Court File No.: CV15-10961-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

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

Applicants

FACTUM OF THE ROYAL BANK OF CANADA

May 28, 2015

Thornton Grout Finnigan LLP
Barristers & Solicitors
Suite 3200, TD West Tower
100 Wellington Street West
P.O. Box 329, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D.J. Miller (LSUC# 34393P)
djmiller@tgf.ca
Tel: (416) 304-0559

Kyla E. M. Mahar (LSUC# 44182G)
kmahar@tgf.ca
Tel: (416) 304-0594
Fax: (416) 304-1313

Lawyers for Royal Bank of Canada

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PART I - NATURE OF THE MOTION

1. Nelson Education Ltd. ("**Nelson Education**") and Nelson Education Holdings Ltd ("**Holdings**" and collectively with Nelson Education, the "**Applicants**") commenced a proceeding under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 (the "**CCAA**") on May 12, 2015 (the "**CCAA Proceedings**") as the mechanism by which it would effect a credit bid by the First Lien Lenders (as defined herein) of the Applicants' entire business and all assets (the "**Transaction**").

2. The application was on *ex parte* notice to Royal Bank of Canada ("**RBC**") and the Applicants were granted a pared down form of Initial Order by Justice Newbould (the "**Initial Order**") when compared to the form of Initial Order sought by the Applicants and contained at Tab 4 in their Application Record (the "**Proposed Initial Order**"). In support of the application, the Applicants filed the Affidavit of Greg Nordal sworn on

May 11, 2015 (the "**Nordal Affidavit**"). Capitalized terms not defined herein shall have the meanings ascribed to them in the Nordal Affidavit.

3. The Initial Order set the date of May 29, 2015 (the "**Comeback Hearing**") to allow any interested party to seek to set aside or vary any provisions of the Initial Order as a true comeback hearing. The only issues that will be addressed at the Comeback Hearing are those relating to the Proposed Initial Order originally sought by the Applicants. On May 15, 2015, the Applicants served motion materials in respect of a Sale Motion seeking Court approval of the Transaction. This factum (and submissions at the Comeback Hearing) will not address any aspects of the Applicants' Sale Motion, as it would be premature to do so.

4. RBC takes the position that these CCAA Proceedings have been commenced for the singular purpose of seeking this Court's "blessing" for a quick flip transaction (which, but for RBC's intervention, the Applicants sought to complete nine days after the Proposed Initial Order was sought). The Transaction has the effect of expropriating the Second Lien Lender's security over the assets of the Applicants for no consideration, while leaving virtually every other stakeholder, including unsecured creditors, whole.

5. RBC's view is that it is not an appropriate use of the CCAA solely to effectuate a quick flip of all of the Applicants' assets pursuant to a credit bid in the circumstances of this case where: (i) the Applicants do not have the consent of the Second Lien Lenders as secured creditors; (ii) a plan is not being proposed; and (iii) the CCAA Court has not been involved in any aspect of a restructuring or liquidation, or in supervising any form

of sale process. If the Applicants seek to avail themselves of the protections offered by the CCAA, then there should be corollary oversight of the process by the Court and an independent Monitor to assist the Court and all stakeholders.

6. RBC is of the view that, if the Court determines on the Comeback Motion that the CCAA Proceedings should continue:

(a) Alvarez & Marsal Canada Inc. ("**A&M**") should be replaced with FTI Consulting Canada Inc. ("**FTI**") as Monitor of the Applicants;

(b) the following amendments should be made to the Proposed Initial Order:

(i) The provisions of the Initial Order should not reference or be subject to the Supplemental Support Agreement among Nelson Education, Holdings, the First Lien Agent, the Supplemental Agent and the Consenting First Lien Lenders dated May 11, 2015 (the "**Supplemental Support Agreement**");

(ii) Paragraph 6 of the Initial Order should be amended to provide protection to RBC, in its capacity as provider of the Cash Management System, by way of a Court Ordered charge, as the Applicants have no intention of putting forward a Plan (as defined in the Initial Order) or continuing to own any of their assets;

(iii) Paragraph 7(a) and (h) of the Initial Order also should require the agreement of the Monitor or as otherwise ordered by the Court;

(iv) Paragraph 10(a) of the Initial Order should be amended to include (iii) interest, costs, indemnities, expenses and fees payable to the Second Lien Lenders under the Second Lien Credit Agreement, to provide the same treatment as the First Lien Lenders;

(v) Paragraph 31 of the Initial Order should be amended to include the reasonable fees and disbursements of the Canadian and U.S. counsel for the Second Lien Agent and the financial advisor for the Second Lien Lenders, consistent with that provided to counsel and the financial advisor for the First Lien Lenders; and

(vi) Paragraph 33 of the Initial Order should be amended to remove the First Lien Counsel and First Lien Financial Advisor as beneficiaries of the Administration Charge.

PART II - THE FACTS

RBC

7. In respect of the Applicants, RBC is:

(a) a First Lien Lender holding approximately 12% of the principal amounts outstanding under the First Lien Credit Agreement and is the only First Lien Lender that is not a Consenting First Lien Lender;

(b) a Second Lien Lender, holding the largest share of the principal amounts outstanding, and the Second Lien Agent under the Second Lien Credit Agreement; and

(c) the financial institution providing the Cash Management System to the Applicants.

