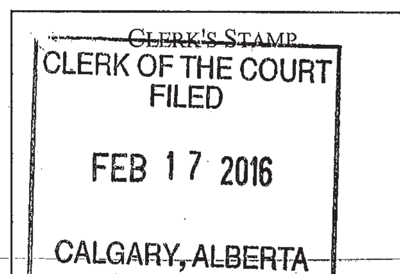

COURT FILE NUMBER	
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, as amended
	AND IN THE MATTER OF A PLAN OF ARRANGEMENT OF ARGENT ENERGY TRUST, ARGENT ENERGY (CANADA) HOLDINGS INC. and ARGENT ENERGY (US) HOLDINGS INC.
DOCUMENT	**BENCH BRIEF OF THE APPLICANTS**
HEARING	**WEDNESDAY, FEBRUARY 17, 2016**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**BENNETT JONES LLP** Barristers and Solicitors 4500 Bankers Hall East 855 – 2nd Street SW Calgary, Alberta T2P 4K7 Attention: Kelsey Meyer / Sean Zweig Telephone No.: 403.298.3323 / 416.777.6254 Fax No.: 403.265.7219 / 416.863.1716 Client File No.: 68859.14

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I INTRODUCTION

1. This Bench Brief is submitted on behalf of Argent Energy Trust (the "Trust"), Argent Energy (Canada) Holdings Inc. ("Argent Canada") and Argent Energy (US) Holdings Inc. ("Argent US", and together with the Trust and Argent Canada, the "Applicants" or "Argent") in support of an application for a stay of proceedings and such other relief as is more particularly set out in the draft Initial Order scheduled to the Applicants' Originating Application, pursuant to the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*").

2. The Applicants' application for an Initial Order will be supported by, among other things, an Affidavit to be sworn by Sean Bovingdon, President and Chief Financial Officer of the Applicants (the "Bovingdon Affidavit"). Capitalized terms not defined herein have the meanings given to them in the Bovingdon Affidavit.

3. The purpose of this Bench Brief is to outline for the Court certain legislation and jurisprudence that is relevant to the relief being sought in the Applicants' initial application on February 17, 2016.

4. The Applicants' application and supporting materials have been served upon the Applicants' secured creditor.

II APPLICATION OF THE CCAA

5. The *CCAA* applies in respect of a "debtor company" or "affiliated debtor companies" where the total of claims against the debtor or its affiliates exceeds five million dollars.

- *CCAA*, s. 3(1) **[TAB 1]**

6. The terms "company", "debtor company" and "income trust" are defined in section 2 of the *CCAA* as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*,

railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;

"debtor company" means any company that

(a) is bankrupt or insolvent,

(b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act*, whether or not proceedings in respect of the company have been taken under either of those Acts,

(c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act*, or

(d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

"income trust" means a trust that has assets in Canada if

(a) its units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act, or

(b) the majority of its units are held by a trust whose units are listed on a prescribed stock exchange on the day on which proceedings commence under this Act;

- *CCAA*, s. 2 **[TAB 1]**

7. Each of the Applicants is a "company" as defined in the *CCAA*:

(i) The Trust is an unincorporated limited purpose open-ended trust established under the laws of Alberta. Its units are listed for trading on the Toronto Stock Exchange.

(ii) Argent Canada is a corporation incorporated under the *Alberta Business Corporations Act*, R.S.A. 2000, c. B-9.

(iii) Argent US is a corporation incorporated under the laws of the State of Delaware, and has assets in Canada.

8. Courts have held that a U.S. company with bank accounts in Canada comes within the definition of "company". It is immaterial what percentage the Canadian assets bear to the overall assets of the company, or the importance of those assets.

- *Re Cadillac Fairview Inc.*, (1995), 30 C.B.R. (3d) 29 (Ont. Gen. Div.) at para. 6 **[TAB 2]**
- *Re Global Light Telecommunications Inc.* (2004), 2 C.B.R. (5th) 210 (B.C. S.C.) at paras. 16-18 **[TAB 3]**

9. None of the Applicants fall within any of the excluded categories listed in section 2 of the *CCAA*, as set out above.

