

## A. NEGATIVE PLEDGE

There are a number of potential pitfalls and gaps in the negative pledge covenant commonly seen in investment grade bond indentures of Canadian issuers. The underlying rationale of the covenant is to restrict the amount of additional debt an Issuer may incur that is effectively senior to the bonds issued under its indenture. Common shortcomings of this covenant in existing investment grade bond indentures include the following:

1. Structural subordination – the lien covenant only applies to the holdco Issuer, and not all material opco subsidiaries and, moreover, there is no restriction on the incurrence of debt at such opco subsidiary level.
2. Ability to incur unlimited secured debt – a common formulation of this covenant allows issuers to incur unlimited secured debt as long as the bonds are "equally and ratably" secured. This may lead to unintended consequences whereby the bonds may find themselves sharing collateral with massive amounts of new debt (e.g. LBO or leveraged recapitalization scenario).

The model covenant below governs debt of all material opco subsidiaries, thus addressing the structural subordination issue noted in 1. above. This model also captures "attributable debt" resulting from sale and leaseback transactions, thereby eliminating the need for a separate sale and leaseback covenant (which is also not always properly addressed in investment grade indentures). Importantly, the proposed

model eliminates the "equal and ratable" concerns described in 2. above.

### I. Proposed Model Limitation on Indebtedness Covenant and Negative Pledge Language:

**Limitation on Indebtedness.** The Issuer shall not, and shall not permit any Restricted Subsidiary<sup>1</sup> to, create, incur, assume or suffer to exist any Indebtedness, other than Permitted Debt.

**Limitation on Liens.** The Issuer shall not, and shall not permit any Restricted Subsidiary to, create, incur, assume or suffer to exist any Lien of any kind securing Indebtedness on any asset now owned or hereafter

acquired, other than Permitted Liens.

"Permitted Debt" means:

Indebtedness of the Issuer or any Restricted Subsidiary existing as of the date of this Indenture;

Unsecured Indebtedness of the Issuer which is equal or subordinated in right of payment to the Notes

and any guarantee of the Notes;

1 The proposed model terms set forth in this paper have been drafted to include a "Restricted Subsidiary" concept (see below under "A. Negative

Pledge; II. Proposed Model Restricted/Unrestricted Subsidiary Definitions"). This should be an acceptable approach for bondholders provided

that the definitions and other provisions relating to Restricted/Unrestricted Subsidiaries are carefully crafted to ensure that at no time will a

material amount of the assets or cash flow (e.g. consolidated total assets or consolidated EBITDA) of the corporate group reside with Unrestricted

Subsidiaries. The model terms set forth in this paper also limit the amount of asset and value "leakage" which is allowed from the restricted

group to unrestricted subsidiaries in other ways (e.g. the "Permitted Debt" definition includes intercompany debt only between the Issuer and

Restricted Subsidiaries and the "Change of Control" and "Coupon Step-Up" clauses and related definitions have been drafted to permit certain

transactions between the Issuer and Restricted Subsidiaries only).

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Indebtedness, which, by its terms, is Non-Recourse Debt to the Issuer or any Restricted Subsidiary;

Indebtedness of any Person acquired by, merged, amalgamated or consolidated with, or liquidated into, the Issuer or any Restricted Subsidiary after the Issue Date, provided that such Indebtedness was not incurred in anticipation of such acquisition, merger, amalgamation, consolidation or liquidation, and only

to the extent such Indebtedness is an obligation of, and secured (if at all) by the assets and capital stock of, the Person (and Subsidiaries of such Person) so acquired by, merged, amalgamated or consolidated with, or liquidated into the Issuer or any Restricted Subsidiary;

Purchase Money Obligations;

Intercompany Indebtedness of the Issuer or any Restricted Subsidiary owing to the Issuer or another Restricted Subsidiary;

Indebtedness of any Restricted Subsidiary in the form of guarantees of the Notes;

Indebtedness not otherwise permitted under clauses (i) through (vii) above, provided that the aggregate principal amount of such Indebtedness would not then exceed [5 - 10]% of Consolidated Net Tangible

Assets<sup>2</sup>;

[other specified carve-outs to be agreed]<sup>3</sup>; and

any extension, renewal, alteration, refinancing, replacement, exchange or refunding (or successive extensions, renewals, alterations, refinancings, replacements, exchanges or refundings) of all or part of any Indebtedness referred to in the foregoing clauses; provided, however, that (A) such refinancing Indebtedness is only secured by Liens on some or all of the property and assets that secured the refinanced Indebtedness at the time of such extension, renewal, alteration, refinancing, replacement, exchange or refund, and (B) the principal amount (or deemed amount, in the case of Attributable Debt) of the refinancing Indebtedness is not increased from the principal amount of the refinanced Indebtedness then existing at the time of such extension, renewal, alteration, refinancing, replacement, exchange or refunding, plus an amount necessary to pay fees and expenses, including premiums, related to such extensions, renewals, alterations, refinancings, replacements, exchanges or refundings.