Affidavit of Annette Fournier sworn on May 20, 2015 (the "Fournier Affidavit") at para. 3.

8. RBC provides Nelson Education's Cash Management System as described in the Nordal Affidavit. It does so as the single largest lender to the Applicants and the only Canadian financial institution among the First and Second Lien Lenders. The Applicants seek to have RBC continue to provide the existing Cash Management System and maintain the banking arrangements during the continuation of the CCAA Proceedings. However, under the arrangements currently in existence, Nelson Education is not required to maintain a minimum amount of cash on hand.

Affidavit of Greg Nordal sworn on May 11, 2015 (the "Nordal Affidavit") at para. 141 to 148.

The Applicants' Objectives of its CCAA Proceedings and the State of the Business

9. The Applicants identify the principal objectives of these CCAA Proceedings as follows:

(a) To ensure the ongoing operations of the Applicants for the benefit of their many stakeholders; and

(b) To complete the sale and transfer of Nelson Education's business to a newly incorporated entity to be owned indirectly by the Company's First Lien Lenders pursuant to the Transaction in satisfaction of the indebtedness owing to the First Lien Lenders free and clear of the obligations under the Second Lien Credit Agreement.

The Nordal Affidavit at paras. 3 and 14.

10. As of the date of the Nordal Affidavit, there was approximately US$268,753,930, plus accrued interest, outstanding under the First Lien Credit Agreement and approximately US$153,218,764, plus accrued interest, outstanding under the Second Lien Credit Agreement. The First Lien Credit Agreement's maturity date was July 3, 2014. The Second Lien Credit Agreement's maturity date was July 3, 2015 subject to acceleration. Despite acceleration of the indebtedness, the Second Lien Lenders have taken no enforcement steps.

The Nordal Affidavit at paras. 18, 59 and 63.

11. Nelson Education's revenue for the fiscal year ending March 31, 2015 was approximately $129 million and its EBITDA, net of pre-publication expenditures, was approximately $31.5 million, and for the twelve-month period ending March 31, 2014, the Company's revenue was approximately $128 million and its EBITDA, net of pre-publication expenditures, was approximately $31.7 million.

The Nordal Affidavit at para. 19.

12. In March 2015, a third party consultant confirmed that Nelson Education's EBITDA margins and cost metrics are the best among its peer group.

The Nordal Affidavit at para. 76.

13. Nelson Education's EBITDA has remained positive over the last several years. For the fiscal year ended June 30, 2011 it was $47.4 million, for the fiscal year ended June 30, 2012 it was approximately $37.3 million and for the year ended June 30, 2013 it was approximately $40.9 million.

Response to Written Questions on Affidavit of Greg Nordal sworn May 11, 2015 (the "Nordal Responses") at para. 6, Compendium at Tab 7.

14. Nelson Education's business operations are stable and, but for it deliberately ceasing to make certain interest payments under the Second Lien Credit Agreement, it has been operating in the ordinary course of business on revenues generated from the business. Interest and fees accruing under the First Lien Credit Agreement (including newly created "consent fees" for Consenting First Lien Lenders in September, 2014 in the aggregate amount of US$12 million to date) have been paid in cash in the ordinary course. Nelson Education is current on its contributions under its DC Plan. It has substantial cash on hand, and does not require (and is not seeking) a DIP facility.

The Nordal Affidavit at paras. 20, 43, and 60.

Nordal Responses, at para. 37.

15. At the commencement of these CCAA Proceedings, the Applicants' estimated cash position was approximately $21.2 million. That amount is after payment of the newly-created "consent fees" to the Consenting First Lien Lenders in the amount of US$12

million over the last eight months. During the CCAA Proceedings, the Applicants intend to make all pre-filing and post-filing payments in the ordinary course, resulting in only the Second Lien Lenders not receiving amounts they are contractually entitled to receive during the proceeding.

Pre-Filing Report of the Proposed Monitor A&M dated May 11, 2015 (the "Pre-Filing Report") at paras. 8.5 and 8.6.

Nordal Responses, at para. 37.

16. Nelson Education is well positioned to take advantage of future increasing opportunities in the digital education market space, and is well positioned to grow its business in future.

The Nordal Affidavit at para. 84.

17. Mr. Nordal asserts:

> By pursuing the implementation of the Transaction under the CCAA at this time, the Nelson Business can continue as a going concern while substantially all of the Company's assets, trade payables and employment obligations are transferred to and assumed by the Purchaser.

The Nordal Affidavit at para. 130.

18. The Applicants have no intention of proposing a plan of compromise or arrangement to their creditors. Rather, the Nordal Affidavit describes the Transaction the Applicants intend to seek immediate court approval of and the process undertaken leading to the Transaction, which was undertaken by A&M. In fact, the Cash Flow Forecast filed at the commencement of these CCAA Proceedings is only for 5 week period rather than the traditional 13 week period.

The Nordal Affidavit at paras. 3, 8 to 15, 91 to 124, 178 to 180 and Exhibit "I".

Pre-Filing Report at Appendix "A".