10. Insolvency is not defined in the *CCAA*. The courts have interpreted this term by reference to the three tests of insolvency set out in section 2(1) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3. An entity is an insolvent "debtor company" under the *CCAA* if any one of the following conditions exist:

   (i) the entity is for any reason unable to meet its obligations as they generally become due;

   (ii) the entity has ceased paying its current obligations in the ordinary course of business as they generally become due; or

   (iii) the aggregate of the entity's property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

- *Re Stelco Inc.*, [2004] O.J. No. 1257 at paras. 21-22, 28 (Sup. Ct.); leave to appeal to C.A. refused, [2004] O.J. No. 1903; leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336 **[TAB 4]**

11. Consistent with the remedial purposes of the *CCAA*, the first branch of the test has been interpreted such that a financially troubled entity will be considered insolvent for the purposes of the *CCAA* if it is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring."

- *Re Stelco*, at para. 26 **[TAB 4]**

III SUMMARY OF FACTS

12. The facts are as set out in the Bovingdon Affidavit, and are briefly summarized here.

A. The Applicants

13. The Trust was formed pursuant to a Trust Indenture dated January 31, 2012 between Computershare Trust Company of Canada, as trustee (the "Trustee") and Argent Energy Ltd. ("AEL", which is not an Applicant in these proceedings). The Trustee has delegated a number of the management, administrative and governance duties relating to the Trust to AEL pursuant to an Administrative Services Agreement. The Trust was established to indirectly acquire an interest in Argent US through its acquisition of the shares of Argent Canada.

14. Argent Canada is a direct wholly-owned subsidiary of the Trust, and is the sole shareholder of Argent US. Argent Canada is a holding company and does not carry on any operations. Argent US is the only Applicant that has active operations, and it directly owns all of the Applicants' petroleum properties.

15. The Applicants have 46 employees, 45 of whom are employed by Argent US. Argent previously had more than 75 employees, but it has proactively reduced its workforce over the past twelve months. The remaining employees are all critical from Argent's perspective.

B. Business of the Applicants

16. The Applicants own interests in oil and gas assets (the "Assets") in three states: Texas, Wyoming and Colorado.

17. Pursuant to an Amended and Restated Credit Agreement dated October 25, 2012 (the "Credit Agreement"), Argent US entered into a credit facility (the "Credit Facility") with a lending syndicate comprised of The Bank of Nova Scotia, Canadian Imperial Bank of Commerce, Royal Bank of Canada, and Wells Fargo Bank, N.A. (collectively, the "Syndicate"). The Bank of Nova Scotia acts as the administrative agent.

18. The Credit Facility is subject to a borrowing base valuation of Argent US's oil and gas assets.

19. The Credit Facility is guaranteed by the Trust and Argent Canada. It is secured by a first priority security interest on substantially all of the property and assets of Argent US, including all of its oil and natural properties, and substantially all of the property and assets of the Trust and Argent Canada, including the shares of Argent US owned by Argent Canada.

20. The Trust issued convertible debentures on June 4, 2013 and June 12, 2013 (the "Subordinated Debentures") which are subordinated unsecured obligations of the Trust. Neither Argent US or Argent Canada is an obligor with respect to the Subordinated Debentures.

21. Further, as part of Argent US's strategy to mitigate the impact of fluctuating commodity prices on its funds flowing from operations, it from time to time entered into various hedging agreements with The Bank of Nova Scotia and Wells Fargo Bank, N.A., both of which are members of the Syndicate.

22. Given the recent plummeting of commodity prices, the hedges provided significant and important cash flow to Argent. At current prices, Argent remained cash flow positive from operations with the hedges in place, but cash flow negative without them.

C. Cause of Insolvency

23. The global decline of oil and gas prices is what has caused Argent to become insolvent. The severe decline in commodity prices has led to a significant reduction in the value of Argent's reserves, such that the current market value of the assets is now significantly less than Argent's outstanding liabilities.

