On Record Contents:

What is A Plan of Arrangement? Page 1

Credit Bidding: An Increasingly Popular Insolvency Strategy Page 4


DIP Financing: Are Lenders Truly Protected? Page 8

Banking Lawyers

Betteridge, Robert D. (Bob) 403-260-0188................................................................. rdb@bdplaw.com
Chan, Byron 403-260-0240................................................................. bchan@bdplaw.com
Cramer, Nicole F. 403-260-0271................................................................. nfc@bdplaw.com
DeLuca, G. Dino 403-260-0211................................................................. gdd@bdplaw.com
Fehr, Trish M. 403-260-0212................................................................. pmf@bdplaw.com
Grout, David 403-260-0326................................................................. dgrout@bdplaw.com
Ionescu-Mocanu, Simina 403-260-0231................................................................. sionescu@bdplaw.com
Johnson q.c., Cal D. 403-260-0203................................................................. cjd@bdplaw.com
Langdon, Margot D. 403-260-0205................................................................. mdl@bdplaw.com
Martin, Christie E. 403-806-7870................................................................. cmartin@bdplaw.com
Pybus, Kathy L. 403-260-0196................................................................. klp@bdplaw.com
Smith, Nancy D. 403-260-0124................................................................. nsmith@bdplaw.com
Wilmot, John A. 403-260-0117................................................................. jaw@bdplaw.com
Winters, W.H. (Bill) 403-260-0248................................................................. whw@bdplaw.com

If you would like any further information on any members of our team, such as a more detailed resume, please feel free to contact the team member or the Managing Editor. You may also refer to our website at www.bdplaw.com.
What is A Plan of Arrangement?

By Nancy Smith and Robert Carleton

The Short Story

If you are a frequent reader of corporate press releases, you will be familiar with language indicating a major corporate acquisition or merger bid being completed by a “Plan of Arrangement”. This form of court-approved transaction is found in both federal and provincial corporate statutes. In Alberta, plans of arrangement are effected pursuant to the Business Corporations Act (Alberta) (the “ABCA”).

Generally, a plan of arrangement is a court approved process (in Alberta, the Court of Queen’s Bench) (the “Court”) to enable a corporation to complete certain transactions that include, among other things, a merger, a transfer of all or substantially all of the property of a corporation, or an exchange of securities of a corporation for property, money or securities of another corporation.

A plan of arrangement is favoured for both its flexibility and certainty. It can make it possible for an acquisition to occur in a single step process, rather than a more involved takeover bid. This flexibility can also allow different players in the transaction to be offered different consideration. The court process offers greater certainty to the parties involved, because, once approved by the Court, the arrangement is binding on the corporation and all other persons. Although not required by the ABCA, in practice, courts will almost always entitle dissenting parties to be bought out for fair value.
Once completed, the arrangement becomes binding on all parties involved, including all shareholders of the applicant corporation that may have dissented to the arrangement, providing a certain level of finality to the transaction that may not have been achieved outside of the arrangement process.

How To Do One

First, apply to the Court for an interim order approving the arrangement. The interim order will detail the procedure to obtain approval of the proposed arrangement from shareholders. Before the interim order is granted, the Court must determine that the proposed arrangement cannot be effected under any other provision of the ABCA or that it would be “impracticable” to do so. Canadian courts have interpreted the impracticability requirement broadly, meaning that “impracticable” does not mean “impossible”, but simply “difficult to put into practice”.

The interim order will typically require an applicant corporation to hold a meeting to obtain approval of the arrangement from its shareholders (which may be satisfied by a unanimous written resolution of the shareholders) and in some cases, the Court may specify the manner in which such approval is to be obtained. Among other things, the Court may provide directions on calling, and notice of, the meeting of shareholders, the conduct of the meeting, the level of majority consent required for approval, which in no case, can be less than 66 2/3% of the votes cast by the shareholders voting on the resolution, and any other matter the Court thinks fit.

Concurrently with providing notice of the shareholder’s meeting, the corporation must also include a statement explaining the effect of the arrangement and any material interests of the directors of the corporation and the effect of the arrangement on those interests.

