

Syndicated Debt Agreement Agency Provisions

Prepared by:
Alison R. Manzer
Cassels Brock & Blackwell LLP

INTRODUCING

Lorman's New Approach to Continuing Education

ALL-ACCESS PASS

The All-Access Pass grants you **UNLIMITED** access to Lorman's ever-growing library of training resources:

- ☑ Unlimited Live Webinars - 120 live webinars added every month
- ☑ Unlimited OnDemand and MP3 Downloads - Over 1,500 courses available
- ☑ Videos - More than 1300 available
- ☑ Slide Decks - More than 2300 available
- ☑ White Papers
- ☑ Reports
- ☑ Articles
- ☑ ... and much more!

Join the thousands of other pass-holders that have already trusted us for their professional development by choosing the All-Access Pass.



Get Your All-Access Pass Today!

SAVE 20%

Learn more: www.lorman.com/pass/?s=special20

Use Discount Code Q7014393 and Priority Code 18536 to receive the 20% AAP discount.

*Discount cannot be combined with any other discounts.

LORMAN EDUCATION SERVICES
SUPPLEMENTAL MATERIALS
RECENT DEVELOPMENTS WITH LOAN SYNDICATIONS
APRIL 30, 2018

Alison R. Manzer, *Partner*
Cassels Brock & Blackwell, Toronto

Ms. Manzer's more than 35 year legal practice encompasses a broad range of experience in the financial services sector, with a focus on Canada-US cross border issues involving financial institution regulation, secured and unsecured debt finance, asset-based financing, securitization and structured finance, project finance and syndicated lending. Restructuring and lender rights and remedies within these areas is also part of her active practice.



Alison Manzer
Direct: 416 869 5469 • Fax: 416 350 6938 • amanzer@casselsbrock.com
2100 Scotia Plaza, 40 King Street West, Toronto, Ontario, M5H 3C2
www.casselsbrock.com

NEW ISSUES EMERGING IN SYNDICATED LOAN TRANSACTIONS

Syndicated Debt Agreement Agency Provisions

The final agreement selected for the inclusion of agency provisions is a North American based credit agreement which was drafted using many of the concepts of the LSTA recommended forms. These have been revised, for the transaction, and may differ significantly in some aspects from that of the LSTA recommendations. We suggest that if it is intended to use the LSTA protocols that the LSTA forms be acquired and used for that purpose. These were transactionally negotiated terms but ones which we believe reflect good practice, and generally industry standard approaches to the agency relationship.

"Majority Lenders" means at any time:

- (a) that there are two or fewer Lenders, all the Lenders; and
- (b) that there are three or more Lenders, the Lenders which then have Commitments of 66^{2/3}% or more of the maximum total principal amount of all Commitments at such time."

It is usual in a syndicated transaction for one of the lenders, most often the agent, to act as the issuing bank to issue letters of credit. The other lenders agree to effectively indemnify the issuing bank by agreeing that if there

is a call on the letter of credit that they will advance their proportionate share of the amount drawn to the issuing lender, to allow reimbursement for their proportionate amount of that obligation. The issuing lender is generally entitled to receive an additional fee for the credit risk taken for the issuance, which is generally fairly small because of the back-up of the purchase requirement, which is effectively an indemnity, and the remaining lenders are paid only interest if and when the draw is made. If the syndicate does not have adequate credit quality the perceived credit risk and therefore fronting fees may be higher; the more usual is to require reasonable credit quality in the syndicate participants increasing the credit quality of the participation obligations. The right of the issuing bank to issue letters of credit is generally dictated by the mechanics of the agreement and does not require the ongoing consents or agreements of the remaining lenders.

Participation of the Lenders. By the issuance of a Letter of Credit hereunder and without further action on the part of the Agent or the Lenders, each Lender hereby accepts from the Agent a participation (which participation shall be nonrecourse to the Agent) in such Letter of Credit in such Lender's Proportionate Share of Facility, effective upon the issuance of such Letter of Credit. Each Lender hereby absolutely and unconditionally assumes, as primary obligor and not as a surety, and agrees to pay and discharge and to indemnify and hold the Agent harmless from liability in respect of, such Lender's said Proportionate Share of the amount of any drawing under a Letter of Credit. Each Lender acknowledges and agrees that its obligation to acquire participations in each Letter of Credit issued by the Agent and its obligation to make the payments specified herein, and the right of the Agent to receive the same, in the manner specified herein, are absolute and unconditional and shall not be affected by any circumstance whatsoever, including the occurrence and continuance of a Default or Event of Default hereunder, and that each such payment shall be made without any offset, abatement, withholding or reduction whatsoever.

Assignments and Participations

There exist fairly standard provisions for general use in North America around the ability of lenders to complete assignments and participations. The questions which are generally asked, and dealt with, in these provisions are: (i) is there a minimum assignment amount?; (ii) how much is the assignment fee?; (iii) is the fee payable by the assignor or the assignee?; (iv) are there restrictions on the nature of the permitted assignees?; and (v) is the borrower's approval required (borrower approval is generally required in a smaller syndication other than where the borrower is in default but not required in a larger syndicate group).