19. Pursuant to section 6.9(b) of the Intercreditor Agreement, in the event the Applicants commence any restructuring proceeding in Canada and put forward a plan, the Applicants, the First Lien Lenders and the Second Lien Lenders agreed that the First Lien Lenders and the Second Lien Lenders should be classified together in one class. This contractual provision results in RBC's support being required for any plan to be put forward.

The Intercreditor Agreement at section 6.9(b) at Exhibit "F" to the Nordal Affidavit.

A&M's Substantial Engagements with Nelson Education

20. Nelson Education engaged Alvarez & Marsal Canada Securities ULC ("**A&M Securities**"), an affiliate of A&M, as its financial advisor in March, 2013. A&M Securities has been operating as a financial advisor to Nelson Education, among other capacities, for more than two years prior to the date of the Initial Order.

The Nordal Affidavit at para. 85.

Pre-Filing Report of the Proposed Monitor A&M dated May 11, 2015 (the "Pre-Filing Report") at para. 3.1.

Supplemental Report to the Pre-Filing Report of the Monitor dated May 26, 2015 (the "Supplemental Report") at paras. 3.4 and 3.8.

21. The scope of A&M Securities' engagement in 2013 (the "**2013 Engagement**") includes the following:

(a) Analyze and evaluate Nelson Education's financial condition,

(b) Assist Nelson Education to prepare, among other things, financial models, a balance sheet, income statement and cash flow statement;

(c) Assist Nelson Education to respond to questions from its lenders regarding Nelson Education's business plan and financial model;

(d) If requested by Management, attend and participate in meeting of the Board with respect to matters on which A&M was engaged to advise Nelson Education; and

(e) Other activities as approved by Management or the Board of Nelson Education and agreed to by A&M.

A&M Securities Engagement Letter dated March 28, 2013 (the "2013 Engagement") at p. 1, attached as Appendix "D" to the Supplemental Report.

22. In addition to A&M Securities' engagement under the 2013 Engagement, A&M Securities was engaged by Nelson Education in September 5, 2014 (the "**September 2014 Engagement**") to act as the exclusive lead advisor for a transaction. A&M's goal was identified thereunder as "completing a successful transaction in the most expedient manner."

A&M Securities Engagement Letter dated September 5, 2014 (the "September 2014 Engagement") at page 1, attached as Appendix "E" to the Supplemental Report.

23. Pursuant to the September 2014 Engagement, A&M's fees excluded time associated with A&M's involvement on behalf of Nelson Education with matters pertaining to:

(a) The Cengage operating agreement;

(b) Heritage Canada;

(c) *Competition Act* review; and

(d) A&M's existing mandate as Financial Advisor to Nelson in accordance with its pre-existing engagement letter, including any contingency planning and/or any future mandate as Monitor pursuant to the CCAA or the provision of a Fairness Opinion.

September 2014 Engagement at p. 1, attached as Appendix "E" to the Supplemental Report.

24. In addition, under phase 2 of its mandate under the September 2014 Engagement, A&M's compensation is described as being based on time billed at standard hourly rates and is "subject to any other arrangements agreed upon among Nelson, the lenders and A&M". [emphasis added]. The term "lenders" refers only to the First Lien Lenders.

September 2014 Engagement at p. 6, attached as Appendix "E" to the Supplemental Report.

25. In undertaking its mandate under the 2013 Engagement and the September 2014 Engagement, A&M was specifically authorized to utilize the services of employees of its affiliates under common control with A&M and subsidiaries.

2013 Engagement at p. 2, attached as Appendix "D" to the Supplemental Report.

September 2014 Engagement at p. 4, attached as Appendix "E" to the Supplemental Report.

26. RBC requested that A&M provide copies of all accounts rendered to Nelson, accompanied by docket entries that provide sufficient detail to determine the work undertaken. In its Supplemental Report, the Monitor confirms that A&M issued over 60 accounts but only provides a sample of these accounts and does not give an explanation

as to why all accounts are not provided. The sample accounts show 83.7 hours of time billed prior to 2015 by A&M employees Al Hutchens, the person intended to act as Monitor in the CCAA Proceedings, and Greg Karpel.

Written Questions in respect of the Proposed Monitor's Pre-Filing Report dated May 22, 2015 at para. 5 at Appendix "B" to the Supplemental Report.

Supplemental Report at para. 3.17 and Appendix "F".

27. In the two year period prior to the commencement of these CCAA Proceedings, A&M billed Nelson Education $5,440,794.00 in fees (excluding HST and disbursements) undertaking its mandates on behalf of Nelson Education.

The Supplemental Report at para. 3.15.

28. The 2013 Engagement and the September 2014 Engagement both seek Nelson Education's waiver of any conflict of interest that may exist or arise in connection with an A&M affiliate's engagement with Cengage Learning Holdings II, LP ("**Cengage**"). At the time of the 2013 Engagement, A&M US was engaged by Cengage to provide restructuring and financial advisory services and Cengage and Nelson Education had common shareholders. At the time of the September 2014 Engagement, an A&M affiliate was providing certain financial advisory and financial management services to Cengage.

2013 Engagement at p. 4, attached as Appendix "D" to the Supplemental Report.

September 2014 Engagement at p. 8, attached as Appendix "E" to the Supplemental Report.

