

THE QUEEN'S BENCH
Winnipeg Centre

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

**AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR ARRANGEMENT OF WITH RESPECT TO
ARCTIC GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER
INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON
SCHEDULE "A" HERETO**

(collectively, the "APPLICANTS")

**APPLICATION UNDER THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED**

BRIEF OF THE APPLICANTS

(Sale Approval Motion)

**DATE OF HEARING: THURSDAY, JUNE 21, 2012 AT 10:00 A.M.
BEFORE THE HONOURABLE MADAM JUSTICE SPIVAK**

McCARTHY TÉTRAULT LLP

Barristers and Solicitors
Suite 5300, Box 48
Toronto Dominion Bank Tower
Toronto-Dominion Centre
Toronto, ON M5K 1E6

Kevin McElcheran

Tel: (416) 601-7539
Fax: (416) 868-0673
Law Society No. 22119H

Heather L. Meredith

Tel: (416) 601-8342
Fax: (416) 868-0673
Law Society No. 48354R

**AIKINS, MacAULAY &
THORVALDSON LLP**

30th Floor – 360 Main Street
Winnipeg, MB R3C 4G1

G. Bruce Taylor

Tel: (204) 957-4669
Fax: (204) 957-4218

J.J. Burnell

Tel: (204) 957-4663
Fax: (204) 957-4285

File No.: 1103500

File No. 10671373

Box No. 3

THE QUEEN'S BENCH
Winnipeg Centre

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

**AND IN THE MATTER OF A PROPOSED PLAN
OF COMPROMISE OR ARRANGEMENT OF WITH RESPECT TO ARCTIC
GLACIER INCOME FUND, ARCTIC GLACIER INC., ARCTIC GLACIER
INTERNATIONAL INC. and the ADDITIONAL APPLICANTS LISTED ON
SCHEDULE "A" HERETO
(collectively, the "APPLICANTS")**

APPLICATION UNDER THE *COMPANIES' CREDITORS*
ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

BRIEF OF THE APPLICANTS

INDEX

	<u>Page</u>
PART I. List of Documents to be relied upon	1
PART II. Statutory Provisions and Authorities to be relied upon	2
PART III. List of Points to be Argued	3
(A) SALE APPROVAL.....	5
(B) ASSIGNMENT OF ASSIGNED CONTRACTS	11
(C) STAY OF PROCEEDINGS.....	15
(D) SEALING ORDER.....	16

PART I **LIST OF DOCUMENTS TO BE RELIED UPON**

1. Notice of Motion;
2. Affidavit of Keith McMahon sworn February 21, 2012;
3. Affidavit of Keith McMahon sworn March 9, 2012;
4. Affidavit of Keith McMahon sworn March 28, 2012;
5. Affidavit of Keith McMahon sworn June 13, 2012;
6. The Fourth Report of the Monitor; and
7. Such further and other materials as counsel may advise and this Court may permit.

PART II **STATUTORY PROVISIONS AND AUTHORITIES TO BE RELIED UPON**

Tab

- 1 *Companies' Creditors Arrangement Act*, R.S.C., c. C-36, as amended
- 2 *Canwest Publishing Inc.*, 2010 ONSC 222 (CanLII)
- 3 *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (Ont. CA)
- 4 *Re AbitibiBowater Inc.*, 2010 QCCS 1742
- 5 *Re Grant Forest Products Inc.*, 2010 ONSC 1846
- 6 Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause by clause analysis:<http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01985.html#a70>)
- 7 *Re Doman Industries Ltd.*, [2003] B.C.J. No. 562
- 8 *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758
- 9 *Canwest Global Communications Corp. (Re)*, 2009 CanLII 63368 (Ont. S.C.J.) [Comm. List]
- 10 *Sierra Club v. Canada (Minister of Finance)*, [2002] SCC 41 (SCC)
- 11 *Histed v. Law Society (Manitoba)*, 2005 CarswellMan 325 (MB CA)

PART III **LIST OF POINTS TO BE ARGUED**

1. This is a motion for approval of an asset sale transaction (the “**Transaction**”) between the Applicants and Glacier Valley Ice Company, L.P. (California), as vendors (together, the “**Vendors**” or “**Arctic Glacier**”), and H.I.G. Zamboni, LLC, as purchaser (the “**Purchaser**”), pursuant to a certain Asset Purchase Agreement (the “**Asset Purchase Agreement**”) made as of June 7, 2012, generated from the Court-supervised Sale and Investor Solicitation Process (“**SISP**”) approved by this Honourable Court in these proceedings..