Final Approval

After obtaining the required level of shareholder approval required by the interim order, the corporation must then obtain a final order from the Court approving the arrangement. Although the Court theoretically has the authority to amend the arrangement proposed by the corporation, this happens sparingly and only in exceptional circumstances. In determining whether to issue the final order and approve the arrangement, the Court will have to consider, among other questions:

1. Has the application been put forward in good faith?
2. Is the arrangement “fair and reasonable”?

The requirement that an arrangement be “fair and reasonable” has been interpreted to mean an arrangement that “an intelligent and honest business person, as a member of the class concerned and acting in his or her own interest, might reasonably approve.” This test is often referred to as the “business judgment test.” Overwhelming shareholder approval will also go a long way to establishing fairness and can out-weight other concerns of a true fairness opinion, if the arrangement is put forward in good faith.

It has become customary for an applicant corporation to obtain a “fairness opinion” from a financial firm (generally provided by tax or accounting advisors) that what Shareholders are receiving under the arrangement is fair from a financial standpoint. A failure to obtain an independent valuation will not necessarily call into question the fairness of the arrangement in the circumstances; however, obtaining a fairness opinion is strongly encouraged and provides comfort to Court that the arrangement is fair and reasonable.

Once the Court has issued the final order approving the arrangement, the corporation is required to file, among other things, a copy of the final order and the articles of arrangement with the Alberta Registrar of Corporations. The plan of arrangement becomes effective once the final order and articles of arrangement have been filed, and any applicable certificates issued, usually the same day of the Court order.

What About My Lender?

Plans of arrangement can impact lenders who will have to consider the effect the arrangement will have on the corporate structure of a borrower group, and whether it is permitted under its credit agreements. Obviously, both lenders and borrowers will need to consider outstanding debt obligations of the company being acquired. If the arrangement will result in a new subsidiary or subsidiaries, additional guarantee and security documents, and even a new credit agreement, may be required concurrently with the arrangement. If no new subsidiaries are created, but the result of the arrangement involves a merger, lenders may require certain confirmations and acknowledgements to be provided by the borrower and/or any subsidiary involved in the arrangement.

Conclusion

Because of the flexibility and certainty of a court approved process, completing an acquisition through a plan of arrangement has become quite common in a corporate context. Once completed, the arrangement becomes binding on all parties involved, including all shareholders of the applicant corporation that may have dissented to the arrangement, providing a certain level of finality to the transaction that may not have been achieved outside of the arrangement process. Expect to see this mechanism continue in favour with important players in the energy industry.
Securing Agricultural Assets: What Are the Risks?

By Simina Ionescu-Mocanu

Production-Money Security Interests

Lenders securing against certain types of agricultural assets may be unaware that their priority position may be defeated by another party. This party, a (“Production Lender”), would have also specifically financed that same borrower’s acquisition of food, drugs or hormones to be fed to or placed in fowl, cattle, horses, sheep, swine or fish.

Under Alberta’s Personal Property Security Act (the “PPSA”), a Production Lender holding this type of security interest—also known as a “production-money security interest” (a “Production MSI”)—has priority over almost all other security interests given by the same debtor in the same assets. Although the Production MSI will have priority to typical bank lenders’ security interests in all of the debtor’s present and after-acquired personal property, it will not be able to defeat a purchase money security interest (a “PMSI”)—if that PMSI has been “perfected” (i.e. by registration). A PMSI is a security interest obtained where money has been loaned and used to acquire a specific asset.

Impact on Bank Lenders

Unfortunately, the PPSA does not specify when the Production Lender should perfect (i.e. register) its security interest to take advantage of the special priority. Although it might seem sensible to assume that the Production Lender must perfect its security interest by the time it finances the acquisition of food, drugs or hormones; the PPSA does not explicitly say so. According to legal commentary on the subject, this means that the Production Lender need not perfect the Production MSI (i.e. register the interest at the PPR) right away. So long as the Production Lender perfects its security interest before it enforces, it can assert priority over another perfected secured party (such as a bank lender), even if the competing secured party perfected its lien first.

The PPSA is also silent on the priority between two or more valid Alberta Production MSIs and fails to address conflicts between a valid Alberta Production MSI and other similar security interests obtained under the PPSA’s U.S. counterpart—the Uniform Commercial Code.

As a result, lenders hoping to obtain a first priority position in respect of agricultural collateral (that do not already have a PMSI in such collateral) risk being subordinated to a Production Lender. This is so because there are no available safeguards or due diligence mechanisms to determine absolutely whether the collateral is already encumbered with a Production MSI.

How Can A Bank Lender Protect Itself?