29. Nelson Education maintains a strong relationship with Cengage and is the exclusive distributor for Cengage educational content in Canada pursuant to an Operating

Agreement that expires on January 1, 2018. Cengage also provides certain operational support to Nelson Education.

The Greg Nordal at paras. 22, 24 and 25.

Pre-Filing Report at para. 3.4.

30. Cengage commenced Chapter 11 proceedings in July 2013, and completed its financial restructuring and emerged from its Chapter 11 reorganization on March 31, 2014 (the "**Cengage Chapter 11 Proceedings**").

Pre-Filing Report at para. 3.4.

31. A&M is a subsidiary of Avarez & Marsal Holding, LLC ("**A&M Holdings**"). The A&M Firm (as defined in the Pre-Filing Report), has been engaged by Cengage and its subsidiaries to provide financial, interim management and tax advisory services including during the Cengage Chapter 11 Proceedings (i.e. going back at least to July 2013). RBC requested that the Monitor advise on the quantum of fees the A&M Firm has billed Cengage and has not received this information to date. Given the engagements, it is anticipated that these fees are significant.

Pre-Filing Report at para. 3.4.

The Supplemental Report at paras. 3.16 to 3.19.

32. Nelson Education and A&M engaged in preliminary discussions with Cengage with respect to a potential transaction and related benefits to each of Nelson Education and Cengage under the agreements between the parties. These discussions terminated in February 2015.

Nordal Affidavit at para. 103.

33. Nelson Education chose to stop paying interest payments due under the Second Lien Credit Agreement, having only made a partial payment on March 31, 2014 and making no payments on account of interest on June 30, 2014, September 30, 2014, December 31, 2014 or March 31, 2015, while continuing to make payments to all other creditors.

Nordal Affidavit at para. 64.

34. A&M Securities was present at the meetings of Nelson Education's Board wherein the ongoing decision was made by that Board to not make interest payments to the Second Lien Lenders including on March 20, 2014, March 27, 2014, April 7, 2014 and June 27, 2014. A&M Securities was involved in certain discussions with RBC and its financial advisors in connection with the extension of the cure period for payment of interest to the Second Lien Lenders as the financial advisor to Nelson Education.

The Nordal Responses at para. 23.

35. The decision to defer or stop payment of the Second Lien Lenders' financial advisor was made by Nelson Education in August 2014.

Nordal Responses at para. 27.

36. Nelson Education and Holdings entered into the First Lien Support Agreement, which provides that neither Nelson Education nor Holdings shall, unless consented to by the Majority Initial Consenting First Lien Lenders, make any payment in connection with the Second Lien Credit Agreement, including any interest or other payment that is due or that may become due pursuant to the Second Lien Credit Agreement.

Nordal Responses at para. 22.

37. Pursuant to the First Lien Support Agreement, Consenting First Lien Lenders (i.e. all First Lien Lenders except RBC) have received "consent fees" in the aggregate amount of US$11,984,058 since September, 2014. Although also a First Lien Lender, RBC has not received any such fees.

Nordal Responses at para. 37.

38. The Applicants acknowledge that following the announcement of the First Lien Term Sheet and the Transaction, they only engaged in "certain limited discussions and exchange of correspondence with the Second Lien Agent".

Nordal Affidavit at para. 93.

39. FTI has consented to act as Monitor in these CCAA Proceedings.

The Consent of FTI Consulting Canada Inc. dated May 28, 2015.

PART III - THE ISSUES

40. The commencement of the CCAA Proceedings by the Applicants raises the following issues to be determined by this Court:

(a) Is it an appropriate circumstance for the Court to grant the Proposed Initial Order under the CCAA if the purpose of the proceedings is simply to seek approval of the Transaction?

(b) If the CCAA Proceedings continue, should A&M be the Monitor of the Applicants?

(c) If the CCAA Proceedings continue, what changes, if any, should be made to the Proposed Initial Order?

PART IV - THE LAW

ISSUE 1: **Is it an appropriate circumstance for the Court to grant the Proposed Initial Order under the CCAA if the purpose of the proceedings is simply to seek approval of the Transaction?**

41. It is not appropriate to use the CCAA for the purpose of effecting the Transaction.

42. RBC does not challenge the Applicants' position that it meets the statutory threshold to seek protection under the CCAA ($5 million in debts and existing or impending insolvency). However, in addition to meeting the statutory requirements to qualify for protection under the CCAA, the Court must be satisfied that circumstances exist that make an order under section 11 of the CCAA appropriate.

CCAA, section 11.02.

43. Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The Supreme Court of Canada in *Century Services Inc. v. Canada (Attorney General)* states as follows:

> Appropriateness under the *CCAA* is assessed by inquiring whether the order sought advances the policy objectives underlying the *CCAA*. The question is whether the order will usefully further efforts to achieve the remedial purpose of the *CCAA* — avoiding the social and economic losses resulting from liquidation of an insolvent company. I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where participants achieve

> common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit. [*emphasis added*]
>
> ***Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, at para. 70, RBC's Book of Authorities at Tab 1.**

44. A stay of proceedings under the CCAA should only be granted to further the CCAA's fundamental purpose. The fundamental purpose of the CCAA is expressed in its long title as "An Act to facilitate compromises or arrangements between companies and their creditors."