24. In addition, the oversupply of global oil production, coupled with weakened demand for fuel in the global economy, has compressed the margins that oil and gas suppliers like Argent can command. Consequently, earnings are down for historically profitable oil and

gas companies, leading to a reduction in drilling activity, payroll cuts, and in some instances, insolvency.

D. Default

25. Argent is in default of the Credit Facility and its Subordinated Debentures.

26. On November 27, 2015, Argent US received a notice from The Bank of Nova Scotia, as administration agent under the Credit Agreement, that the borrowing base had been re-determined to be USD $45.0 million, effective immediately. At such time, Argent US's borrowings were USD $66.3 million (inclusive of a letter of credit), which meant that there was a borrowing base shortfall of USD $21.3 million. Argent US had 60 days to cure the borrowing base shortfall, failing which there would be an Event of Default under the Credit Agreement.

27. On December 31, 2015, the Trust failed to make its semi-annual interest payments due in respect of the Subordinated Debentures. As a result of Argent's borrowing base shortfall under the Credit Facility, the Trust was prohibited by the terms of the Credit Agreement from making the interest payments in respect of the Subordinated Debentures. The Debenture Indenture provides for a 30 day cure period in which the Trust may make the interest payments.

28. The 60 day cure period under the Credit Agreement expired on January 26, 2016 without the borrowing base shortfall having been cured. The 30 day cure period under the Debenture Indenture expired on January 31, 2016 without the interest payments having been made. Accordingly, there is now an Event of Default under both the Credit Agreement and the Debenture Indenture.

29. On January 28, 2016, in accordance with the terms of the hedge agreements, each of The Bank of Nova Scotia and Wells Fargo Bank, N.A. terminated the hedges. The aggregate termination payment that was owing to Argent US as a result of the terminations was approximately USD $12.38 million, which amount was set-off by the Syndicate against the Credit Facility. Accordingly, Argent no longer has any hedges and is cash flow negative.

30. Given the inability to sell assets or refinance the Credit Facility, and the fact that Argent is now cash flow negative at current commodity prices (after the termination of the hedges), Argent has no ability to continue to operate without additional funding, which the Syndicate has said that it is not willing to provide other than in the context of a sales process within the contemplated insolvency proceedings. Argent has been unable to obtain additional funding.

31. On February 16, 2016, the Syndicate accelerated the Credit Facility, demanded repayment thereof, and issued notices of intention to enforce security to the Trust and Argent Canada. As at that date approximately USD $51.9 million is outstanding under the Credit Facility, and Argent is unable to repay the amounts owing.

E. The Applicants are Insolvent

32. Each of the Applicants is an obligor or guarantor of the Credit Facility and the Applicants lack the liquidity to pay those obligations in full. As such, the Applicants are insolvent for the purposes of this initial application.

33. The Applicants are therefore proposing to run a comprehensive and transparent sale process through coordinated insolvency proceedings in Canada and the United States that is intended to yield the best offer(s) available in these difficult circumstances.

34. The immediate objective of the proceeding is to repay the Syndicate in full, and Argent is hopeful that there could be value for other junior creditors.

F. A Stay of Proceedings Is Required

35. The Applicants do not have sufficient liquid assets to repay all amounts owing in respect of the Credit Facility, which is now due and owing. Accordingly, a stay of proceedings is essential to maintain the *status quo* in order to preserve the value of the Applicants' business and assets, and to ensure that no creditor of the Applicants obtains preferred treatment relative to other creditors.

36. A plan of arrangement is not required of the debtor company at the Initial Order application. Relief should be granted to a debtor company under the CCAA where the

debtor plans to continue operating as a viable commercial entity but requires Court protection to do so, and where it is otherwise too early for the Court to determine whether the debtor company will succeed.

- *Re Lehndorff*, [1993] O.J. No. 14 (Gen. Div.), at para. 7 **[TAB 5]**

IV STAY OF PROCEEDINGS

37. The overarching goal of an initial order is to maintain the status quo during the *CCAA* proceeding. The Court should exercise its power broadly under the *CCAA* and at common law in order to maintain the status quo.