The only possible way to know whether a Production MSI exists is to request the borrower to provide a representation that all persons who have provided food, drugs or hormones for the fowl, animals or fish collateral have been paid in full for all such products or services. If the representation is factually correct, no problem. Of course, the risk remains if the representation is incorrect. Lenders providing funds for agricultural productions should be aware of these undisclosed security interests and upgrade their information bases from time to time to mitigate this risk.
Credit Bidding: An Increasingly Popular Insolvency Strategy
What is Credit Bidding?
Credit bidding is a process by which secured creditors use the debt that they hold to acquire a debtor’s assets in exchange for the cancellation of that debt. This mechanism essentially allows a secured creditor to use its debt as “currency” to satisfy the purchase price of the asset sale transaction. Although credit bidding is common in real estate foreclosure practice, the process is becoming increasingly popular in insolvency and restructuring proceedings (bankruptcy, receivership, plans of arrangement or restructuring proposals) dealing with complex business structures and a wide array of assets subject to varying levels of secured debt.

In the U.S., credit bidding is expressly codified in Chapter 11 of the Bankruptcy Code (Chapter 11). Although none of the Canadian insolvency statutes (i.e. the Bankruptcy and Insolvency Act (the BIA) and Companies Creditors’ Arrangement Act (the CCAA)) expressly allow credit bidding or provide any guidelines regarding its use, both the BIA and the CCAA were amended in 2009 to expressly authorize a court to approve the sale of assets in connection with a proposal or a plan of arrangement “outside of the ordinary course of business”.

Approving a Credit Bid: Relevant Considerations
The decision of whether to approve a credit bid in connection with a BIA proposal or a CCAA plan of arrangement depends on the circumstances of each case. The courts must consider, among other things, the following factors when deciding whether to authorize the sale:

• whether the process leading to the proposed sale or disposition resulting from the credit bid was reasonable in the circumstances;
• whether any court appointed monitor approved the process;
• whether any court appointed monitor filed a report stating that, in its opinion, the sale or disposition would be more beneficial to the creditors than a sale or disposition under a bankruptcy;
• the extent to which the creditors were consulted;
• the effects of the proposed sale or disposition on the creditors or interested parties; and
• whether the consideration to be received for the assets is reasonable and fair, taking into account their market value.

Unanswered Questions: Objecting Creditors and Syndicated Transactions
Although both the CCAA and the BIA require the debtor to provide notice of the proposed sale to its secured creditors, some practitioners have feared that these new provisions could be used to approve credit bids in spite of secured creditors’ objections. Given the sparse judicial authority on the subject, it is unclear whether these concerns will materialize in practice.
With respect to syndicated lending transactions, many have also argued that newly-enacted provisions allow the administrative agent to credit bid up to the full amount of the outstanding loan on behalf of an entire syndicate. The argument is that an agent derives its authority from the direction of the majority over any minority objections, provided that the loan documents give the agent the power to exercise remedies upon default. In these situations, it is common for lenders to agree to share any recovery on a pro rata basis. Although the law on point is presently unsettled, courts have confirmed that agents could credit bid up to the entire amount of the syndicated facility if authorized to do so by the syndicate.

**Implementing a Credit Bid**

If a credit bid is approved, the amount of the credit bid need not be limited to the fair market value of the encumbered assets and may be as high as—but must not exceed—the face value amount of the debt. In many cases, the debt value may exceed or match the value of the assets purchased. At the same time, if there are unsecured assets or assets subject to other lenders’ security, bids may also have to contain a cash component in order to sweep in those assets as well.

If a secured creditor can prove that it has valid security in the collateral and that it is under-secured, it will not need to incur the cost of a sales process to implement a successful credit bid. However, to prove an under-secured position, the creditor will have to obtain some form of valuation evidence. As a result, the risk of a protracted valuation dispute will weigh in favour of running a sales process. In that case, depending on timing or the market for the debtor’s assets, the secured creditor may submit its credit bid as a stalking horse at the outset of the case or participate with the other bidders in the auction.

Secured creditors also have the option of implementing a credit bid through a conventional acquisition transaction coupled with a court order approving the transaction and vesting the transferred assets in an “acquireco” (an entity incorporated by the secured creditors designated to be the purchaser of the debtor’s assets) free and clear of all liens and encumbrances.