"Permitted Liens" means:

Liens existing as of the date of this Indenture;

Liens created, incurred or assumed to secure any Non-Recourse Debt;

Liens on the assets and capital stock of a Person (and Subsidiaries of such Person) acquired by, merged, amalgamated or consolidated with, or liquidated into, the Issuer or any Restricted Subsidiary after the

2 The CNTA basket has been drafted to capture any Attributable Debt or Hedging Obligations of the Issuer or any Restricted Subsidiary, senior

debt of the Issuer and other Indebtedness (both secured and unsecured) not otherwise permitted under clauses (i), (iii)-(vii), (ix) or (x) at any

Restricted Subsidiary.

3 Permitted indebtedness will need to be carefully tailored for each individual transaction, and the proposed list of "Permitted Debt" is only a

suggested starting place reflecting carve-outs (aside from the CNTA basket) commonly seen in indenture covenants and definitions.

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Issue Date, provided that such Liens were not created, incurred or assumed in anticipation of such acquisition, merger, amalgamation, consolidation or liquidation;

Liens created, incurred or assumed to secure Purchase Money Obligations;

Liens in favour of the Issuer or any Restricted Subsidiary created, incurred or assumed to secure intercompany Indebtedness of any Restricted Subsidiary owing to the Issuer or another Restricted Subsidiary;

Liens created, incurred or assumed to secure the Notes or any guarantee of the Notes;

Liens securing Indebtedness permitted pursuant to clause (viii) of the definition of "Permitted Debt"; [other specified carve-outs to be agreed]4; and

any extension, renewal, alteration or replacement (or successive extensions, renewals, alterations or replacements) of all or part of any Lien referred to in the foregoing clauses; provided, however, that (A) the property and assets which are subject to such Lien is limited to some or all of the property and assets

which were subject to such Lien (and accretions thereto and improvements thereon) at the time of such extension, renewal, alteration or replacement, and (B) the principal amount (or deemed amount, in the case of Attributable Debt) of the Indebtedness secured by such Lien is not increased from the principal amount of the Indebtedness then existing at the time of such extension, renewal, alteration or replacement.

"Attributable Debt" in respect of a Sale/Leaseback Transaction means, as at the time of determination, the present value (discounted at the interest rate implicit in such transaction, determined in accordance with Canadian generally accepted accounting principles) of the total obligations of the lessee for rental payments during the remaining term of the lease included in such Sale/Leaseback Transaction (including during any period for which such lease has been extended); provided; however, that if such Sale/Leaseback Transaction results in a Capital Lease Obligation, the amount of Indebtedness represented

thereby will be determined in accordance with the definition of "Capital Lease Obligation."

"Capital Lease Obligation" means, at the time any determination is to be made, the amount of the liability

in respect of a capital lease that would at that time be required to be classified and accounted for as a capitalized lease obligation on a balance sheet in accordance with Canadian generally accepted accounting principles.

"Commodity Hedging Contracts" means any transaction, arrangement or agreement entered into

between a Person (or any of its Restricted Subsidiaries) and a counterparty on a case by case basis, including any futures contract, a commodity option, a swap, a forward sale or otherwise, the purpose of which is to mitigate, manage or eliminate its exposure to fluctuations in commodity prices, transportation

4 Permitted liens will need to be carefully tailored for each individual transaction, and the proposed list of "Permitted Liens" is only a suggested

starting place reflecting carve-outs (aside from the CNTA basket) commonly seen in indenture covenants and definitions.

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or basis costs or differentials or other similar financial factors including contracts settled by physical delivery of the commodity not settled within 60 days of the date of any such contract.

"Consolidated Net Tangible Assets" shall mean, at any time of determination, the total amount of assets of any Person and its Subsidiaries on a consolidated basis, after deducting therefrom (i) all current liabilities (excluding any indebtedness classified as a current liability), (ii) all goodwill, trade names, trademarks, patents, unamortized debt discounts and financing costs and all other like intangible assets and (iii) appropriate adjustments on account of minority interests of other Persons holding shares of the Subsidiaries of such Person, all as set forth in the most recent annual audited or quarterly unaudited consolidated balance sheet of such Person and its Subsidiaries and computed in accordance with Canadian generally accepted accounting principles.

"Currency Agreement" means any financial arrangement entered into between a Person (or its Restricted

Subsidiaries) and a counterparty on a case by case basis in connection with a foreign exchange futures contract, currency swap agreement, currency option or currency exchange or other similar currency related transactions, the purpose of which is to mitigate or eliminate its exposure to fluctuations in exchange rates and currency values.