- *Meridian Developments v. Toronto Dominion Bank*, 1984 CarswellAlta 259 (Q.B.) at paras. 21-23. **[TAB 6]**

38. It is well-established that under section 11 of the *CCAA* the court has broad jurisdiction to grant a stay of proceedings:

> The CCAA is intended to facilitate compromises and arrangements between companies and their creditors as an alternative to bankruptcy and, as such, is remedial legislation entitled to a liberal interpretation. It seems to me that the purpose of the statute is to enable insolvent companies to carry on business in the ordinary course or otherwise deal with their assets so as to enable plan of compromise or arrangement to be prepared, filed and considered by their creditors and the court. In the interim, a judge has great discretion under the CCAA to make order so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors.

- *Re Lehndorff*, at para. 7 **[TAB 5]**
- *CCAA*, s. 11 **[TAB 1]**

39. The *CCAA* is remedial legislation, and is intended to facilitate compromises and arrangements. The Court should give the statute a broad and liberal interpretation so as to encourage and facilitate new and creative ways to successfully restructure whenever possible.

- *Chef Ready Foods Ltd. v. Hongkong Bank of Canada*, [1990] B.C.J. No. 2384 (C.A.) at paras. 10 and 17 **[TAB 7]**

40. It is submitted that the stay of proceedings being sought, which is substantially in conformance with the Alberta Model Template CCAA Initial Order, is appropriate and necessary in the circumstances, to allow the Applicants the necessary breathing room to effect a value maximizing sale and/or restructure for the benefit of their creditors.

41. The Applicants' only secured creditor supports the Applicants in this CCAA proceeding. It is providing interim financing to allow the Applicants sufficient time to run the Sale Solicitation Process under the oversight of the proposed Monitor.

42. Having regard to the interests of all of the Applicants' stakeholders, a stay of proceedings is necessary and appropriate in order to undertake the Sale Solicitation Process.

V ADMINISTRATION CHARGE

43. Section 11.52 of the *CCAA* expressly provides the Court with the jurisdiction to grant the Administration Charge, relating to the professional fees and disbursements of counsel to the Applicants, the Monitor, counsel to the Monitor and the Syndicate's advisors:

> 11.52(1) *Court may order security or charge to cover certain costs*
>
> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate – in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) *Priority*

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

- *CCAA*, ss. 11.52(1) and (2) **[TAB 1]**

44. In *Canwest Publishing*, the Court noted that Section 11.52 of the *CCAA* does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. The list of factors to consider in approving an administration charge include:

    (a) the size and complexity of the business being restructured;

    (b) the proposed role of the beneficiaries of the charge;

    (c) whether there is unwarranted duplication of roles;

    (d) whether the quantum of the proposed charge appears to be fair and reasonable;

    (e) the position of the secured creditors likely to be affected by the charge; and

    (f) the position of the Monitor.

- *Re Canwest Publishing Inc.,* 2010 ONSC 222, at para. 54 **[TAB 8]**

45. The Applicants submit that the priority and quantum of the Administration Charge is justified and appropriate in the circumstances. In particular:

    (i) the restructuring of the Applicants and the Sale Solicitation Process to be undertaken by the Applicants are sufficiently large and complex to warrant the charge in the amount sought;

    (ii) the professionals that are to be the beneficiaries of the Administration Charge have contributed and will continue to contribute to the restructuring of the Applicants;

    (iii) there is no unwarranted duplication of the roles so as to minimize the professional fees associated with these proceedings;

(iv) the secured creditor affected by the charge has been provided with notice of these *CCAA* proceedings and is consenting to the Administration Charge; and

(v) the proposed Monitor supports the proposed Administration Charge, including the quantum thereof.

VI INTERIM FINANCING & INTERIM LENDER'S CHARGE

46. Section 11.2 of the *CCAA* provides statutory jurisdiction to grant an interim financing charge:

> 11.2(1) *Interim financing* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> 11.2(2) *Priority* – secured creditors– The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.