Finally, a credit bid may be implemented through a plan of arrangement or proposal which contains only one voting class of creditors—the secured creditors. This process is particularly advantageous if the terms of the credit agreement require unanimous consent from the secured creditors to fully implement the credit bid. If the requisite CCAA/BlA voting majorities (two-thirds in value and a simple majority in number) are achieved at the creditors’ meeting, then the whole syndicate will be bound under the CCAA restructuring plan or BlA proposal.

**Recent Credit Bidding Cases in Canada**

Following the enactment of the September 2009 amendments to the BlA and CCAA, and as a result of the recent credit crisis, Canadian lenders started to consider credit bidding as a “big case strategy” in the restructuring of insolvent entities. Accordingly, the process began to receive more and more judicial consideration. In each case, courts chose to rely on and apply the factors outlined in the CCAA and BlA. Some of the more noteworthy decisions released in the last two years on the subject are briefly summarized below.

(a) Trident

In early 2010, Trident Exploration Corporation ULC (TEC), Trident Resources Corp. and their respective Canadian subsidiaries and U.S.-based subsidiaries (collectively, the Trident Group) filed for creditor protection under the CCAA and Chapter 11. In this case, the credit bidding process was not used as a primary asset sale strategy, but as a back-stop mechanism, to be implemented only if the Trident Group was unable to achieve its proposed restructuring plan.

In the course of the CCAA and Chapter 11 proceedings, the Trident Group hoped to restructure using either a plan of compromise or arrangement or through a mass sale of its business as a going concern. To accomplish its aim, the Trident Group sought sponsorship using a sale and investor solicitation process (a SISP). Parties interested in sponsoring the restructuring plan or purchasing assets from the Trident Group were encouraged to submit letters of intent and participate in the SISP.

At first, the Trident Group’s senior lenders found themselves party to a dual CCAA and Chapter 11 restructuring with little influence over its income or their debtors. To gain an upper hand in the proceedings, the senior lenders presented a credit bid as a competing proposal. Indeed, the Court order approving the SISP also contained a provision allowing the senior lenders to acquire some or all of the Trident Group’s property.

**Advantages and Frequent Uses**

Credit bidding seeks to protect secured lenders’ investments and ensure they receive the highest possible recovery in insolvency. It also provides transactional efficiency by bypassing the typical transactional requirements for asset recovery: (i) advancing funds to purchase a debtor’s assets, (ii) flowing these funds through the debtor’s estate, and (iii) applying the same funds to reduce or repay in full the indebtedness owed the secured lenders.

The most frequent uses for a credit bid strategy are as follows:

- **Employing a “Loan to Own” Strategy**: Credit bids can be useful if a creditor’s ultimate goal is to own the debtor’s business. This strategy is most often used by private equity funds, hedge funds and other similar providers of private capital that aim to convert debt to equity control. These entities often acquire secured debt in the secondary market at a discount and bid the full value of the debt at the credit bid stage.

- **Creating a Stalking Horse**: Placing a credit bid establishes a floor price for the sold assets. This may help encourage higher bids in an auction or affectively allow a creditor to own the debtor’s business if higher bids are not presented.

- **Risk Reduction**: A credit bid can help reduce the risk that secured lenders will be forced to accept less favourable assets, such as debt or equity, under the debtor’s plan of arrangement.

- **Stabilization**: Creditors who successfully use a credit bid can own and operate the debtor’s assets for a short period of time while waiting for the market to stabilize. By holding the assets, creditors have the chance to enhance their recovery on a sale under improved market conditions. Stabilization also gives debtors some relief if the market for revenue-generating assets is not improving.

- **Balancing Competing Enforcement Views in Syndicated Credit Facilities**: In many cases, lenders in a syndicate will have different views regarding preferred enforcement strategies. Some lenders may prefer to retain equity in the reorganized debtor and wait to recover in a more favourable market. In these cases, the ability to credit bid can be of significant value because it can allow the agent to distribute shares of a newly-incorporated acquiring entity to the syndicate in amounts equal to or greater than the current realizable value of the business. This would give some of the lenders the option to monetize their investment or hold shares with little or no loss to the syndicate as a whole.
in exchange for and in full satisfaction of the Trident Group’s obligations if the Trident Group was unable to file a restructuring plan or close the purchase and sale of its business and assets as a going concern. Although the parties in this case did not end up resorting to the credit bid, using the mechanism as a competing proposal allowed the senior lenders to force the Trident Group to complete its plan of arrangement in a relatively short period of time.3