- (a) A Lender (herein sometimes called a "**Granting Lender**") may, with the prior written consent of the Borrower, which consent may not be unreasonably withheld or delayed, grant a participation in any Credit Facility to one or more financial institutions or other entities (the "**Participant**"). If a participation is granted, (A) the Granting Lender shall remain fully liable for all of its obligations and responsibilities under this Agreement to the same extent as if the participation had not been granted, and (B) the Granting Lender shall administer the participation of the Participant. None of the Participant and the Borrower shall have any rights against or obligations to one another, nor shall any of them be required to deal directly with one another in respect of the participation by a Participant.
- (b) A Lender (herein sometimes called an "**Assigning Lender**") may, with the prior written consent of the Borrower which consent may not be unreasonably withheld or delayed, assign all or any part of its rights to, and may have its obligations in respect of any Facility assumed by, one or more financial institutions or other entities (each an "**Assignee**") in minimum amounts of \$5,000,000. Notwithstanding the foregoing, no consent shall be required in respect of any assignment by an Assigning Lender to its Affiliate or another existing Lender. An assignment shall become effective when the Borrower and the Agent have been notified of it by the Assigning Lender and have received from the Assignee an undertaking (addressed to all the parties to this Agreement) to be bound by this Agreement and to perform the obligations assigned to it, in substantially the form of Schedule Y, and the Agent has received from the Assignor an assignment fee of \$5,500. Any Assignee shall be treated as a Lender for all purposes of this Agreement, shall be entitled to the full benefit hereof and shall be subject to the obligations of the Assigning Lender to the same extent as if it were an original party in respect of the rights or obligations assigned to it, and the Assigning Lender shall be released and discharged from its obligations hereunder (but not from

any claims or damages resulting from such Assigning Lender's gross negligence or wilful misconduct) from the date of assignment, accordingly and to the same extent, and the Schedules hereto, as applicable, shall be amended accordingly from time to time without further notice or other requirement.

Notwithstanding anything to the contrary herein contained, where a Default or an Event of Default has occurred and is continuing, the consent of the Borrower shall not be required with respect to the granting of a participation by or the assignment of all or any part of the rights of a Lender hereunder.

- (a) *Limitation.* No Lender shall be entitled to make an assignment under Section [] or change its Branch of Account if this would, immediately following the assignment or change of Branch of Account or upon a subsequent payment being made by the Borrower in respect of a Credit Facility, increase the cost of the Credit Facility to the Borrower (including by reason of any additional amount being payable pursuant to Section []), except that (i) this Section shall not be applicable if (A) the Borrower shall have failed to make when due, whether by acceleration or otherwise, any payment of principal required to be made by the Borrower under this Agreement or any other Document, (B) the Borrower shall have failed to make when due (and after the expiry of any applicable grace period), whether by acceleration or otherwise, any payment of interest, fees, costs or any other payment under this Agreement or any other Document, or (C) a declaration shall have been made pursuant to Section [], and (ii) nothing in this Section shall prohibit the granting of an assignment by a Schedule I Lender to a Schedule II Lender notwithstanding that the Discount Rate applicable to Bankers' Acceptances issued by the Schedule II Lender may be higher than the Discount Rate applicable to Bankers' Acceptances issued by the Schedule I Lender.
- (b) *Borrower Cooperation.* Provided that the consent of the Borrower, if required, shall have been given, the Borrower will execute such further documents and instruments and do such further things as the Agent may reasonably request for the purpose of any participation or assignment.
- (c) *Disclosure.* The Agent and each Lender may disclose to any prospective Participants, Assignees or Affiliate of any Lender, on a confidential basis, such information concerning the Borrower and the other Obligors as it considers appropriate without incurring any liability for any breach of the duty of banker-customer confidentiality but subject to receiving an undertaking from such prospective Participant, Assignee or Affiliate to receive and maintain such information in confidence.

The following agency clauses provide a fulsome protocol around the appointment of an agent, and the outline of the duties, obligations and responsibilities of the agent. These were tailored to the specific requirements of the syndicate, agent and transaction but provide a good general outline of industry standard approaches to agency relationships and the syndicated debt transaction in North America.

(A) Appointment. Each Lender hereto and, upon obtaining an interest in any Loan, any participant, transferee or other assignee of any Lender irrevocably appoints, designates and authorizes [] as Agent to take such actions or refrain from taking such action as its agent on its behalf and to exercise such powers hereunder and under the other Loan Documents as are delegated by the terms hereof and thereof, together with such powers as are reasonably incidental thereto. Neither the Agent nor any of its directors, officers, employees or agents shall be liable for any action so taken. The provisions of this subsection are solely for the benefit of Agent and Lenders and neither Borrower nor any other Loan Party shall have any rights as a third party beneficiary of any of the provisions hereof. In performing its functions and duties under this Agreement and the other Loan Documents, Agent shall act solely as agent of Lenders and does not assume and shall not be deemed to have assumed any obligation toward or relationship of agency or trust with or for Borrower or any other Loan Party. Agent may perform any of its duties hereunder, or under the Loan Documents, by or through its agents or employees.

(B) Nature of Duties. Agent shall have no duties, obligations or responsibilities except those expressly set forth in this Agreement or in the Loan Documents. The duties of Agent shall be mechanical and administrative in nature. Agent shall not have by reason of this Agreement a fiduciary, trust or agency relationship with or in respect of any Lender, Borrower or any other Loan Party. Nothing in this Agreement or any of the Loan Documents, express or implied, is intended to or shall be construed to impose upon Agent any obligations in respect of this Agreement or any of the Loan Documents except as expressly set forth herein or therein. Each Lender shall make its own appraisal of the credit worthiness of Borrower, and shall have independently taken whatever steps it considers necessary to evaluate the financial condition and affairs of Borrower, and Agent shall have no duty or responsibility, either initially or on a continuing basis, to provide any Lender with any credit or other information with respect thereto (other than as expressly required herein), whether coming into its possession before the Closing Date or at any time or times thereafter. If Agent seeks the consent or approval of any Lenders to the taking or refraining from taking any action hereunder, then Agent shall send notice thereof to each Lender. Agent shall promptly notify each Lender any time that the Requisite Lenders have instructed Agent to act or refrain from acting pursuant hereto.