"Disqualified Equity Interests" means any Equity Interests that, by its terms (or by the terms of any security

into which it is convertible, or for which it is exchangeable, in each case, at the option of the holder of the

Equity Interests), or upon the happening of any event, matures or is mandatorily redeemable, pursuant to a sinking fund obligation or otherwise, or redeemable at the option of the holder of the Equity Interests,

in whole or in part, on or prior to the date on which the Notes mature, and shall be deemed to have an outstanding value equal to the maximum amount that the issuer thereof may become obligated to pay upon the maturity of, or pursuant to any mandatory redemption provisions of, such Disqualified Equity Interests, exclusive of accrued dividends.

"Equity Interests" means, with respect to any Person, all of the shares in the capital of (or other ownership

or profit interests in) such Person, all of the warrants, options or other rights for the purchase or acquisition from such Person of shares in the capital of (or other ownership or profit interests in) such Person, all of the securities convertible into or exchangeable for shares in the capital of (or other ownership or profit interests in) such Person or warrants, rights or options for the purchase or acquisition

from such Person of such shares (or such other interests), and all of the other ownership or profit interests

in such Person (including, without limitation, partnership, member or trust interests therein), whether voting or nonvoting, and whether or not such shares, warrants, options, rights or other interests are outstanding on any date of determination.

"Hedging Obligations" means, with respect to any specified Person, the outstanding amount of all obligations of such Person and its Restricted Subsidiaries under all Currency Agreements, all Interest Rate

Agreements and all Commodity Hedging Contracts, with the amount of such obligations being equal to the net amount payable if such obligations were terminated at that time due to default by such Person (after giving effect to any contractually permitted set-off).

"Indebtedness" means, with respect to any specified Person, whether or not contingent:

all indebtedness of such Person in respect of borrowed money;

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all obligations of such Person evidenced by bonds, notes, debentures or similar instruments or letters of credit, letters of guarantee or tender cheques (or reimbursement agreements in respect thereof);

all obligations of such Person in respect of banker's acceptances;

all Capital Lease Obligations of such Person and all Attributable Debt in respect of Sale/Leaseback Transactions entered into by such Person;

all obligations of such Person representing the balance deferred and unpaid of the purchase price of any property, except any such balance that constitutes an accrued expense or trade payable;

all Hedging Obligations of such Person;

the amount of all obligations of such Person with respect to the redemption, repayment or other repurchase of Disqualified Equity Interests of such Person and the amount of the liquidation preference of any Preferred Shares of a Restricted Subsidiary; and

all conditional sale obligations of such Person and all obligations of such Person under title retention agreements, but excluding a title retention agreement to the extent it constitutes an operating lease under Canadian generally accepted accounting principles.

In addition, the term "Indebtedness" includes all Indebtedness of others secured by a Lien on any asset of

the specified Person (whether or not such Indebtedness is assumed by the specified Person) and, to the extent not otherwise included, a guarantee by the specified Person of any Indebtedness of any other Person.

"Interest Rate Agreement" means any financial arrangement entered into between a Person (or its Restricted Subsidiaries) and a counterparty on a case by case basis in connection with interest rate swap transactions, interest rate options, cap transactions, floor transactions, collar transactions and other similar interest rate protection related transactions, the purpose of which is to mitigate or eliminate its exposure to fluctuations in interest rates.

"Lien" means any mortgage, lien (statutory or otherwise), pledge, charge, security interest or encumbrance upon or with respect to any property or assets of any kind, whether or not filed, recorded or otherwise perfected under applicable law, including any conditional sale or other title retention agreement.

"Non-Recourse Debt" means indebtedness:

(1) as to which neither the Issuer nor any of its Restricted Subsidiaries (a) provides credit support of any kind (including any undertaking, agreement or instrument that would constitute

Indebtedness) other than a pledge of the Equity Interests of an Unrestricted Subsidiary, (b) is directly or indirectly liable as a guarantor or otherwise other than by virtue of a pledge of the Equity Interests of an Unrestricted Subsidiary or (c) constitutes the lender;

(2) no default with respect to which (including any rights that the holders thereof may have to take enforcement action against an Unrestricted Subsidiary) would permit, upon notice, lapse of time or both, any holder of any other Indebtedness (other than the Notes) of the Issuer or any of its

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Restricted Subsidiaries to declare a default on such other Indebtedness or cause the payment thereof to be accelerated or payable prior to its stated maturity date; and

(3) as to which the lenders have been notified in writing that they will not have any recourse to the stock or assets of the Issuer or any of its Restricted Subsidiaries other than as set forth in clause

(1).