> ***Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327 at paras. 26 and 27 ["*Cliffs*"], RBC's Book of Authorities at Tab 2.**

45. In this case, the Applicants have no intention of proposing a compromise or arrangement between companies and their creditors. The contemporaneous scheduling of a Sale Approval motion, returnable nine days after the Initial Order, suggests that the Applicants and the First Lien Lenders view the CCAA Proceedings as nothing more than a means to an end (extinguishment of Second Lien interests with First Lien Lenders owning the business) in which they have pre-determined the result.

46. Rather, RBC submits that the CCAA proceedings and the Proposed Initial Order is being used as a secured creditor's enforcement tool to effectuate a "quick flip" Transaction for the benefit of the First Lien Lenders to the extreme detriment of the Second Lien Lenders, without their consent. It attempts to use the Court to "rubber stamp" or provide "cover" for actions already taken (which RBC has objected to as being in breach of the Second Lien Credit Agreement and the Intercreditor Agreement), rather than for the

purpose of submitting itself to a process that is open, transparent, fair to all stakeholders and designed to maximize value.

47. RBC submits that if CCAA protection for the Applicants is to be made available, then it should be for a true CCAA proceeding where a neutral, independent Court-appointed Monitor has a sufficient opportunity to review and consider what hurdles the Applicants face, and report back to the Court with suggestions as to a process to maximize value for all stakeholders. RBC supports continuing the CCAA Proceedings on that basis.

ISSUE 2: If the CCAA Proceedings continue, should A&M be the Monitor of the Applicants?

48. A&M is not an appropriate party to act as Monitor in these CCAA Proceedings.

49. RBC acknowledges that A&M has the qualifications to act as a Monitor under the appropriate circumstances and has a good reputation in undertaking such mandates in other CCAA proceedings. However, RBC asserts that A&M is not an appropriate party to be appointed Monitor in this case. RBC proposes FTI to fulfill the Court officer mandate as Monitor of the Applicants, with Nigel Meaken, Managing Director of FTI overseeing the mandate.

50. FTI can act as an independent Monitor and will be better able to consider the interests of all stakeholders and assist and provide its recommendations to the Court during the pendency of the CCAA Proceedings. If appointed, FTI should be afforded a sufficient

opportunity to consider the Applicants' circumstances and report to the Court on next steps in the proceeding.

51. Even prior to the CCAA mandating the appointment of a Monitor, the Court recognized that it was essential to ensure that any Monitor appointed must not be in a conflict of interest situation and that its sole responsibility is to the Court. In dismissing the application to appoint the debtor company's auditor for lack of the necessary "independence", the Court in *Stokes Building Supplies Ltd.*, stated:

> The court must ensure that the monitor, as agent of the court, is independent of the parties. This type of examination can only be made after all interested parties have been given an opportunity to make representations.

***Stokes Building Supplies Ltd., Re*, 1992 CarswellNfld 20 at paras. 15 and 22 (S.C.), RBC's Book of Authorities at Tab 3.**

52. Section 11.7 of the CCAA provides a starting point to the analysis as to who is an appropriate party to be appointed Monitor by the Court and places restrictions on who may be monitor. In particular, section 11.7(2) states:

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

> under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or
> (ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

CCAA, s.11.7(2).

53. A&M has been retained by and been acting on behalf of Nelson Education for over two years as its financial advisor and, in that capacity, it has undertaken accounting tasks including creating the Applicants' financial model, preparing balance sheets, income statements and cash flow forecasts which would necessitate reviewing the books and records of the business.

54. It is submitted that A&M's engagement as financial advisor over more than two years can be analogized to it acting as an "accountant" under section 11.7(2).

55. The term "accountant" is not defined in the CCAA. The language of subsection 11.7(2) of the CCAA is identical to section 13.3 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "**BIA**"). "Accountant" is also not defined in the BIA.

BIA, section 13.3.

56. In *Hover*, the Court considered whether KPMG LLP, which previously provided an individual with accounting services for their professional corporation, was the debtor's accountant within the meaning of that term under the BIA. In interpreting the term "accountant" under the BIA, the Court favoured an expansive approach which gives the word its generally accepted meaning and in doing so stated as follows:

> ...[S]tatutory interpretation requires the term accountant be given its usual, normal and generally accepted meaning. The views of the professional associations in their rules and guidelines which provide a restrictive interpretation to the word "accountant" are not supportable. The function of accountants have expanded over time and the services of accounting firms continue to expand. Before Canada had an Income Tax Act, accountants would prepare and maintain books and records for businesses and individuals. They have expanded into the area of preparation of income tax returns for individuals, corporations and other business entities. The preparation of a review engagement financial statement is but a small part of work performed by accountants. While the work of KPMG LLP for the debtor and his professional corporation was somewhat restricted after 1995 [four years before the commencement of the insolvency], the firm continued to do accounting work for both the professional corporation and the debtor. No doubt the debtor continued to view KPMG as his accounting firm not as his bookkeeping or data entry clerk. I am equally certain that KPMG continued to charge fees commensurate with their duties as accountants and not as bookkeepers and data entry clerks.