(C) Rights, Exculpation, Etc. Neither Agent nor any of its officers, directors, employees or agents shall be liable to any Lender for any action taken or omitted by them hereunder or under any of the Loan Documents, or in connection herewith or therewith, except that Agent shall be liable to the extent of its own gross negligence or willful misconduct as determined by a court of competent jurisdiction. Agent shall not be liable for any apportionment or distribution of payments made by it in good faith and if any such apportionment or distribution is subsequently determined to have been made in error, the sole recourse of any Lender to whom payment was due but not made, shall be to recover from other Lenders any payment in excess of the amount to which they are determined to be entitled (and such other Lenders hereby agree to return to such Lender any such erroneous payments received by them). Neither Agent nor any of its agents or representatives shall be responsible to any Lender for any recitals, statements, representations or warranties herein or for the execution, effectiveness, genuineness, validity, enforceability, collectability, or sufficiency of this Agreement or any of the Loan Documents or the transactions contemplated thereby, or for the financial condition of any Loan Party. Agent shall not be required to make any inquiry concerning either the performance or observance of any of the terms, provisions or conditions of this Agreement or any of the Loan Documents or the financial condition of any Loan Party, or the existence or possible existence of any Default or Event of Default. Agent may at any time request instructions from Lenders with respect to any actions or approvals which by the terms of this Agreement or of any of the Loan Documents Agent is permitted or required to take or to grant, and if such instructions are promptly requested, Agent shall be absolutely entitled to refrain from taking any action or to withhold any approval and shall not be under any liability whatsoever to any Person for refraining from any action or withholding any approval under any of the Loan Documents until it shall have received such instructions from Requisite Lenders or all or such other portion of the Lenders as shall be prescribed by this Agreement. Without limiting the foregoing, no Lender shall have any right of action whatsoever against Agent as a result of Agent acting or refraining from acting under this Agreement or any of the other Loan Documents in accordance with the instructions of Requisite Lenders in the absence of an express requirement for a greater percentage of Lender approval hereunder for such action.

(D) Reliance. Agent shall be under no duty to examine, inquire into, or pass upon the validity, effectiveness or genuineness of this Agreement, any other Loan Document, or any instrument, document or communication furnished pursuant hereto or in connection herewith. Agent shall be entitled to rely, and shall be fully protected in relying, upon any written or oral notices, statements, certificates, orders or other documents or any telephone message or other communication (including any writing, fax, telecopy or telegram) believed by it in good faith to be genuine and correct and to have been signed, sent or made by the proper Person, and with respect to all matters pertaining to this Agreement or any of the Loan Documents and its duties hereunder or thereunder. Agent shall be entitled to rely upon the advice of legal counsel, independent accountants, and other experts selected by Agent in its sole discretion.

(E) Indemnification. Lenders will reimburse and indemnify Agent for and against any and all liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses (including,

without limitation, attorneys' fees and expenses), advances or disbursements of any kind or nature whatsoever which may be imposed on, incurred by, or asserted against Agent in any way relating to or arising out of this Agreement or any of the Loan Documents or any action taken or omitted by Agent under this Agreement or any of the Loan Documents, in proportion to each Lender's Pro Rata Share, but only to the extent that any of the foregoing is not promptly reimbursed by Borrower; provided, however, no Lender shall be liable for any portion of such liabilities, obligations, losses, damages, penalties, actions, judgments, suits, costs, expenses, advances or disbursements resulting from Agent's gross negligence or willful misconduct as determined by a final non-appealable judgment by a court of competent jurisdiction. If any indemnity furnished to Agent for any purpose shall, in the opinion of Agent, be insufficient or become impaired, Agent may call for additional indemnity and cease, or not commence, to do the acts indemnified against, even if so directed by Lenders or Requisite Lenders, until such additional indemnity is furnished. The obligations of Lenders under this subsection shall survive the payment in full of the Obligations and the termination of this Agreement.

Successor Agent. - (1) Resignation. Agent may resign from the performance of all its agency functions and duties hereunder at any time by giving at least thirty (30) Business Days' prior written notice to Borrower and the Lenders. Such resignation shall take effect upon the acceptance by a successor Agent of appointment as provided below.

(2) Appointment of Successor. Upon any such notice of resignation, Requisite Lenders shall appoint a successor Agent which, unless an Event of Default has occurred and is continuing, shall be reasonably acceptable to Borrower. If a successor Agent shall not have been so appointed within said thirty (30) Business Day period, the retiring Agent, upon notice to Borrower, shall then appoint a successor Agent who shall serve as Agent until such time, if any, as Requisite Lenders appoint a successor Agent as provided above.

(3) Successor Agent. Upon the acceptance of any appointment as Agent under the Loan Documents by a successor Agent, such successor Agent shall thereupon succeed to and become vested with all the rights, powers, privileges and duties of the retiring Agent, and the retiring Agent shall be discharged from its duties and obligations under the Loan Documents. After any retiring Agent's resignation as Agent, the provisions of this Section shall inure to its benefit as to any actions taken or omitted to be taken by it while it was Agent.

Collateral Security Duties

It is usual for a member of the syndicate to take on the role of holding, managing and dealing with the security over collateral in the syndicated secured transaction. This can be the agent, or where multiple roles and appointments are contemplated a specifically appointed collateral agent. The provisions which follow work regardless of the determination as to who will act in the capacity as a collateral security agent. The provisions which have been included are considered industry standard for a North American transaction in terms of the allocation of the duties and responsibilities with regard to the perfection and holding of security over collateral.