"Preferred Shares" of any Person means Equity Interests of such Person of any class or classes (however designated) that ranks prior to, as to the payment of dividends or as to the distribution of assets upon any

voluntary or involuntary liquidation, dissolution or winding up of such Person, to any other class of Equity

Interests of such Person and shall be valued at the greater of its voluntary or involuntary maximum fixed repurchase price plus accrued and unpaid dividends.

"Purchase Money Obligation" means any indebtedness or monetary obligation incurred, created or assumed as, or incurred, created or assumed to provide funds to pay, all or part of (a) the purchase price (which shall be deemed to include any costs of construction or installation or lease payments, as the case

may be) of any property acquired (including by way of lease) after the date of this Trust Indenture or (b) the cost of improvements made after the date of this Trust Indenture to any property, provided that the principal amount of such indebtedness or monetary obligation does not, at the time incurred, created or assumed, exceed the purchase price of the property when originally acquired, or the cost of improvements, as the case may be, and is incurred, created or assumed not later than 180 days after such

purchase or the completion of such acquisition, construction, installation or improvement, as the case



may be, and includes any extension, renewal, refunding or refinancing thereof so long as the principal amount outstanding immediately prior to the date of such extension, renewal, refunding or refinancing is

not increased.

"Sale/Leaseback Transaction" means an arrangement relating to property owned by the Issuer or a Restricted Subsidiary on the Issue Date or thereafter acquired by the Issuer or a Restricted Subsidiary whereby the Issuer or a Restricted Subsidiary transfers such property to a Person and the Issuer or a Restricted Subsidiary leases it from such Person.

## II. Proposed Model Restricted/Unrestricted Subsidiary Definitions:

"Restricted Subsidiary" means any Subsidiary of the Issuer that is not an Unrestricted Subsidiary.

"Unrestricted Subsidiary" means (a) any Subsidiary of the Issuer that is designated by the Board of Directors of the Issuer as an Unrestricted Subsidiary in the manner provided below and (b) any Subsidiary

of an Unrestricted Subsidiary.

The Board of Directors of the Issuer may designate any Subsidiary of the Issuer to be an Unrestricted Subsidiary subject to the following terms, conditions, limitations and restrictions:

such Subsidiary has no Indebtedness other than Non-Recourse Debt;

such Subsidiary is not party to any agreement, contract, arrangement or understanding with the Issuer or

any of its Restricted Subsidiaries unless the terms of any such agreement, contract, arrangement or understanding are no less favorable to the Issuer or such Restricted Subsidiary than those that might be obtained at the time from Persons who are not Affiliates of the Issuer;

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such Subsidiary is a Person with respect to which neither the Issuer nor any of its Restricted Subsidiaries has any direct or indirect obligation (i) to subscribe for additional Equity Interests or (ii) to maintain or preserve such Person's financial condition or to cause such Person to achieve any specified levels of operating results;

such designation would not cause a Default or Event of Default; and

after giving pro forma effect to such designation, (i) the sum, without duplication, of the EBITDA of the

Issuer's Unrestricted Subsidiaries, would not be greater than [5 – 10]% of the EBITDA of the Issuer and its

Subsidiaries, on a consolidated basis, and (ii) the sum, without duplication, of the total assets of the

Issuer's Unrestricted Subsidiaries, would not be greater than [5 – 10]% of the total assets of the Issuer and

its Subsidiaries, on a consolidated basis, all as shown on the most recent internal income statement and balance sheet of the Issuer.<sup>5</sup>

The Board of Directors of the Issuer may designate any Unrestricted Subsidiary as a "Restricted Subsidiary", provided that such designation shall be deemed to be an incurrence of Indebtedness by a Restricted Subsidiary in an amount equal to the outstanding Indebtedness of such Unrestricted Subsidiary

and such designation shall only be permitted if (a) such Indebtedness is Permitted Debt, calculated on a pro forma basis; and (b) no Default or Event of Default would be in existence following such designation.

Any designation of a Restricted Subsidiary as an Unrestricted Subsidiary shall be evidenced to the Trustee

by filing with the Trustee a certified copy of a resolution of the Board of Directors of the Issuer giving effect to such designation and an Officer's Certificate certifying that such designation complied with the preceding conditions. If, at any time, any Unrestricted Subsidiary would fail to meet the definition of an Unrestricted Subsidiary, it shall thereafter cease to be an Unrestricted Subsidiary for purposes of this Indenture and any Indebtedness of such Unrestricted Subsidiary shall be deemed to be incurred by a Restricted Subsidiary as of such date and, if such Indebtedness is not Permitted Debt, the Issuer shall be in default of [the Limitation on Indebtedness covenant].