directors' Charge would only cover obligations and liabilities that the directors and officers, as applicable, may incur after the commencement of these CCAA proceedings and does not cover wilful misconduct or gross negligence;

- (e) the Applicants' directors and officers have been actively involved in the attempts to address the Applicants' current financial circumstances and difficulties, including through the exploration of alternatives, communicating with the principal secured lenders, implementation of the SISP, and the commencement of the within CCAA proceedings;
- (f) the Applicants require the continued active and committed involvement of the directors and officers;
- (g) the amount of the Directors' Charge has been calculated based on the estimated exposure of the directors and officers of the Applicants and has been reviewed by the proposed Monitor;
- (h) the secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
- (i) the Consenting First Lien Lenders have agreed to and the proposed Monitor is supportive of the Directors' Charge.

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

(c) *KERP Charge*

67. The Applicants are seeking a Court-ordered charge in the amount of \$340,000 over the assets and property of the Applicants as security for the Retention Payments (the "**KERP Charge**"). The KERP Charge is to be subordinate to the Administration Charge and the Directors' Charge.

Nordal Affidavit at paras. 164 and 173; Application Record, Tab 2.

68. The CCAA is silent with respect to the granting of KERP charges. Approval of a KERP and a KERP charge are matters within the discretion of the Court. The Court in *Re Grant Forest Products Inc.* considered a number of factors in determining whether to grant a KERP and a KERP charge, including:

- (a) whether the Monitor supports the KERP agreement and charge (to which great weight was attributed);
- (b) whether the employees to which the KERP applies would consider other employment options if the KERP agreement were not secured by the KERP charge;
- (c) whether the continued employment of the employees to which the KERP applies is important for the stability of the business and to enhance the effectiveness of the marketing process;
- (d) the employees' history with and knowledge of the debtor;
- (e) the difficulty in finding a replacement to fulfill the responsibilities of the employees to which the KERP applies;
- (f) whether the KERP agreement and charge were approved by the board of directors, including the independent directors, as the business judgment of the board should not be ignored;
- (g) whether the KERP agreement and charge are supported or consented to by secured creditors of the debtor; and
- (h) whether the payments under the KERP are payable upon the completion of the restructuring process.

Armtec, supra at para. 69; Book of Authorities, Tab H.

Re Grant Forest Products Inc. (2009), 57 C.B.R. (5th) 128 (Ont. Sup. Ct. J. [Commercial List]) at paras. 8-24; Book of Authorities, Tab L.

Cinram, supra at paras. 27 and 91-92; Book of Authorities, Tab F.

Canwest Global, supra at para. 49; Book of Authorities, Tab E.

69. The Applicants submit that the KERP Charge is warranted and necessary, and that it is appropriate in the present circumstances for this Court to exercise its jurisdiction and grant the KERP Charge in the amount of \$340,000, given:

- (a) the KERP was developed by the Company with the principal purpose of providing an incentive for certain key employees critical to the preservation of the Company's enterprise value to remain with the Company while the Company pursued its restructuring efforts despite the financial difficulties it is currently facing;
- (b) the eligible employees are essential for a successful restructuring of the Company and the preservation of the Company's value during the restructuring process;
- (c) the eligible employees are likely to seek alternative employment absent the KERP;
- (d) it would be detrimental to the restructuring process if Nelson Education were required to find replacements for the eligible employees during this critical period;
- (e) the KERP, including the Retention Payments payable thereunder, not only provides appropriate incentives for the eligible employees to remain in their current positions, but also ensures that they are properly compensated for their assistance in Nelson Education's restructuring process;
- (f) the Company consulted with the First Lien Steering Committee in connection with the KERP;
- (g) the secured creditors affected by the charge have been provided with notice of these CCAA proceedings; and
- (h) the KERP has been reviewed and approved by the Board of Directors of Nelson Education, has been agreed to by the Consenting First Lien Lenders and is supported by the Monitor.

70. In connection with the Sale Approval Motion, the Applicants expect to seek a release and discharge of the KERP Charge upon the completion of the Transaction and the assumption by the Purchaser of all of the obligations under the KERP.

Nordal Affidavit at para. 165; Application Record, Tab 2.

C. SEALING OF THE CONFIDENTIAL SUPPLEMENT

71. The Applicants request that this Honourable Court seal the Confidential Supplement, which contains a summary of the individual Retention Payments (the “**KERP Summary**”) and the Stockholders and Registration Rights Agreement (as more fully described in the Nordal Affidavit). The KERP Summary contains individually identifiable information and compensation information, including sensitive salary information, about the individuals who are covered by the KERP, and the Stockholders and Registration Rights Agreement contains commercially sensitive information in connection with the corporate governance terms of Purchaser Holdco.

Nordal Affidavit at paras. 122 and 166; Application Record, Tab 2.