- *CCAA*, s. 11.2 **[TAB 1]**

47. Subparagraph 11.2(4) of the *CCAA* sets out the factors to be considered by the Court in determining whether to grant an interim financing charge:

> 11.2(4) *Factors to be considered* – In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;

(d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;

(e) the nature and value of the company's property;

(f) whether any creditor would be materially prejudiced as a result of the security or charge; and

(g) the monitor's report referred to in paragraph 23(1)(b), if any

- *CCAA*, s. 11.2(4) **[TAB 1]**

48. The relief sought by the Applicants with respect to the Interim Loan and Interim Lender's Charge is appropriate in the circumstances and will ensure that the Applicants will have sufficient cashflow to continue operations while under *CCAA* protection. Without the Interim Loan, the Applicants would very quickly run out of liquidity and could be forced to become bankrupt, which would have a material adverse effect on the Applicants' stakeholders. In addition:

(i) the Applicants do not anticipate a lengthy *CCAA* process. The predominant purpose of this *CCAA* proceeding is to give the Applicants sufficient time to complete the Sale Solicitation Process;

(ii) the Applicants' business is intended to continue to operate on a going concern basis during the *CCAA* proceedings under the direction of existing management with the assistance of the Applicants' advisors and the Monitor;

(iii) the Applicants' management has the confidence of its major creditor, the Syndicate;

(iv) the Interim Loan does not just enhance the prospects for a viable compromise or arrangement; it is absolutely essential for one. The Interim Loan is needed to "keep the lights on" and to allow the Applicants to continue functioning during the Sale Solicitation Process;

(v) the nature and value of the Applicants' assets as set out in their financial statements can support the requested Interim Lender's Charge;

(vi) the only party being affected by the Interim Lender's Charge is the Syndicate, who is supporting the relief sought;

(vii) the Interim Lender will not provide the Interim Loan if the Interim Lender's Charge is not approved; and

(viii) the proposed Monitor has stated that the terms of the Interim Loan and the Interim Lender's Charge are, in its opinion, fair and reasonable.

VII DIRECTORS' CHARGE

49. Section 11.51 of the *CCAA* affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

> 11.51(1) *Security or charge relating to director's indemnification*
>
> On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.
>
> 11.51(2) *Priority*
>
> The court may order that the security or charge rank in priority over the claim of any secured creditors of the company.
>
> 11.51(3) *Restriction -- indemnification insurance*
>
> The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault*
>
> The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a

> director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.

- *CCAA*, s. 11.51 **[TAB 1]**

50. The test for granting a directors' charge was described in *Canwest Global* as follows:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.

- *Re Canwest Global Communications Corp.*, [2009] O.J. No. 4286 (S.C.J.) at para. 46 **[TAB 9]**
- *Canwest Publishing,* at paras. 56-57 **[TAB 8]**

51. The Alberta Model Template CCAA Initial Order contemplates a directors' charge that does not duplicate coverage already in place pursuant to directors & officers insurance. That formulation has not been changed in the Initial Order being sought by the Applicants. It is submitted that the charge being proposed is reasonable and appropriate.

52. The Court should also consider whether the proposed Monitor has reviewed the quantum of the charge and whether the proposed Monitor considers the amount to be reasonable.

- *iMarketing Solutions Group (Re)*, 2013 ONSC 2223 at para. 20 **[TAB 10]**

53. The Directors' Charge is appropriate and necessary for the following reasons:

    (i) the beneficiaries of the Directors' Charge may be subject to potential liabilities in connection with these *CCAA* proceedings and have expressed their desire for certainty with respect to potential liability if they continue in their current capacities;

(ii) the Applicants' D&O Insurance Policy contains several exclusions and limitations to the coverage period, and there is a potential for there to be insufficient coverage in respect of potential liabilities;

(iii) the Directors' Charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of these proceedings, and is not intended to apply to willful misconduct or gross negligence;

(iv) the beneficiaries of the Directors' Charge have been actively involved in the efforts taken by the Applicants to address their current financial circumstances and difficulties;

(v) in order to continue to carry on business during the *CCAA* proceedings and in order to implement the Sale Solicitation Process, the Applicants require the continued active and committed involvement of the directors and officers;

(vi) the amount of the Directors' Charge has been calculated based on the estimated exposure of the directors in the event of a sudden shut-down of the Applicants, and has been reviewed with the proposed Monitor;

(vii) the secured creditor affected by the Directors' Charge has been provided with notice of these *CCAA* proceedings and is consenting to the charge sought; and

(viii) the proposed Monitor supported the proposed Directors' Charge.