(1) Release of Collateral. Lenders hereby irrevocably authorize Agent, at its option and in its discretion, to release any Lien granted to or held by Agent upon any Collateral (a) upon termination of the Commitments and upon payment and satisfaction of all Obligations (other than contingent indemnification obligations to the extent no claims giving rise thereto have been asserted); or (b) constituting property being sold or disposed of if Borrower certifies to Agent that the sale or disposition is made in compliance with the provisions of this Agreement (and Agent may rely in good faith conclusively on any such certificate, without further inquiry).

(2) Confirmation of Authority; Execution of Releases. Without in any manner limiting Agent's authority to act without any specific or further authorization or consent by Lenders, each Lender agrees to confirm in writing, upon request by Agent or Borrower, the authority to release any Collateral conferred upon Agent. To the extent Agent agrees to release any Lien granted to or held by Agent as authorized, (a) Agent is hereby irrevocably authorized by Lenders to, execute such documents

as may be necessary to evidence the release of the Liens granted to Agent, for the benefit of Agent and Lenders, upon such Collateral; provided, however, that Agent shall not be required to execute any such document on terms which, in Agent's opinion, would expose Agent to liability or create upon Agent any obligation or entail any consequence other than the release of such Liens without recourse or warranty, and (b) Borrower shall provide at least five (5) Business Days prior written notice of any request for any document evidencing such release of the Liens and Borrower agrees that any such release shall not in any manner discharge, affect or impair the Obligations or any Liens granted to Agent on behalf of Agent and Lenders upon (or obligations of any Loan Party, in respect of) all interests retained by any Loan Party, including, without limitation, the proceeds of any sale, all of which shall continue to constitute part of the property covered by this Agreement or the Loan Documents.

(3) No Duty as to Extent of Security. Agent shall have no obligation whatsoever to any Lender or any other Person to assure that the property covered by this Agreement or the Loan Documents exists or is owned by Borrower or is cared for, protected or insured or has been encumbered or that the Liens granted to Agent on behalf of Agent and Lenders herein or pursuant hereto have been properly or sufficiently or lawfully created, perfected, protected or enforced or are entitled to any particular priority, or to exercise at all or in any particular manner or under any duty of care, disclosure or fidelity, or to continue exercising, any of the rights, authorities and powers granted or available to Agent in this Agreement or in any of the Loan Documents, it being understood and agreed that in respect of the property covered by this Agreement or the Loan Documents or any act, omission or event related thereto, Agent may act in any manner it may deem appropriate, in its discretion, given Agent's own interest in property covered by this Agreement or the Loan Documents as one of the Lenders and that Agent shall have no duty or liability whatsoever to any of the other Lenders; provided, however, that Agent shall exercise the same care which it would in dealing with loans for its own account.

Agency for Perfection. Agent and each Lender hereby appoint each other Lender as agent for the purpose of perfecting Agent's security interest in assets which, in accordance with the Uniform Commercial Code or Canadian PPSL, as applicable, in any applicable jurisdiction, can be perfected by possession or Control. Should any Lender (other than Agent) obtain possession of any such assets, such Lender shall notify Agent thereof, and, promptly upon Agent's request therefor, shall deliver such assets to Agent or in accordance with Agent's instructions. The Agent may file such proofs of claim or documents as may be necessary or advisable in order to have the claims of the Agent and the Lenders (including any claim for the reasonable compensation, expenses, disbursements and advances of the Agent and the Lenders, their respective agents, financial advisors and counsel), allowed in any judicial proceedings relative to Borrower and/or its Subsidiaries, or any of their respective creditors or property, and shall be entitled and empowered to collect, receive and distribute any monies, securities or other property payable or deliverable on any such claims. Any custodian in any judicial proceedings relative to Borrower and/or its Subsidiaries is hereby authorized by each Lender to make payments to the Agent and, in the event that the Agent shall consent to the making of such payments directly to the Lenders, to pay to the Agent any amount due for the reasonable compensation, expenses, disbursements and advances of the Agent, its agents, financial advisors and counsel, and any other amounts due the Agent. Nothing contained in this Agreement or the other Loan Documents shall be deemed to authorize the Agent to authorize or consent to or accept or adopt on behalf of any Lender any plan of reorganization, arrangement, adjustment or composition affecting the Loans, or the rights of any holder thereof, or to authorize the Agent to vote in respect of the claim of any Lender in any such proceeding, except as specifically permitted herein.

Exercise of Remedies. Each Lender agrees that it will not have any right individually to enforce or seek to enforce this Agreement or any Loan Document or to realize upon any collateral security for the Obligations, unless instructed to do so by Agent, it being understood and agreed that such rights and remedies may be exercised only by Agent.

Notice of Default. Agent shall not be deemed to have knowledge or notice of the occurrence of any Default or Event of Default except with respect to defaults in the payment of principal, interest and fees required to be paid to Agent for the account of Lenders, unless Agent shall have received written notice from a Lender or Borrower referring to this Agreement, describing such Default or Event of Default and

stating that such notice is a "notice of default". Agent will notify each Lender of its receipt of any such notice.

Action by Agent. Agent shall take such action with respect to any Default or Event of Default as may be requested by Requisite Lenders. Unless and until Agent has received any such request, Agent may (but shall not be obligated to) take such action, or refrain from taking such action, with respect to any Default or Event of Default as it shall deem advisable or in the best interests of Lenders.

Amendments, Waivers and Consents

A well crafted syndicated debt transaction agreement will include a protocol for lender participation and consent, as to amendments, waivers, and consents required pursuant to the credit agreement and in relation to the ongoing administration of the credit arrangements. This will generally include consideration of what matters will require notice to and consent from the lenders, the percentage of lenders required to approve the step or action, the nature of the instructions and directions which would be given to the agent and protections for the agent in acting on such directions or instructions.