72. This Court has the discretion pursuant to Section 137(2) of the *Courts of Justice Act* (Ontario) and pursuant to its inherent jurisdiction to order that any document filed in a civil proceeding be treated as confidential, sealed and not form part of the public record.

Courts of Justice Act, R.S.O. 1990, c. C.43, Section 137(2).

73. The Courts will exercise their discretion to depart from the general principle that court proceedings should be public where it is demonstrated that openness would cause serious harm or injustice. In *MacIntyre v. Nova Scotia (Attorney General)*, the Supreme Court of Canada held:

Undoubtedly every Court has a supervisory and protecting power over its own records. Access can be denied when the ends of justice would be subverted by disclosure or the judicial documents might be used for an improper purpose. The presumption, however, is in favour of public access and the burden of contrary

proof lies upon the person who would deny the exercise of the right.

MacIntyre v. Nova Scotia (Attorney General) (1982), 132 D.L.R. (3d) 385 (S.C.C.) at para. 70; Book of Authorities, Tab M.

74. In *Sierra Club of Canada v. Canada (Minister of Finance)*, a decision of the Supreme Court of Canada interpreting the sealing provisions of the Federal Court Rules, the following test to determine when a sealing order should be made was adopted:

A confidentiality order under Rule 151 should only be granted when:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonable alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v. Canada (Minister of Finance), [2002] 2 S.C.R. 522 at para. 53 [*Sierra Club*]; Book of Authorities, Tab N.

75. In *Canwest Global*, the Court applied the test from *Sierra Club* and approved a similar request by the applicants for the sealing of a confidential supplement containing unredacted copies of the applicants' key employee retention plans:

In this case, the unredacted KERPS reveal individually identifiable information including compensation information. Protection of sensitive personal and compensation information the disclosure of which could cause harm to the individuals and to the CMI Entities is an important commercial interest that should be protected. The KERP participants have a reasonable expectation that their personal information would be kept confidential. As to the second branch of the test, the aggregate amount of the KERP has been disclosed and the individual personal information adds nothing. It seems to me that the second branch of the test has been met. The relief requested is granted.

Canwest Global, supra at para. 52; Book of Authorities, Tab E.

76. With respect to the first branch of the *Sierra Club* test, the KERP Summary outlines individual Retention Payments, and the Stockholders and Registration Rights Agreement contains the corporate governance terms of Purchaser Holdco. Protecting the sensitive personal and compensation information of the employees, and the commercially sensitive information of Purchaser Holdco, a private entity, and its shareholders, the disclosure of which would cause harm to the Applicants, the employees subject to the KERP, and the shareholders of Purchaser Holdco, as applicable, is an important commercial interest that should be protected. Moreover, the employees subject to the KERP have a reasonable expectation that their names and salary information would be kept confidential.
77. With respect to the second branch of the *Sierra Club* test, the Applicants submit that keeping this information confidential will not have any deleterious effects. In any event, the salutary effects of sealing the Confidential Supplement outweigh any conceivable deleterious effects. In the normal course, outside the context of a CCAA proceeding, confidential personal and salary information would be kept strictly confidential by an employer and would not find its way into the public domain, and a company's confidential information would likewise be kept strictly confidential and would not find its way into the public domain. The Stockholders and Registration Rights Agreement is commercially sensitive as it contains corporate governance and shareholder terms in respect of Purchaser Holdco. Moreover, the Stockholders and Registration Rights Agreement has previously been made available to all First Lien Lenders subject to the confidentiality provisions under the First Lien Credit Agreement, and, with respect to the KERP Summary, the aggregate amount of the KERP Charge has been disclosed in the Nordal Affidavit. There is no compelling reason for allowing disclosure of the individual compensation arrangements under the KERP or the Stockholders and Registration Rights Agreement.

Nordal Affidavit at paras. 122-123 and 164; Application Record, Tab 2.

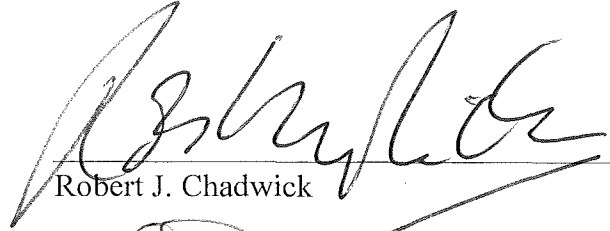
78. Accordingly, the Applicants submit that this Honourable Court ought to order that the Confidential Supplement be permanently sealed from and not form part of the public record.