***Hover, Re*, 2000 ABQB 938 at para. 23 ["*Hoover*"], RBC's Book of Authorities at Tab 4.**

57. The purpose of section 13.3 of the BIA (which is identical to section 11.7 of the CCAA) has been described as preventing a conflict of interest, protecting the debtor from an accountant who may have information that could be used to its prejudice and to ensure that the trustee who may have a close relationship with the debtor does not work to the prejudice of the creditors.

***Hoover* at para. 26.**

58. The Monitor owes a fiduciary duty to all parties and an obligation to ensure that one creditor is not given an advantage over any other creditor.

***Siscoe & Savoie v. Royal Bank*, 1994 CarswellNB 14 at para. 28 (C.A.), RBC's Book of Authorities at Tab 5.**

59. RBC submits that A&M's involvement with Nelson Education prior to the commencement of these proceedings make it impossible for it to act (or be perceived to act) as a disinterested and impartial officer of this Court.

60. Public confidence in the insolvency system is founded upon court officers acting in a fair, disinterested and impartial manner for the benefit of *all* stakeholders. In *Winalta Inc.*, the Court emphasized the importance of the Monitor's neutrality in CCAA proceedings:

> Bias, whether perceived or actual, undermines the public's faith in the [insolvency] system. In order to safeguard against that risk, a CCAA monitor must act with professional neutrality, and scrupulously avoid placing itself in a position of potential or actual conflict of interest.

***Winalta Inc. (Re)*, 2011 ABQB 399 at para. 82, RBC's Book of Authorities at Tab 6.**

61. The appearance of a conflict of interest has a deleterious effect on public confidence in the insolvency system. The perception of bias is the reason why the CCAA was amended in 2009 to include section 11.7(2) to expressly prohibit, among others, any trustee who was, within the previous two years, the debtor company's auditor or accountant.

> **Clause by Clause Analysis, Bill Clause No. 129, s. 11.7 of CCAA): "[The debtor company's auditor acting as monitor] *may create a perception of bias* in the minds of creditors and stakeholders") [emphasis added].**

62. Avoiding the perception of bias for Court officers is also confirmed in section 25 of the CCAA, which, among other rules, incorporates Rule 44 (*i.e.*, part of the Code of Ethics) of the *BIA General Rules* into the CCAA in respect of CCAA Monitors. Rule 44 states:

> Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the

> opinion of an informed person to impair, their professional judgment. [emphasis added]
>
> **CCAA, s.25, incorporating 13.5 of the BIA and the prescribed Code of Ethics in the *Bankruptcy and Insolvency General Rules*, CRC, c 368 including rule 44.**

63. In this case, A&M has billed approximately $5.5 million in fees in its various capacities, including as financial advisor for Nelson Education for over two years.

> **The Supplemental Report at para. 3.15.**

64. In addition, A&M's affiliates have acted as an advisor to Cengage (a critical stakeholder of Nelson Education) for longer than it has acted for Nelson Education. It has provided restructuring and financial advisory services, certain financial advisory and financial management services to Cengage over that period of time. A&M implicitly acknowledged the potential for conflict of interest as between their two mandates and sought a waiver from Nelson Education regarding same.

> **2013 Engagement at p. 4, attached as Appendix "D" to the Supplemental Report.**
>
> **September 2014 Engagement at p. 8, attached as Appendix "E" to the Supplemental Report.**

65. While A&M was not specifically requested to support the decisions Nelson Education took prior to the commencement of these proceedings, including the decision to stop paying the Second Lien Lenders' interest and professional fees and the entering into of the First Lien Term Sheet and Support Agreement which resulted in the Transaction, A&M was closely involved in discussions alongside Nelson Education throughout as their advisor.

> **The Supplemental Report at paras. 3.22-3.23, 3.26-3.27, and 3.30-3.35.**

66. Nelson now seeks to appoint A&M as an officer of this court, to purportedly act in the best interests of *all* stakeholders. It is submitted that A&M's conduct as described in the previous paragraphs makes it impossible for A&M to be *perceived* as a disinterested and impartial neutral third party. RBC submits that public confidence in the insolvency system requires a neutral third party who was not previously (and continuously, for a two year period) the debtor company's financial advisor to act as the Monitor or the advisor of another of Nelson's significant stakeholders in this case.

67. Typically the cases where the Court accepts the appointment of a Monitor notwithstanding a disclosed conflict involve cases where the Court is cognizant of the "commercial realities" of the situation. In *Can-Pacific*, with great hesitation, the Court accepted the appointment of debtor company's financial advisor as the Monitor in order to avoid delay and the cost of expenses already incurred in a circumstance where the Court was not prepared to grant an administration charge as part of the Initial Order in that case.

> ***Can-Pacific Farms Inc., Re*, 2012 BCSC 760 at paras. 24 - 26 ["*Can-Pacific*"], RBC's Book of Authorities at Tab 7.**
>
> **See also *Hickman Equipment (1985)* Ltd., Re, 2002 CarswellNfld 154 at paras. 7-9 (S.C.), RBC's Book of Authorities at Tab 8.**

68. Notwithstanding that the proposed monitor was appointed in *Can-Pacific*, the Court found that it was difficult to come to the conclusion the proposed monitor was "independent of the parties" when it served as the financial advisor to the company. The Court stated:

> Without laying down a general rule that it is inappropriate for a petitioner to seek the appointment as a monitor of a financial advisor that has been working with a petitioner to prepare proceedings under the Act, such an appointment should not be made as a general rule.