Percentage of Lenders Required. Except as otherwise provided herein or in any of the other Loan Documents, no amendment, modification, termination or waiver of any provision of this Agreement or any other Loan Document, or consent to any departure by any Loan Party therefrom, shall in any event be effective unless the same shall be in writing and signed by Requisite Lenders (or, Agent, if expressly set forth herein or in any of the other Loan Documents) and the applicable Loan Party; provided no amendment, modification, termination, waiver or consent shall be effective, unless in writing and signed by (i) in the case of any amendment necessary to implement the terms of a Facilities Increase in accordance with the terms hereof, the Agent, Loan Parties and the Participating Lenders, and (ii) in the case of any amendment, consent or waiver granting a new Lien for the benefit of Agent and Lenders or extending any existing Lien over additional property or adding additional Subsidiaries of any Loan Party or other pledgors as parties to this Agreement or the other Loan Documents, the Agent and the applicable Loan Party; provided, further, no amendment, modification, termination, waiver or consent shall be effective to: (1) increase or extend any of the Commitments of a Lender without the written consent of such Lender; (2) reduce the principal of or the rate of interest on any Loan or reduce the fees payable with respect to any Loan or Lender Letter of Credit (excluding any waiver of default interest or any amendments to financial covenants set forth in Section 6 hereof and the Financial Covenants Rider and the terms related thereto) without the written consent of each Lender directly and adversely affected thereby; (3) extend the Termination Date or the scheduled due date for all or any portion of principal of the Loans or any interest or fees due hereunder (except for mandatory prepayments and any rescission of prior acceleration) without the written consent of each Lender directly and adversely affected thereby; (4) amend the definition of the term "Requisite Lenders" or the percentage of Lenders which shall be required for Lenders to take any action hereunder without the written consent of each Lender; (5) amend or waive this subsection or the definitions of the terms used in this subsection insofar as the definitions affect the substance of this subsection without the written consent of each Lender; (6) release Collateral (except if the sale, disposition or release of such Collateral is permitted under subsection [] or under any other Loan Document) or any Guarantor without the written consent of each Lender; (7) consent to the assignment, delegation or other transfer by any Loan Party of any of its rights and obligations under any Loan Document without the written consent of each Lender; or (8) amend any pro rata sharing or application of payment provisions among Lenders required hereby without the written consent of each Lender directly and adversely affected thereby; provided, further, that no amendment, modification, termination, waiver or consent affecting the rights or duties of Agent under this Section or under any Loan Document shall in any event be effective, unless in writing and signed by Agent, in addition to the Lenders required to take such action. Any amendment, modification, termination, waiver or consent effected in accordance with this Section shall be binding upon each Lender or future Lender and, if signed by a Loan Party, on such Loan Party.

Specific Purpose or Intent. Each amendment, modification, termination, waiver or consent shall be effective only in the specific instance and for the specific purpose for which it was given. No amendment, modification, termination, waiver or consent shall be required for Agent to take additional Collateral.

Failure to Give Consent; Replacement of Non-Consenting Lender. In the event Agent requests the consent of a Lender and does not receive a written consent or denial thereof within [] Business Days after such Lender's receipt of such request, then such Lender will be deemed to have denied the giving of such consent. If, in connection with any proposed amendment, modification, termination or waiver of any of the provisions of this Agreement requiring the consent or approval of more than Requisite Lenders (without giving effect to the proviso of such definition) under this subsection, the consent of Requisite Lenders (without giving effect to the proviso of such definition) is obtained but the consent of one or more other Lenders whose consent is required is not obtained, then Borrower shall have the right, to either (1) replace any non-consenting Lender with one or more Replacement Lenders, as if such Lender were an Affected Lender thereunder, but only so long as each such Replacement Lender consents to the proposed amendment, modification, termination or waiver, or (2) prepay in full the Obligations of such non-consenting Lender and terminate such non-consenting Lender's Commitments, as if such Lender were an Affected Lender thereunder.

Notwithstanding anything in this subsection, Agent and Borrower, without the consent of either Requisite Lenders or all Lenders, may execute amendments to this Agreement and the Loan Documents, which consist solely of the making of typographical corrections and addressing any technical defects and/or ambiguities.

The agents will frequently require the ability to make discretionary advances to protect collateral, or to prevent significant adverse consequences from arising in the event of a borrower default. These kinds of rights are given to the agent to proceed where speed is of the essence, and the lenders agree that they will fund their proportionate share of the discretionary advances made. These actions do not require the consent of the lenders, and generally notice of the occurrence of the discretionary advance can be provided to the lenders after the making of the advance without effect on the obligations of the lenders to provide the reimbursement contemplated.

Discretionary Advances. Notwithstanding anything contained herein to the contrary, at any time after and during the continuance of a Default or Event of Default, Agent may, in its sole discretion, make Revolving Advances in an aggregate amount of not more than \$[] in excess of the limitations set forth in the US Borrowing Base and Canadian Borrowing Base but not in excess of the US Revolving Loan Commitment (in the case of US Revolving Advances) and Canadian Revolving Loan Commitment (in the case of Canadian Revolving Advances) for the purpose of preserving or protecting the Collateral or for incurring any costs associated with collection or enforcing rights or remedies against the Collateral, or incurred in any action to enforce this Agreement or any other Loan Document.