PART IV – RELIEF REQUESTED

79. The Applicants currently have unsustainable debt levels when compared to their annual revenue and EBITDA. In addition, the Applicants' First Lien Credit Agreement matured in July 2014 and remains unpaid, and the Applicants are also in default under their Second Lien Credit Agreement, which matures on July 3, 2015.
80. The Company, with the assistance of its advisors, conducted the comprehensive SISP, which did not result in an executable transaction that would result in proceeds to repay the obligations under the First Lien Credit Agreement in full or would otherwise be supported by the First Lien Lenders.
81. There is no value available to the Second Lien Lenders and the within CCAA proceedings are necessary to preserve the value of the Nelson Business with minimal disruption while the Applicants pursue the completion of the Transaction and the transfer of the assets and property of the Company in satisfaction of the indebtedness owing to the First Lien Lenders free and clear of the obligations under the Second Lien Credit Agreement.
82. The Transaction is the only executable transaction in the circumstances and will significantly reduce the debt levels of the Company, establish a stronger financial foundation for Nelson Education, create stability for the business and strengthen the Company's position as Canada's leading education publisher for the benefit of the Company's many stakeholders.
83. The Applicants submit that they meet all of the qualifications required to obtain the requested relief under the CCAA.
84. For the reasons set out above, the Applicants request that this Court grant the proposed form of Initial Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

May 11, 2015



Robert J. Chadwick



Caroline Descours

SCHEDULE A – LIST OF AUTHORITIES

- A. *Re Stelco Inc.* (2004), 48 C.B.R. (4th) 299 (Ont. Sup. Ct. J. [Commercial List]), leave to appeal to C.A. refused [2004] O.J. No. 1903, leave to appeal to S.C.C. refused [2004] S.C.C.A. No. 336
- B. *Elan Corporation v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289, [1990] O.J. No. 2180 (C.A.)
- C. *Re Lehndorff General Partners Ltd.* (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275 (Ont. Gen. Div.)
- D. *Re Sulphur Corporation of Canada Ltd.*, 2002 ABQB 682, [2002] A.J. No. 918 (QL)
- E. *Re Canwest Global Communications Corp.* (2009), 59 C.B.R. (5th) 72, [2009] O.J. No. 4286 (Sup. Ct. J. [Commercial List])
- F. *Re Cinram International Inc.*, 2012 ONSC 3767, 91 C.B.R. (5th) 46 (Commercial List)
- G. *Re SkyLink Aviation Inc.*, 2013 ONSC 1500 (Commercial List)
- H. *Re Armtec Infrastructure Inc.*, 2015 ONSC 2791 (Commercial List)
- I. *Re Canwest Publishing Inc.*, 2010 ONSC 222, 63 C.B.R. (5th) 115 (Commercial List)
- J. *Re Cinram International Inc.*, Initial Order granted June 25, 2012, Court File No. CV12-9767-00CL (Ont. Sup. Ct. J. [Commercial List])
- K. *Re Armtec Infrastructure Inc.*, Initial Order granted April 29, 2015, Court File No. CV15-10950-00CL (Ont. Sup. Ct. J. [Commercial List])
- L. *Re Grant Forest Products Inc.* (2009), 57 C.B.R. (5th) 128 (Ont. Sup. Ct. J [Commercial List])
- M. *MacIntyre v. Nova Scotia (Attorney General)* (1982), 132 D.L.R. (3d) 385 (S.C.C.)
- N. *Sierra Club of Canada v. Canada (Minister of Finance)*, [2002] 2 S.C.R. 522

SCHEDULE B – STATUTORY REFERENCES

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

s. 2 (“company”)

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

s. 2 (“debtor company”)

“debtor company” means any company that

- a) is bankrupt or insolvent,
- b) has committed an act of bankruptcy within the meaning of the Bankruptcy and Insolvency Act or is deemed insolvent within the meaning of the Winding-up and Restructuring Act, whether or not proceedings in respect of the company have been taken under either of those Acts,
- c) has made an authorized assignment or against which a bankruptcy order has been made under the Bankruptcy and Insolvency Act, or
- d) is in the course of being wound up under the Winding-up and Restructuring Act because the company is insolvent.

s. 3(1)

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

s. 11

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

s. 11.51(1)

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

s. 11.51(2)

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

s. 11.51(3)

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

s. 11.51(4)

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

s. 11.52(1)

Court may order security or charge to cover certain costs – 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 proceeding 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.

s. 11.52(2)

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

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

s. 2 (“insolvent person”)

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

- d) who is for any reason unable to meet his obligations as they generally become due,
- e) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
- f) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due.

COURTS OF JUSTICE ACT
RSO 1990, c C.43

s. 137(2)

Sealing documents - A court may order that any document filed in a civil proceeding before it be treated as confidential, sealed and not form part of the public record.

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

Court File No: _____

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

Applicants

**ONTARIO
SUPERIOR COURT OF JUSTICE-
COMMERCIAL LIST**

Proceeding commenced at Toronto

**FACTUM OF THE APPLICANTS
(CCAA Application)**

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