(b) Re Canwest Publishing

In Re Canwest Publishing, multiple entities of Canwest Global Communications Corp. (the Canwest Entities) became insolvent and applied for relief under the CCAA. Similar to the Trident Group, the Canwest Entities’ restructuring plan consisted of a SISP back-stopped by a credit acquisition transaction through an entity (AcquireCo) capitalized by the Canwest Entities’ secured creditors. Through AcquireCo, these secured creditors planned to acquire substantially all the Canwest Entities’ assets using their outstanding secured debt. Once purchased, the assets would be allocated based on the lenders’ pro rata share of the debt, which was also correlated to the lenders’ equity interest in AcquireCo. Although the SISP ultimately produced a superior alternative bid which paid out the secured creditors in full (meaning that the Canwest Entities did not use the credit acquisition option), it is noteworthy that the Court initially approved the Canwest Entities’ plan. In doing so, it found that the only alternative to this arrangement would have been bankruptcy or liquidation, both of which would have resulted in significant detriment, not only to the Canwest Entities’ creditors and employees, but also to the broader community affected by their business. Even though the Court clearly stated that it was approving the credit acquisition as part of the SISP process only (not approving the credit acquisition itself), the Court took no issue with the structure of the credit acquisition. As some have noted, implicit in the Court’s decision was the acceptance of credit bidding as a concept in Canadian restructuring law.4

(c) Re White Birch Paper Holding Co.

In Re White Birch Paper Holding Co., the debtor experienced financial difficulties and sought protection under the CCAA and Chapter 11. The debtor’s restructuring plan contemplated a sale of all of its assets. BDWhite Birch Investment Co., LLC (BDWBI)—a corporation organized by members of a syndicate of lenders holding approximately 65% of the first secured debt—initiated a stalking horse bid. The minority members of this same syndicate hold approximately 10% of the debt also participated in the process and also submitted a qualified bid for the debtor’s assets. The bidding process allowed secured creditors to bid up to the full amount of their debt to purchase the debtor’s assets that were subject to their security. The process was approved by the parties, the monitor, the Superior Court of Quebec and the U.S. Bankruptcy Court overseeing the debtor’s Chapter 11 proceedings. At the auction, BDWBI won the bid. In spite of the minority lenders’ opposition, both the Quebec Superior Court and the U.S. Bankruptcy Court approved the sale of the assets to BDWBI. The minority lenders appealed, arguing that the credit bid process was unreasonable and detrimental to the debtor’s unsecured creditors. The Court of Appeal dismissed the minority lenders’ application and referenced the CCAA factors listed above. Since the credit bid process had already been approved by the parties, the monitor and the courts, it could not be described as “unreasonable” in the circumstances. As none of the participants had argued that a bidder’s use of credit was different than the typical cash bid at the outset of the proceedings, presenting this argument after a winning bid has been selected was “tantamount to changing the rules of the game once it has been played.” Leave to appeal to the Supreme Court of Canada was subsequently denied.

(d) The Alberta Experience: Clarity Life Sciences Ltd.

In the recent Alberta case of Clarity Life Sciences Ltd., Clarity Life Sciences Ltd., Clarity Enterprises Ltd. and Trafalgur Universal Limited (collectively, Clarity) provided $3.2 million in financing to Saponin Inc. (Saponin) and held security over all of Saponin’s property. Following a default by Saponin, and with court approval, a receiver and manager (the Receiver) was appointed.

After its appointment, the Receiver undertook a publicly advertised sales process to obtain possible bidders for Saponin’s assets and distributed an information summary—a “teaser” containing brief descriptions of the sale process and offered assets—to approximately 41 interested parties. After receiving two unconditional offers, the Receiver elected to enter into an asset purchase agreement with Clarity (the Clarity APA). By the time the Clarity APA was presented to the Court for its approval, Clarity was Saponin’s sole remaining secured creditor. Although the Court ultimately approved the credit bid, which included a cash component, the Court expressed a reluctance to grant the approval if it appeared that the only party benefitting from the credit bid would be Clarity. To obtain the required approval, the Court sought assurances that Clarity’s bid would also benefit Saponin’s other stakeholders and, most importantly, Saponin’s estate as a whole.

Concluding Remarks: Maintaining Transactional Fairness and Transparency

As noted by the Quebec Court of Appeal in Re White Birch Paper, regardless of the creditor’s motive, the credit bid process must be fair and transparent from the beginning. Hopeful credit bidders must demonstrate that they have provided appropriate value for the debtor’s business. Most of all, it must be clear that no credit bidder has benefited from the process by exerting undue influence or control.