VIII KERP, KEIP, AND KERP AND KEIP CHARGE

54. There is no express statutory jurisdiction in the *CCAA* for the Court to approve a key employee retention or incentive plan. However, the courts have recognized that the approval of such plans is within their statutory jurisdiction under the *CCAA*.

- *Grant Forest Products Inc. (Re)* (2009), 57 C.B.R. (5th) 128 at para. 8 (Ont. S.C.J. [Comm. List]) **[TAB 11]**

- *Canwest Global*, at para. 49 **[TAB 9]**

- *Re Lone Pine Resources Canada Ltd., et al*, Initial Order granted September 25, 2013, Court File Number 1301-11352 (ABQB) **[TAB 12]**

- *Re Laricina Energy Ltd., et al*, Order granted April 22, 2015, Court File number 1501-03351 (ABQB) **[TAB 13]**

55. Key employee retention and incentive plans have been approved in *CCAA* proceedings where the continued participation of key employees is crucial to a successful restructuring.

- *Nortel Networks Corp. (Re)*, [2009] O.J. No. 1044 (Ont. S.C.J. [Comm. List]) at para. 4 **[TAB 14]**

56. In *Grant Forest*, the Court considered the following factors in approving a key employee incentive plan and related charge:

(a) whether the Monitor supports the key employee incentive plan and related charge;

(b) whether the beneficiaries of the key employee retention plan are likely to consider other employment opportunities if the plan is not approved;

(c) whether the beneficiaries of the key employee incentive plan are crucial to the successful restructuring of the debtor company;

(d) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and

(e) the business judgment of the board of directors of the debtor company.

- *Grant Forest*, at paras. 8-25 **[TAB 11]**

57. In *Grant Forest*, the Court noted the importance of the business judgment of the board of directors of a debtor company in this context:

> … The business acumen of the board of directors of the [debtor company], including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and [the Chief Restructuring

Advisor] for the KERP provisions. Their business judgment cannot be ignored.

- *Grant Forest*, at para. 18 **[TAB 11]**

58. In this case, the KERP, the KEIP and the KERP and KEIP Charge are appropriate and necessary for the following reasons:

    (i) the Monitor supports the KERP, the KEIP and the KERP and KEIP Charge;

    (ii) the beneficiaries of the KERP and the KEIP, who are crucial to the Sale Solicitation Process and the ongoing operations of the business, are likely to consider other employment opportunities if the KERP and KEIP are not approved;

    (iii) the Applicants cannot readily replace the beneficiaries of the KERP and the KEIP if they choose to terminate their employment;

    (iv) the directors of the Applicants exercised their business judgement in developing the KERP and the KEIP; and

    (v) the Syndicate supports the KERP and the KEIP.

IX PAYMENTS OF CERTAIN PRE-FILING AMOUNTS

59. The Applicants are seeking an order authorizing them to continue to pay certain pre-filing amounts up to USD $315,000 in the ordinary course (*i.e.* paying amounts after filing for pre-filing provision of goods and services). It is contemplated that the Monitor and the Syndicate will play important oversight roles with respect to any payments, such that the Monitor and the Syndicate will both have to agree that the pre-filing amount be paid.

60. The Applicants submit that in the circumstances, the relief sought is appropriate and necessary to allow the Applicants' business operations to continue uninterrupted after their application for the Initial Order. The Applicants are seeking this authorization to pay certain critical suppliers based on the uniqueness of their supply and the possible serious material consequences of a disruption of their supply.