2. This motion is for an Order:

- (a) if necessary, abridging the time for service of the Notice of Motion such that the motion is properly returnable on June 21, 2012 at 10:00 a.m. and dispensing with further service thereof;
- (b) approving the Transaction contemplated by the Asset Purchase Agreement;
- (c) vesting in the Purchaser the Vendors’ right, title and interest in and to the assets described in the Asset Purchase Agreement (the “**Assets**”) free and clear of any claims and encumbrances other than certain permitted encumbrances as set out in the draft Order;
- (d) assigning to the Purchaser the rights and obligations of the Vendors under the Assigned Contracts (as defined in the Asset Purchase Agreement, the “**Assigned Contracts**”);

- (e) directing the Monitor to pay from the net proceeds of the sale of the Assets an amount sufficient to pay the Arctic Lenders (as defined in the Asset Purchase Agreement, the “**Arctic Lenders**”) in respect of the Lender Claims (as defined in the SISP) in full and in cash concurrently with, and as a condition precedent to, the closing of the Transaction, with the balance of the net proceeds to be held by the Monitor in accordance with the terms of the Order;
 - (f) extending the Stay Period (the “**Stay Period**”) as defined in paragraph 30 of the Initial Order of the Honourable Madam Justice Spivak dated February 22, 2012 (the “**Initial Order**”) and extended by further orders, until August 31, 2012;
 - (g) approving the Third Report of the Monitor and the Fourth Report of the Monitor (the “**Fourth Report**”) provided by Alvarez & Marsal Canada Inc. in its capacity as monitor of the Applicants (the “**Monitor**”) and the Monitor’s activities as described therein;
 - (h) ordering that the Confidential Appendix to the Fourth Report be sealed, kept confidential and not form part of the public record; and
 - (i) granting such further and other relief as this Honourable Court may deem just.
3. The key points to be argued on this motion are as follows:
- (a) Sale Approval: It is appropriate to approve the proposed Transaction;
 - (b) Assignment of Assigned Contracts: It is appropriate to approve the assignment of the Assigned Contracts;

- (c) Stay of Proceedings: An order granting a stay of proceedings during the requested stay period is appropriate; and
- (d) Sealing: The Court should exercise its discretion to seal the Confidential Appendix to the Fourth Report.

(a) Sale Approval

4. This Court has the power to approve a sale pursuant to section 36 of the CCAA. Section 36(3) sets out a non-exhaustive list of factors for the Court to consider in determining whether to approve a proposed sale transaction. It provides as follows:

36(3) In deciding whether to grant the authorization, the court is to consider, among other things,

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

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

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

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

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

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

(Tab 1)

5. The list of factors set out in section 36(3) largely overlaps with the criteria established in *Royal Bank v. Soundair Corp.*, a case decided prior to the enactment of section 36(3) of the CCAA, which is widely cited for setting out the factors a Court

should consider in determining whether to approve a sale of assets by an insolvent entity.

The *Soundair* criteria are as follows:

- (a) Whether sufficient effort has been made to obtain the best price and that the debtor has not acted improvidently;
- (b) The interests of all parties;
- (c) The efficacy and integrity of the process by which offers have been obtained; and,
- (d) Whether there has been unfairness in the working out of the process.

(**Tabs 2 and 3** *Re Canwest Publishing Inc.* (2010), 68 C.B.R. (5th) 233 (OSJ [Comm.List]) at para. 13; *Royal Bank v. Soundair Corp.* (1991), 4 O.R. (3d) 1 (ON CA) at para. 16)

6. If a sale process leading to the proposed sale is fair and reasonable then “a court will not lightly interfere with the exercise of [the Debtor’s and Monitor’s] commercial and business judgment in the context of an asset sale.” Similarly, “once a process has been put in place by Court Order for the sale of assets of a failing business, that process should be honoured, excepting extraordinary circumstances.”