Upon Agent's making of any Revolving Advances under this subsection, each of the Lenders shall be deemed to have irrevocably, unconditionally and immediately purchased from Agent a participation in such Revolving Advances in an amount equal to such Lender's Pro Rata Share of the US Revolving Loan Commitment or Canadian Revolving Loan Commitment, as applicable, multiplied by the total amount of such US Revolving Advances or Canadian Revolving Advances, as applicable, outstanding under this subsection. Each Lender shall effect such purchase by making available the amount of such Lender's participation in such Revolving Loans in Dollars in immediately available funds to Agent's Account. In the event any Lender fails to make available to Agent when due the amount of such Lender's participation in such Revolving Advances, Agent shall be entitled to recover such amount on demand from such Lender together with interest at the Federal Funds Effective Rate. Each such purchase by a Lender shall be made without recourse to Agent, without representation or warranty of any kind, and shall be effected and evidenced pursuant to documents reasonably acceptable to Agent. The obligations of the Lenders under this subsection shall be absolute, irrevocable and unconditional, shall be made under all circumstances and shall not be affected, reduced or impaired for any reason whatsoever.

Syndicated loan agreements in North America now, essentially universally, include the ability to require the borrower to pay additional amounts where there are changes in law, regulations or capital requirements which increase the cost of providing the credit facilities to the borrower by the lenders. In these circumstances, the borrower is generally given the ability to require that the lenders who are calling upon the borrower for such

additional amounts be replaced in order to allow the borrower to mitigate these additional, unanticipated costs. Similarly the borrower is generally given the right to replace lenders who are constrained in their ability to provide any of the credit facilities contemplated by the credit agreement. These rights also extend to circumstances where lenders default in their obligations, the right of the borrower to replace the lender is in addition to the right of the agent and remaining lenders in the syndicate to deal with the defaulting lender. Where there is a defaulting lender, the price for the assignment needs to be considered, whether it will be principal at par, and whether it will include additional amounts such as breakage fees.

Replacement of Lenders. If pursuant to any requests for increased cost, if the Borrower is required to pay any additional amount to any Lender or any Governmental Authority for the account of any Lender, if any Lender's obligations are suspended or if any Lender defaults in its obligation to fund Loans hereunder, then the Borrower may, at its sole expense and effort, upon 10 days' notice to such Lender and the Agent, require such Lender to assign and delegate, without recourse, all of its interests, rights and obligations under this Agreement and the related Loan Documents to an assignee that shall assume such obligations (which assignee may be another Lender, if a Lender accepts such assignment), provided that:

- (i) the Borrower pays the Administrative Agent the assignment fee;
- (ii) the assigning Lender receives payment of an amount equal to the outstanding principal of its Loans and participations in disbursements under Letters of Credit, accrued interest thereon, accrued fees and all other amounts payable to it hereunder and under the other Loan Documents (including any breakage costs and amounts required to be paid under this Agreement as a result of prepayment to a Lender) from the assignee (to the extent of such outstanding principal and accrued interest and fees) or the Borrower (in the case of all other amounts);
- (iii) in the case of any such assignment resulting from a claim for compensation under Section [] or payments required to be made pursuant to Section [], such assignment will result in a reduction in such compensation or payments thereafter; and
- (iv) such assignment does not conflict with Applicable Law.

A Lender shall not be required to make any such assignment or delegation if, prior thereto, as a result of a waiver by such Lender or otherwise, the circumstances entitling the Borrower to require such assignment and delegation cease to apply.

Administrative Agent's Clawback

Administrative agent's who agree to provide funding, before they have access to lenders advances, will generally include claw back amounts. The agreement needs to be reviewed to determine whether the agent has the obligation or right to make such advances, if the agent has such right then a clawback clause would usually be included. If the agreement provides that the agent will only advance when it has same day available funds from the parties, then the clawback clause will generally not be required. The clawback will generally expend both to funding by lenders and payments by the borrower. The determination as to whether an agent will make advances on behalf of either prior to receipt of same day funds is a business matter to be negotiated, and generally will be dependent upon the credit quality of the parties involved.

(a) Funding by Lenders: Presumption by Agent. Unless the Agent shall have received notice from a Lender prior to the proposed date of any advance of funds that such Lender will not make available to the Agent such Lender's share of such advance, the Agent may assume that such Lender has made such share available on such date in accordance with the provisions of this Agreement concerning funding by Lenders and may, in reliance upon such assumption, make available to the Borrower a corresponding amount. In such event if a Lender has not in fact made its share of the applicable advance available to the Agent, then the applicable Lender shall pay to the Agent forthwith on demand such corresponding amount with interest thereon, for each day from and including the date such amount is made available to the Borrower to but excluding the date of payment to the Agent, at a rate determined by the Agent in accordance with prevailing banking industry practice on Interbank compensation. If such Lender pays

such amount to the Agent, then such amount shall constitute such Lender's Loan included in such advance. If the Lender does not do so forthwith, the Borrower shall pay to the Agent forthwith on demand such corresponding amount with interest thereon at the Interest rate applicable to the advance in question. Any payment by the Borrower shall be without prejudice to any claim the Borrower may have against a Lender that has failed to make such payment to the Agent.

(b) Payments by Borrower: Presumptions by Agent. Unless the Agent shall have received notice from the Borrower prior to the date on which any payment is due to the Agent for the account of any Lender hereunder that the Borrower will not make such payment the Agent may assume that the Borrower has made such payment on such date in accordance herewith and may, in reliance upon such assumption, distribute the amount due to the Lenders. In such event, if the Borrower has not in fact made such payment, then each of the Lenders severally agrees to repay to the Agent forthwith on demand the amount so distributed to such Lender with interest thereon, for each day from and including the date such amount is distributed to it to but excluding the date of payment to the Agent, at a rate determined by the Agent in accordance with prevailing banking industry practice on Interbank compensation.

Appointment and Authority. Each of the Lenders and the Issuing Bank hereby irrevocably appoints the Person identified elsewhere in this Agreement as the Agent to act on its behalf as the Agent hereunder and under the other Loan Documents and authorizes the Agent to take such actions on its behalf and to exercise such powers as are delegated to the Agent by the terms hereof or thereof, together with such actions and powers as are reasonably incidental thereto. The provisions of this Article are solely for the benefit of the Agent, the Lenders and the Issuing Bank, and no Obligor shall have rights as a third party beneficiary of any of such provisions.