***Can-Pacific* at paras. 24 and 27.**

69. It is submitted that the "commercial realities" of a cash and time strapped debtor company that persuaded Courts to accept the appointment of a conflicted monitor in other cases are not applicable in this case. The Applicants have sustained operations in the ordinary course from revenue and are able to continue to do so in the CCAA without the need for DIP financing. Rather, at the commencement of the CCAA Proceedings, the Applicants had in excess of $20 million in cash. Moreover, the Proposed Initial Order contemplates Nelson continuing to make payments to all stakeholders (except for the Second Lien Lenders) in the ordinary course for both pre-filing and post-filing amounts.

The Nordal Affidavit at paras. 20, 43, and 60.

Pre-Filing Report at Appendix "A".

70. For the foregoing reasons, RBC submits that A&M should not be the Monitor of the Applicants and that instead FTI should be so appointed.

ISSUE 3: If the CCAA Proceedings continue, what changes, if any, should be made to the Proposed Initial Order?

71. RBC is of the view that the Proposed Initial Order should be amended to ensure that a level playing field is established at the commencement of the CCAA Proceedings and that there is appropriate oversight from an independent Monitor. Actions taken by the

company while it is outside of a formal proceeding to the direct detriment of the Second Lien Lenders (including payments to some but not all secured creditors), provide no justification for seeking the Court's blessing to attempt to continue such actions once a proceeding has been commenced.

(a) Reference to the Supplemental Support Agreement should be Removed

72. The provisions of the Initial Order should not reference or be subject to the Supplemental Support Agreement among Nelson Education, Holdings, the First Lien Agent, the Supplemental Agent and the Consenting First Lien Lenders dated May 11, 2015 (the "**Supplemental Support Agreement**").

73. The Supplemental Support Agreement has not been filed with the Court and it is not appropriate for the Proposed Initial Order to be subject to it.

74. In this case, the First Lien Lenders are not offering new financing during the proceeding by way of DIP Financing wherein making certain provisions of the Proposed Initial Order subject to a DIP commitment letter may be appropriate. Rather, RBC submits that the Proposed Initial Order reflects the extreme control the First Lien Lenders are attempting to assert over these CCAA Proceedings – including as to timing, the process, permitted payments and required outcome.

(b) RBC, as provider of the Cash Management System, should be Protected by way of a Court Ordered Charge

75. The Proposed Initial Order purports to grant protection to RBC, in its capacity as provider of the Cash Management System by making it "in its capacity as provider of the

Cash Management System, an unaffected creditor under the Plan with regard to any claims or expenses it may suffer or incur in connection with the provision of the Cash Management System", which is in accordance with the terms of the Model Order.

Proposed Initial Order at para. 6 at Tab 5 of the Applicants' Application Record.

76. RBC submits that this protection is hollow in this case where the Applicants do not intend to file a plan and have confirmed their intention to undertake a Transaction whereby they will cease to own any assets with which to satisfy unaffected creditor claims. RBC provides the Applicants' cash management system as the only Canadian financial institution lender.

77. As a result, RBC seeks a charge to protect its exposure in its capacity as Cash Management Provider. RBC is prepared to work with the Monitor to determine the amount of this charge.

78. RBC, in continuing to provide the Cash Management System, is effectively acting as a critical supplier and therefore it should be entitled to a Charge for doing so pursuant to section 11.4 of the CCAA, which provides, in part, as follows:

> **Obligation to supply**
> (2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.
> **Security or charge in favour of critical supplier**
> (3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier,

in an amount equal to the value of the goods or services supplied under the terms of the order.

(c) **The Second Lien Lenders should receive the Same Treatment as the First Lien Lenders**

79. The Proposed Initial Order contemplates the payment of all stakeholders other than the Second Lien Lenders during the CCAA Proceedings.

80. Nelson Education and Holdings entered into the First Lien Support Agreement, which provides that neither Nelson Education nor Holdings shall, unless consented to by the Majority Initial Consenting First Lien Lenders, make any payment in connection with the Second Lien Credit Agreement, including any interest or other payment that is due or that may become due pursuant to the Second Lien Credit Agreement.

Nordal Responses at para. 22.

81. The Second Lien Lenders are contractually entitled to receive payment of their interest, costs, expenses and professional fees. The terms of the Support Agreement induce the Applicants to breach its contractual obligations to the Second Lien Lenders.

Second Lien Agreement at para. 10.04(b), at Exhibit "E" of the Nordal Affidavit.

Intercreditor Agreement at para. 3.1(f), at Exhibit "F" of the Nordal Affidavit.

82. No determination has been made by this Court that there is no value available for the Second Lien Lenders and RBC rejects the Applicants' views on this point. RBC further submits that these CCAA Proceedings should not commence with the Court accepting as a *fait accompli* that the Second Lien Lenders should not be paid in the proceeding when every other stakeholder is being paid.