(**Tabs 4 and 5** *Re AbitibiBowater Inc.*, 2010 QCCS 1742 at para. 71; *Re Grant Forest Products Inc.*, 2010 ONSC 1846 at para. 29)

7. Section 36(7) of the CCAA provides a restriction on the sale of assets pursuant to the CCAA as follows, although the correct paragraph references are paragraphs 6(5)(a) and 6(6)(a) of the CCAA, which deal with certain employee and pension payment obligations:

36(7) The court may grant authorization only if the court is satisfied that the company can and will make the payments that would have been required under paragraphs 6(4)(a) and (5)(a) if the court had sanctioned the compromise or arrangements.

(Tab 1)

(i) The Sale Process

8. The sale process which has culminated in the Asset Purchase Agreement is set out in the SISP. The Monitor has reported to this Honourable Court on the progress of the SISP in each of its First, Second and Third Reports. The Fourth Report of the Monitor describes the following, that:

(a) The SISP was extensively negotiated among Arctic Glacier, the Arctic Lenders and the Financial Advisor (as defined in the Initial Order), with input from the Monitor, and was approved by this Honourable Court;

(b) The SISP timelines balanced the time necessary for a commercially reasonable sale/investment process with Arctic Glacier's available financial resources and operations;

(c) Extensive actions were taken to engage interest and participation in the SISP among prospective purchasers/investors, to obtain and review Qualified LOI's (as defined in the SISP), to satisfy due diligence requirements, to obtain and review Qualified Bids (as defined in the SISP), and ultimately to identify a purchaser and enter into the Asset Purchase Agreement;

(d) Under the supervision and with the extensive involvement of the Monitor, Arctic Glacier has implemented the SISP in accordance with the Initial Order and

in accordance with the terms of the SISP in a fair and transparent manner; and that

(e) The Monitor is satisfied that Arctic Glacier, the Financial Advisor and the Chief Process Supervisor (as defined in the SISP) all discharged their responsibilities under the SISP in good faith and with due diligence, and that all interested parties had reasonable opportunity to participate in the process.

9. The Affidavit of Keith McMahon herein sworn June 13, 2012 describes activities of Mr. McMahon and his management team during Phase 2 of the SISP which are consistent with the requirements of the SISP. Mr. McMahon concludes that, based on his participation in the process, the SISP was conducted in accordance with its terms.

10. Following the completion of Phase 2 of the SISP and before entering the Asset Purchase Agreement, the Applicants' counsel, the Monitor and the Monitor's counsel held conference calls with the advisors to the direct purchaser class action plaintiffs and with the Arctic Lenders and their counsel to consult with each such group concerning the Final Bids made in accordance with the SISP on a confidential basis.

(ii) The Transaction

11. The Transaction represents both the highest and the best offer identified in the extensive, Court-supervised sale process and includes the following key elements and benefits:

- (a) The purchase price for the Assets that would be transferred to the Purchaser in the Transaction is the highest price of any offer received in the sale process;
- (b) The closing of the Transaction is subject to very few conditions and no material concerns regarding regulatory approval;
- (c) The Asset Purchase Agreement contains all terms required to have been met by a successful Qualified Bid arising from the SISP, including, among others, that:
 - (i) it is not subject to a financing condition or due diligence and was supported by a letter evidencing an irrevocable financing commitment and a commitment by the Purchaser to provide equity investment to complete the Transaction and fund ongoing business operations, with the only material limitation thereto being the commercially reasonable inclusion of a “material adverse event” clause in terms that are relatively favourable to the Applicants;
 - (ii) it provides for the purchase of substantially all of the assets of Arctic Glacier and for the assumption of significant current liabilities, to be paid, (to the benefit of counterparties) in the ordinary course going forward; and
 - (iii) it provides for payment in full of the Arctic Lender claims if an order is made for distribution of the balance owing to the Arctic Lenders on closing;
- (d) For Arctic Glacier employees, suppliers, customers, landlords and other stakeholders, the Transaction contemplates that the Purchaser, which is

purchasing essentially all of the Arctic Glacier operating assets, including its land, plants and equipment, and extending offers to hire all of the Arctic Glacier Employees (as defined in the Asset Purchase Agreement), will continue the business uninterrupted following the closing;