Rights as a Lender. The Person serving as the Agent hereunder shall have the same rights and powers in its capacity as a Lender as any other Lender and may exercise the same as though it were not the Agent and the term "Lender" or "Lenders" shall, unless otherwise expressly indicated or unless the context otherwise requires, include the Person serving as the Agent hereunder in its individual capacity. Such Person and its Affiliates may accept deposits from, lend money to, act as the financial advisor or in any other advisory capacity for and generally engage in any kind of business with any Obligor or any Affiliate thereof as if such Person were not the Agent and without any duty to account to the Lenders.

Exculpatory Provisions - (1) The Agent shall not have any duties or obligations except those expressly set forth herein and in the other Loan Documents. Without limiting the generality of the foregoing, the Agent:

(a) shall not be subject to any fiduciary or other implied duties, regardless of whether a Default has occurred and is continuing;

(b) shall not have any duty to take any discretionary action or exercise any discretionary powers, except discretionary rights and powers expressly contemplated hereby or by the other Loan Documents that the Agent is required to exercise as directed in writing by the Required Lenders (or such other number or percentage of the Lenders as shall be expressly provided for in the Loan Documents), but the Agent shall not be required to take any action that, in its opinion or the opinion of its counsel, may expose the Agent to liability or that is contrary to any Loan Document or Applicable Law; and

(c) shall not, except as expressly set forth herein and in the other Loan Documents, have any duty to disclose, and shall not be liable for the failure to disclose, any information relating to the Borrower or any of its Affiliates that is communicated to or obtained by the person serving as the Agent or any of its Affiliates in any capacity.

(2) The Agent shall not be liable for any action taken or not taken by it (i) with the consent or at the request of the Required Lenders (or such other number or percentage of the Lenders as is necessary, or as the Agent believes in good faith is necessary, under the provisions of the Loan Documents) or (ii) in the absence of its own gross negligence or wilful misconduct. The Agent shall be deemed not to have

knowledge of any Default unless and until notice describing the Default is given to the Agent by the Borrower or a Lender.

(3) Except as otherwise expressly specified in this Agreement the Agent shall not be responsible for or have any duty to ascertain or inquire into (i) any statement, warranty or representation made in or in connection with this Agreement or any other Loan Document, (ii) the contents of any certificate, report or other document delivered hereunder or thereunder or in connection herewith or therewith, (iii) the performance or observance of any of the covenants, agreements or other terms or conditions set forth herein or therein or the occurrence of any Default, (iv) the validity, enforceability, effectiveness or genuineness of this Agreement, any other Loan Document or any other agreement, instrument or document or (v) the satisfaction of any condition specified in this Agreement, other than to confirm receipt of items expressly required to be delivered to the Agent.

Reliance by Agent. The Agent shall be entitled to rely upon, and shall not incur any liability for relying upon, any notice, request certificate, consent, statement, instrument, document or other writing (including any electronic message, Internet or intranet posting or other distribution) believed by it to be genuine and to have been signed, sent or otherwise authenticated by the proper Person. The Agent also may rely upon any statement made to it orally or by telephone and believed by it to have been made by the proper Person, and shall not incur any liability for relying thereon. In determining compliance with any condition hereunder to the making of a Loan, or the issuance of a Letter of Credit that by its terms must be fulfilled to the satisfaction of a Lender or the Issuing Bank, the Agent may presume that such condition is satisfactory to such Lender or the Issuing Bank unless the Agent shall have received notice to the contrary from such Lender or the Issuing Bank prior to the making of such Loan or the issuance of such Letter of Credit. The Agent may consult with legal counsel (who may be counsel for the Borrower), independent accountants and other experts selected by it and shall not be liable for any action taken or not taken by it in accordance with the advice of any such counsel, accountants or experts.

Indemnification of Agent. Each Lender agrees to indemnify the Agent and hold it harmless (to the extent not reimbursed by the Borrower), rateably according to its Applicable Percentage (and not jointly or jointly and severally) from and against any and all losses, claims, damages, liabilities and related expenses, including the fees, charges and disbursements of any counsel, which may be incurred by or asserted against the Agent in any way relating to or arising out of the Loan Documents or the transactions therein contemplated. However, no Lender shall be liable for any portion of such losses, claims, damages, liabilities and related expenses resulting from the Agent's gross negligence or wilful misconduct.

Delegation of Duties. The Agent may perform any and all of its duties and exercise its rights and powers hereunder or under any other Loan Document by or through any one or more sub-agents appointed by the Agent from among the Lenders (including the Person serving as Agent) and their respective Affiliates. The Agent and any such sub-agent may perform any and all of its duties and exercise its rights and powers by or through their respective Related Parties. The provisions of this Article and other provisions of this Agreement for the benefit of the Agent shall apply to any such sub-agent and to the Related Parties of the Agent and any such sub-agent, and shall apply to their respective activities in connection with the syndication of the credit facilities provided for herein as well as activities as Agent.

Replacement of Agent - (1) The Agent may at any time give notice of its resignation to the Lenders, the Issuing Bank and the Borrower. Upon receipt of any such notice of resignation, the Required Lenders shall have the right in consultation with the Borrower, to appoint a successor, which shall be a Lender having a Commitment to a revolving credit if one or more is established in this Agreement and having an office in [____], or an Affiliate of any such Lender with an office in [____]. The Agent may also be removed at any time by the Required Lenders upon 30 days' notice to the Agent and the Borrower as long as the Required Lenders, in consultation with the Borrower, appoint and obtain the acceptance of a successor within such 30 days, which shall be a Lender having a Commitment to a revolving credit if one or more is established in this Agreement and having an office in [____], or an Affiliate of any such Lender with an office in Toronto or Montreal.