(d) **First Lien Counsel and First Lien Financial Advisor should not have the Protection of the Administration Charge**

83. RBC submits that the Administration Charge should be limited to the Applicants' counsel, the Monitor and its counsel and that it is inappropriate to extend it to the First Lien Lenders' advisors. Section 11.52 of the CCAA provides as follows:

> 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.
>
> **CCAA, section 11.52**

84. There is no evidence before the Court that the First Lien Lenders require a charge to ensure their effective participation in the CCAA Proceedings. Quite the contrary, all of the professional fees of the First Lien Lenders have been being paid by the Applicants and the Applicants intend to continue to do so during these CCAA Proceedings. The very purpose of the CCAA Proceedings is to effect a Transaction by the First Lien Lenders – they need no protection or additional incentive to do so.

PART V - RELIEF REQUESTED

85. For the reasons set out herein, RBC respectfully requests that this Court,

(a) not allow the CCAA Proceedings to continue for the sole purpose of concluding the Transaction;

(b) appoint FTI as the Monitor of the Applicants; and

(c) amend the Proposed Initial Order as proposed by RBC.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 28TH day of May, 2015.

May 28, 2015

Thornton Grout Finnigan LLP
Barristers & Solicitors
Suite 3200, TD West Tower
100 Wellington Street West
P.O. Box 329, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D.J. Miller (LSUC# 34393P)
djmiller@tgf.ca
Tel: (416) 304-0559

Kyla E. M. Mahar (LSUC# 44182G)
kmahar@tgf.ca
Tel: (416) 304-0594
Fax: (416) 304-1313

Lawyers for Royal Bank of Canada

SCHEDULE "A"
LIST OF AUTHORITIES

1. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60.
2. *Cliffs Over Maple Bay Investments Ltd. v. Fisgard Capital Corp.*, 2008 BCCA 327.
3. *Stokes Building Supplies Ltd., Re*, 1992 CarswellNfld 20 (S.C.).
4. *Hover, Re*, 2000 ABQB 938.
5. *Siscoe & Savoie v. Royal Bank*, 1994 CarswellNB 14 (C.A.).
6. *Winalta Inc. (Re)*, 2011 ABQB 399.
7. *Can-Pacific Farms Inc., Re*, 2012 BCSC 760.
8. *Hickman Equipment (1985)* Ltd., Re, 2002 CarswellNfld 154 (S.C.).

SCHEDULE "B"
RELEVANT STATUTES

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Where trustee is not qualified to act

13.3 (1) Except with the permission of the court and on such conditions as the court may impose, no trustee shall act as trustee in relation to the estate of a debtor

- (*a*) where the trustee is, or at any time during the two preceding years was,

  (i) a director or officer of the debtor,

  (ii) an employer or employee of the debtor or of a director or officer of the debtor,

  (iii) related to the debtor or to any director or officer of the debtor, or

  (iv) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the debtor; or

- (*b*) where the trustee is

  (i) the trustee under a trust indenture issued by the debtor or any person related to the debtor, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Québec* that is granted by the debtor or any person related to the debtor, or

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

Bankruptcy and Insolvency General Rules, CRC, c 368

Rule 44. Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment.

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

An Act to facilitate compromises and arrangements between companies and their creditors

General power of court

11. 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.

Stays, etc. — initial application

11.02 (1) A court may, on an initial application in respect of a debtor company, make an order on any terms that it may impose, effective for the period that the court considers necessary, which period may not be more than 30 days,

- (*a*) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*,
- (*b*) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and
- (*c*) prohibiting, until otherwise ordered by the court, the commencement of any action, suit or proceeding against the company.

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.

Critical supplier

11.4 (1) 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 a person to be a critical supplier to the company if the court is satisfied that the person is a supplier of goods or services to the company and that the goods or services that are supplied are critical to the company's continued operation.

Obligation to supply

(2) If the court declares a person to be a critical supplier, the court may make an order requiring the person to supply any goods or services specified by the court to the company on any terms and conditions that are consistent with the supply relationship or that the court considers appropriate.

Security or charge in favour of critical supplier

(3) If the court makes an order under subsection (2), the court shall, in the order, declare that all or part of the property of the company is subject to a security or charge in favour of the person declared to be a critical supplier, in an amount equal to the value of the goods or services supplied under the terms of the order.

Priority

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

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

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

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

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

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

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

- (*b*) if the trustee is

  (i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

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

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

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. (collectively, the "**APPLICANTS**")

Court File No.: CV15-10961-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

Proceedings commenced at **Toronto**

FACTUM OF THE ROYAL BANK OF CANADA (RETURNABLE ON MAY 29, 2015)

Thornton Grout Finnigan LLP
Barristers & Solicitors
Suite 3200, TD West Tower
100 Wellington Street West
P.O. Box 329, Toronto-Dominion Centre
Toronto, ON M5K 1K7

D.J. Miller (LSUC# 34393P)
djmiller@tgf.ca
Tel: (416) 304-0559

Kyla E. M. Mahar (LSUC# 44182G)
kmahar@tgf.ca
Tel: (416) 304-0594
Fax: (416) 304-1313

Lawyers for Royal Bank of Canada