- (e) For Arctic Glacier creditors, the Transaction, if approved, would provide sufficient proceeds and/or provides for the assumption by the Purchaser to:
 - (i) pay the Arctic Lenders in full; (ii) pay all outstanding amounts under the court ordered charges; (iii) pay any amounts that would have been required under paragraphs 6(5)(a) and 6(6)(a) of the CCAA as described above; (iv) pay post-filing obligations (v) pay any liabilities or obligations arising from the completion of the Transaction; and, (vi) is expected to pay all the claims of all other known creditors in full;
- (f) For Arctic Glacier unitholders, following a claims process to identify and adjudicate unknown claims, the proceeds of the Transaction may be sufficient to make a distribution to unit holders of Arctic Glacier Income Fund (the "**Fund**"); and
- (g) The Transaction is to be closed on or before July 31, 2012, within the timelines prescribed in the SISP.

12. In addition, the Fourth Report of the Monitor indicates that:

- (a) The Purchaser has advised that it is committed to preserving the business as a standalone enterprise in Winnipeg, intends to invest significant growth capital into the business, and has plans to invest in new technology, infrastructure and systems;

- (b) the purchase price is fair and reasonable in that it resulted from a wide canvassing of the market pursuant to the Court-approved SISP; and
- (c) it is the Monitor's view that the Transaction, which provides for a going concern sale of the business, is more beneficial to Arctic Glacier's creditors and other stakeholders than a sale or disposition under a bankruptcy.

13. The closing of the Transaction will achieve Arctic Glacier's objectives in commencing this CCAA process by maximizing in the circumstances the outcome for all Arctic Glacier stakeholders, and preserving Arctic Glacier's business with a certain and stable financial and operational foundation for the future. Accordingly, it is submitted that this Court ought to authorize the Transaction as it:

- (a) Was conducted in accordance with a Court-approved and Monitor approved process which was commercially reasonable and in which the Vendors sought to obtain the best price.
- (b) Is in the interests of all of the parties.
- (c) Is supported by the Monitor.
- (d) Results in all of the known creditors being paid and may result in a distribution of some amount to Arctic Glacier unitholders.

(b) Assignment of Assigned Contracts

14. Section 11.3 of the CCAA authorizes the Court to assign the rights and obligations of the debtor under an agreement to any person who is specified by the Court and agrees to the assignment.

(Tab 1)

15. The CCAA sets out a non-exhaustive list of factors for the Court to consider in deciding whether to make such an order assigning contracts. Those factors are as follows:

- (a) Whether the monitor approves the proposed assignment;
- (b) Whether the person to whom the rights and obligations are to be assigned would be able to perform the obligations; and
- (c) Whether it would be appropriate to assign the rights and obligations to that person.

(Tab 1)

16. The vast majority of the Assigned Contracts are real property leases for production and distribution centres in Canada and the United States. These leases are essential to the continuation of the business of the Vendors by the Purchaser.

17. The only other material Assigned Contracts (in addition to real property leases) listed in the Asset Purchase Agreement are: i) leases for leased machinery and equipment; and ii) a Bag Supply Agreement with Norcan Flexible Packaging Inc. dated as of September 1, 2010.

18. The Purchaser has agreed to assume, after the time of closing, all of the Assumed Liabilities (as defined in the Asset Purchase Agreement) in respect of the Assigned Contracts, including the real property leases, in accordance with the existing terms of the Assigned Contracts. The Asset Purchase Agreement provides that the Purchaser may direct Assigned Contracts to affiliates but it remains jointly liable for the Assumed Liabilities under such Assigned Contracts. The Vendors are in the process of contacting

each landlord to advise them of the Transaction and to seek their consent to the assignment of their leases.

19. It is appropriate to assign the rights and obligations under the Assigned Contracts to the Purchaser since the Purchaser is, in essence, acquiring all assets of the Vendors and intends to carry on the business of the Vendors after closing. Providing for the assignment of the Assigned Contracts will allow the Purchaser to carry on the business of the Vendors with minimal interruption. The Transaction will only proceed if the Assigned Contracts are effectively assigned to the Purchaser.