(2) If no such successor shall have been so appointed by the Required Lenders and shall have accepted such appointment within 30 days after the retiring Agent gives notice of its resignation, then the retiring Agent may on behalf of the Lenders, appoint a successor Agent meeting the qualifications specified herein, provided that if the Agent shall notify the Borrower and the Lenders that no qualifying Person has accepted such appointment, then such resignation shall nonetheless become effective in accordance with such notice and (1) the retiring Agent shall be discharged from its duties and obligations hereunder and under the other Loan Documents (except that in the case of any collateral security held by the Agent on behalf of the Lenders under any of the Loan Documents, the retiring Agent shall continue to hold such collateral security until such time as a successor Agent is appointed) and (2) all payments, communications and determinations provided to be made by, to or through the Administration Agent shall instead be made by or to each Lender directly, until such time as the Required Lenders appoint a successor Administration Agent as provided for above in the preceding paragraph.

(3) Upon a successor's appointment as Agent hereunder, such successor shall succeed to and become vested with all of the rights, powers, privileges and duties of the former Agent, and the former Agent shall be discharged from all of its duties and obligations hereunder or under the other Loan Documents (if not already discharged therefrom as provided in the preceding paragraph). The fees payable by the Borrower to a successor Agent shall be the same as those payable to its predecessor unless otherwise agreed between the Borrower and such successor. After the termination of the service of the former Agent, the provisions of this Section shall continue in effect for the benefit of such former Agent, its sub-agents and their respective Related Parties in respect of any actions taken or omitted to be taken by any of them while the former Agent was acting as Agent.

Non-Reliance on Agent and Other Lenders. Each Lender and the Issuing Bank acknowledges that it has, independently and without reliance upon the Agent or any other Lender or any of their Related Parties and based on such documents and information as it has deemed appropriate, made its own credit analysis and decision to enter into this Agreement. Each Lender and the Issuing Bank also acknowledges that it will, independently and without reliance upon the Agent or any other Lender or any of their Related Parties and based on such documents and information as it shall from time to time deem appropriate, continue to make its own decisions in taking or not taking action under or based upon this Agreement, any other Loan Document or any related agreement or any document furnished hereunder or thereunder.

Collective Action of the Lenders. Each of the Lenders hereby acknowledges that to the extent permitted by Applicable Law, any collateral security and the remedies provided under the Loan Documents to the Lenders are for the benefit of the Lenders collectively and acting together and not severally and further acknowledges that its rights hereunder and under any collateral security are to be exercised not severally, but by the Agent upon the decision of the Required Lenders (or such other number or percentage of the Lenders as shall be expressly provided for in the Loan Documents). Accordingly, notwithstanding any of the provisions contained herein or in any collateral security, each of the Lenders hereby covenants and agrees that it shall not be entitled to take any action hereunder or thereunder including, without limitation, any declaration of default hereunder or thereunder but that any such action shall be taken only by the Agent with the prior written agreement of the Required Lenders (or such other number or percentage of the Lenders as shall be expressly provided for in the Loan Documents). Each of the Lenders hereby further covenants and agrees that upon any such written agreement being given, it shall co-operate fully with the Agent to the extent requested by the Agent. Notwithstanding the foregoing, in the absence of instructions from the Lenders and where in the sole opinion of the Agent, acting reasonably and in good faith, the exigencies of the situation warrant such action, the Administrable Agent may without notice to or consent of the Lenders take such action on behalf of the Lenders as it deems appropriate or desirable in the interest of the Lenders.

No Other Duties, etc. Anything herein to the contrary notwithstanding, none of the Bookrunners, Arrangers or holders of similar titles, if any, specified in this Agreement shall have any powers, duties or responsibilities under this Agreement or any of the other Loan Documents, except in its capacity, as applicable, as the Agent or a Lender hereunder.

Reimbursement by Lenders. To the extent that the Borrower for any reason fails to indefeasibly pay any amount required under paragraph (a) or (b) of this Section to be paid by it to the Agent (or any sub-agent thereof), the Issuing Bank or any Related Party of any of the foregoing, each Lender severally agrees to pay to the Agent (or any such sub-agent), the Issuing Bank or such Related Party, as the case may be, such Lender's Applicable Percentage (determined as of the time that the applicable unreimbursed expense or indemnity payment is sought) of such unpaid amount, provided that the unreimbursed expense or indemnified loss, claim, damage, liability or related expense, as the case may be, was incurred by or asserted against the Agent (or any such sub-agent) or the Issuing Bank in its capacity as such, or against any Related Party of any of the foregoing acting for the Agent (or any such sub-agent) or Issuing Bank in connection with such capacity. The obligations of the Lenders under this paragraph (c) are subject to the other provisions of this Agreement concerning several liability of the Lenders.

The material appearing in this website is for informational purposes only and is not legal advice. Transmission of this information is not intended to create, and receipt does not constitute, an attorney-client relationship. The information provided herein is intended only as general information which may or may not reflect the most current developments. Although these materials may be prepared by professionals, they should not be used as a substitute for professional services. If legal or other professional advice is required, the services of a professional should be sought.

The opinions or viewpoints expressed herein do not necessarily reflect those of Lorman Education Services. All materials and content were prepared by persons and/or entities other than Lorman Education Services, and said other persons and/or entities are solely responsible for their content.

Any links to other websites are not intended to be referrals or endorsements of these sites. The links provided are maintained by the respective organizations, and they are solely responsible for the content of their own sites.