As with most transactions, the party wishing to rely on a credit bid would best be served by having provisions to that effect in the main loan or credit agreement governing the debtor-creditor relationship. A clear indication from the outset that both parties have put their mind to the potential for credit bidding will be of significant persuasive value if the transaction were to face judicial scrutiny.

Further, as courts judge transactions against the factors outlined in the CCAA or its BIA counterpart, parties should attempt to align their arrangements with those considerations. These provisions will be especially important in a syndicated loan context where there are increased transactional difficulties such as conflicts of interest between agents representing syndicates and divergent opinions amongst lenders as to best practices upon insolvency.5

Footnotes

3 Ibid.
4 Supra note 1.
5 Supra note 1.
6 Supra note 1.
DIP Financing:
Are Lenders Truly Protected?

By Jonathan Hudolin, Student-at-Law
DIP Financing: 101

What is DIP Financing?
The *Bankruptcy and Insolvency Act* ("the BIA") and the *Companies’ Creditors Arrangement Act* ("the CCAA") provide mechanisms for insolvent companies to maintain business operations by reaching a restructuring agreement with creditors. A successful restructuring results in the company surviving and, usually, the creditors receiving an agreed-upon form of payment over time.

Insolvent companies proceeding under the BIA or the CCAA often require short-term capital or interim financing to finance a restructuring process. BIA and CCAA court approved interim financing is often referred to as debtor-in-possession ("DIP") financing. DIP financing can be a valuable business opportunity for lenders who are able to provide capital in these circumstances.

However, recent case law from the Ontario Court of Appeal suggests that the “super-priority” charge may not be effective against certain types of claims. In light of this decision, it is possible that DIP financing can actually place lenders, and, as a result, restructuring plans under the CCAA and BIA, at risk.

When Do Courts Award Security for DIP Financing?
By virtue of the court’s powers under the BIA and CCAA to award a “super-priority” to DIP Lenders, this security ranks above any other creditor’s claim, whether unsecured, secured, statutory or otherwise.

The order is typically granted following an application from the debtor with notice to other creditors likely to be affected by the DIP charge. When considering such an order, the courts will examine a number of factors, including:

- the period during which the company is expected to be subject to BIA or CCAA proceedings;
- how the company’s business and financial affairs are to be managed during the proceedings;
- whether the company’s management, and any proposed plan has the confidence and support of its major secured creditors;
- whether the DIP loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
- the nature and value of the company’s property;
- whether any creditor would be materially prejudiced as a result of the security or charge; and
- the reports of any monitor or trustee that has been appointed by the court or the parties to assess or supervise the debtor’s affairs.

The amount of approved DIP financing depends on the company’s operational requirements, having regard to its cash-flow. The type of property subject to the DIP lender’s security is also subject to the court’s discretion and can vary from all to a part of the debtor’s property.

Do DIP Lenders Really Have a “Super Priority”?
Despite the discretionary power of a court to award the “super-priority” charge in favour of DIP lenders, circumstances can arise where a DIP lender’s claim may be subordinate to that of another creditor.

Recently, in Re Indalex Limited ("Indalex"), the Ontario Court of Appeal held that a court-sanctioned DIP loan was subordinate to amounts owing to the debtor company’s pension plan beneficiaries. In this case, the key factors affecting the Court’s decision were that the amounts owing to one group of beneficiaries were deemed to be held in trust by the company (according to the Pension and Benefits Act) and that the plan beneficiaries were given no real notice of the proceedings and had no power to ensure that their interests were considered when the DIP order was initially granted.

*Indalex* creates some uncertainty for potential lenders, as DIP financing orders can evidently be successfully challenged by other creditors. *Indalex* is unique in its facts and is currently being appealed to the Supreme Court of Canada.

However, in the interim, *Indalex* should serve as a note of caution to lenders providing DIP financing as it highlights the importance of conducting full due diligence on the debtor company and indentifying the nature of all company-creditor debt obligations at the front end of the restructuring. Future DIP lenders may also need to pay close attention the statutory procedural requirements and ensure that they have provided sufficient notice to third parties or plan members before seeking court-approval of the charge.
BD&P has moved to 8th Avenue Place

COMMON SENSE, UNCOMMON INNOVATION.

BD&P is a leading Canadian law firm of 150 lawyers skilled in virtually every aspect of business law and litigation.