20. There is no evidence of any prejudice to the counter-parties to the Assigned Contracts in assigning such contracts to the Purchaser. Further, the Purchaser has provided evidence that, on closing of the Transaction, it will be properly capitalized with committed debt (including a revolving line of credit and term debt and a substantial equity investment) such that it will be able to perform the obligations under the Assigned Contracts. In addition, the Asset Purchase Agreement provides that the Purchaser will assume liabilities of the Vendors in connection with the performance of any Assigned Contracts (or breach thereof) after the time of closing.

21. Section 11.3(4) of the CCAA provides that the Court may not make an order assigning rights and obligations under an agreement unless it is satisfied that all monetary defaults in relation to the agreement – other than those arising by reason only of the company's insolvency, the commencement of proceedings under the CCAA or the debtor company's failure to perform a non-monetary obligation – will be remedied on or before the day fixed by the Court.

(Tab 1)

22. The purpose of this sub-section, according to Industry Canada, is as follows:

Subsection (4) is amended to ensure that the agreement may only be assigned if the court is satisfied that, if a monetary default has occurred, it will be remedied within a time frame set by the court. It also clarifies that monetary defaults do not include those that arise merely by virtue of the fact that the debtor company is insolvent or failed to perform a non-monetary obligation. This amendment is required to ensure that agreements may not be drafted so as to be rendered unassignable, or assignable only at excessive cost, thereby defeating the purpose of the provision and providing the other party to the agreement a means of obtaining greater recovery than can be expected by other creditors of the same class.

(**Tab 6** - Office of the Superintendent of Bankruptcy Canada, Bill C-12: Clause by clause analysis:<http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br01985.html#a70>)

23. The British Columbia Supreme Court (applying its discretion to assign contracts prior to the enactment of section 11.3) noted as follows:

The law is clear that the court has jurisdiction under the CCAA to impose a stay during the restructuring period to prevent a creditor relying on an event of default to accelerate the payment of indebtedness owed by the debtor company or to prevent a non-creditor relying on a breach of contract with the debtor company to terminate the contract. It is also my view that the court has similar jurisdiction to grant a permanent stay surviving the restructuring of the debtor company in respect of events of default or breaches occurring prior to the restructuring.

(**Tab 7** - *Re Doman Industries Ltd.*, [2003] B.C.J. No. 562 at para. 15)

24. Applying these principles to the interpretation of s. 11.3, it is appropriate for the Court, when assigning an agreement under s. 11.3, to over-ride provisions of such agreements that would permit counterparties to terminate them because of the debtor's insolvency, its filing for creditor protection under the CCAA or other non-monetary defaults.

25. As a condition of the closing of the Transaction, all existing monetary defaults in relation to the Assigned Contracts —other than those arising by reason of the Vendors' Insolvency, the commencement of the CCAA proceedings, or the Vendors' failure to perform a non-monetary obligation (in relation to which the counterparty is prohibited from exercising remedies) —must be paid in accordance with the Asset Purchase Agreement.

26. It is appropriate to approve the assignments in the current circumstances given that the Monitor supports the assignment, the Purchaser is capable of fulfilling the obligations under the Assigned Contracts and the Assigned Contracts are essential to the business and to the Transaction.

(c) Stay of Proceedings

27. Section 11.02 of the CCAA gives the Court discretion to grant or extend a stay of proceedings. Section 11.02(2) applies when a stay of proceedings is requested other than on an initial application. It provides as follows:

11.02 (2) A court may, on an application in respect of a debtor company other than an initial application, make an order, on any terms that it may impose,

(a) staying, until otherwise ordered by the court, for any period that the court considers necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in paragraph (1)(a);

(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.

(Tab 1 - CCAA, s. 11.02(2))

28. Pursuant to section 11.02(3) of the CCAA, the Court must be satisfied that (a) circumstances exist that make the order appropriate, and (b) the Applicant has acted, and is acting, in good faith and with due diligence.

(Tab 1 - CCAA, 11.02(3))

29. With respect to whether circumstances exist that make the order appropriate, the Court “must be satisfied that an extension of the Initial Order and stay will further the purposes of the CCAA.” The broad remedial purposes behind the CCAA include preservation of the business as a going concern for the benefit of all stakeholders rather than liquidating the business and suffering the resulting social and economic losses.

(Tab 8 - *Worldspan Marine Inc. (Re)*, 2011 BCSC 1758 at paras. 13-15.)

30. Applying these principles in *Re Canwest Global Communications Corp.*, Madam Justice Pepall noted that an extension was necessary to provide stability to allow the debtor to work towards a plan of arrangement and considered factors such as the debtors’ available cash resources during the extension of the stay period and the Monitor’s support for the stay extension.

(Tab 9 - *Canwest Global Communications Corp. (Re)*, 2009 CanLII 63368 (Ont. S.C.J.) [Comm. List] at para. 43.)

31. In this case, the Applicants require an extension to close the Transaction and to conduct a claims process.

(d) *Sealing Order*

32. The proposed Order provides for the Confidential Appendix to the Fourth Report to be provided to the Court on a confidential basis and sealed due to the commercially

sensitive nature of the information and the prejudice to the Applicants and their stakeholders should the information be disclosed.

33. Sealing orders generally should only be granted when: 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; or where such an order is necessary to prevent a serious risk to an important interest (including a commercial interest) in the context of litigation because reasonably alternative measures will not prevent the risk. In those circumstances, the Court must examine:

- (a) How substantial the risk is. The risk must be real and substantial, well grounded in evidence, posing a serious threat to commercial interests in question;
- (b) The public interest. The important commercial interest must be one which can be expressed in terms of a public interest in confidentiality, where there is a general principal at stake; and
- (c) Reasonable alternatives. The Judge is required to consider not only whether reasonable alternatives are available to such an order but also to restrict the order as much as is reasonably possible while preserving the commercial interest in question.

(Tabs 10 & 11- *Sierra Club v. Canada (Minister of Finance)*, [2002] SCC 41 (SCC) at para 53-57; followed in *Histed v. Law Society (Manitoba)*, 2005 CarswellMan 325 (MB CA))

34. In this case, the information provided to this Honourable Court in the Confidential Appendix to the Fourth Report of the Monitor is commercially sensitive and confidential for two important reasons that support the sealing of this information at this time.

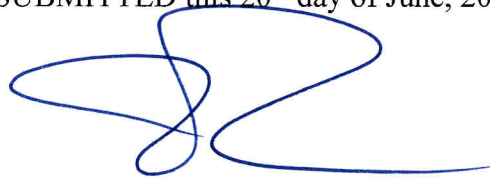
- (a) First, sealing is necessary to protect the Applicants and their stakeholders in the event that, for any reason, the Transaction does not close and it becomes necessary to remarket their Business. The public release of such confidential information would negatively impact such remarketing potentially causing extreme prejudice to the Applicants and their stakeholders.
- (b) Second, the Fund is a public entity. The price may be sufficient to permit a distribution to the unit holders of the Fund. At this time, the Fund has not disclosed the Purchase Price in its public disclosure but has issued a press release announcing the transaction. As stated in the affidavit of Keith McMahon, the price has not been disclosed because, at this time, the Fund is not in a position to provide a reasonably accurate estimate of the amount or timing of any distribution to unit holders because the Applicants must first identify, quantify and, if necessary, adjudicate creditor claims. Of course, all creditor claims must be paid or provided for in full before distributions to unit holders can be made.

35. Accordingly, it is respectfully submitted that an order be granted sealing the Confidential Appendix due to the prejudice to the Applicants and the nature of the information sought to be sealed.

CONCLUSION

36. In all of the circumstances, including as set out above, it is submitted that this Honourable Court ought to grant the requested order as together they will offer the best opportunity for a successful continuation of the Business to optimize the benefit to stakeholders, consistent with the underlying purpose of the CCAA.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 20th day of June, 2012.



Kevin McElcheran/ Heather Meredith
McCARTHY TÉTRAULT LLP

Barristers and Solicitors
Suite 5300, Box 48
Toronto Dominion Bank Tower
Toronto-Dominion Centre
Toronto, ON M5K 1E6

G. Bruce Taylor, J.J. Burnell
AIKINS, MacAULAY & THORVALDSON LLP
30th Floor – 360 Main Street
Winnipeg, MB R3C 4G1