- *Re Lone Pine Resources Canada* **[TAB 12]**
- *Re Cinram International Inc.,* 2012 ONSC 3767, para. 37 and Schedule "C" at para. 66 **[TAB 15]**
- *Re Smurfit-Stone Container Canada Inc.*, 2009 CanLII 2493 (ONSC), at para. 21 **[TAB 16]**

X SALE SOLICITATION PROCESS

61. Pursuant to the Sale Solicitation Process, the Applicants and OGAC, under the oversight of the Monitor, will seek to identify one or more purchasers of Argent US's shares or assets through a broad marketing to all potential purchasers.

62. The *CCAA* is to be given a broad and liberal interpretation to achieve its objectives and to facilitate the restructuring of an insolvent debtor. A sale by a debtor, which preserves its business as a going concern, is consistent with these objectives, and the court has the jurisdiction to authorize such a sale under the CCAA in the absence of a plan.

- *Re Sino-Forest,* 2012 ONSC 2063 at para. 40 **[TAB 17]**
- *Re Nortel Networks Corp.,* [2009] O.J. No. 3169 (S.C.J.) at paras. 47-78 **[TAB 18]**

63. The following questions may be considered when determining whether to authorize a sale under the *CCAA* in the absence of a plan:

(a) Is the sale transaction warranted at this time?

(b) Will the sale benefit the "whole economic community"?

(c) Do any of the debtors' creditors have a bone fide reason to object to the sale of the business?

(d) Is there a better alternative?

- *Re Sino-Forest*, 2012 ONSC 2063 at para. 40 **[TAB 17]**

- *Re Nortel Networks Corp.* at paras. 47-78 **[TAB 18]**

64. Like in *Sino-Forest*, in this case the Applicants are not asking for the approval of an actual sale. They are only seeking approval of a sale *process* by which offers will be elicited in the marketplace. Notwithstanding current commodity prices, the process is warranted at the present time given the extreme liquidity constraints facing the Applicants.

65. The purpose of the Sale Solicitation Process is to identify purchasers to enter into a transaction that will serve the whole economic community by satisfying as many of the Applicants' creditors' claims as possible. The Applicants' secured creditor supports the Sale Solicitation Process, and there is no evidence of any better alternative.

XI FOREIGN REPRESENTATIVE

66. Section 56 of the *CCAA* affords the Court the jurisdiction to appoint a foreign representative:

> 56 *Authorization to act as representative of proceeding under this Act* – The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside of Canada.

- *CCAA*, s. 56 **[TAB 1]**

67. Here, it is anticipated that a Chapter 15 filing for Argent US and Argent Canada will occur shortly after the application for the Initial Order under the CCAA. The filing is necessary because Argent US is incorporated in the United States and substantially all of the Applicants' assets, and certain of their creditors, are in the United States as well.

68. It is contemplated that the Monitor will act as the foreign representative, and it has extensive experience doing so in Chapter 15 proceedings.

XII SEALING

69. This Honourable Court has the jurisdiction to order that certain materials filed with the Court be sealed on the Court file. The Supreme Court of Canada has stated that such orders can be granted where:

(a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

- *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41 **[TAB 19]**

70. In their initial application, the Applicants will ask this Honourable Court to seal on the court file the Confidential Summary, which contains details about the KEIP and details of the names of key employees of the Applicants, their annual salaries and the retention payment that has been offered to them under the KERP.

71. It is submitted that the Confidential Summary is of the type covered by the test set out in *Sierra Club,* and that it ought to be sealed on the Court file.

XIII CONCLUSION AND RELIEF SOUGHT

72. The Applicants seek an Initial Order under the CCAA substantially in the form as attached to the Originating Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 17th day of February, 2016

BENNETT JONES LLP

Per: ______________________________

Kelsey Meyer / Sean Zweig
Solicitors for the Applicants

Estimated Time for Argument: 60 minutes

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4. *Re Stelco Inc.*, [2004] O.J. No. 1257 at paras. 21-22, 28 (Sup. Ct.); leave to appeal to C.A. refused, [2004] O.J. No. 1903; leave to appeal to S.C.C. refused, [2004] S.C.C.A. No. 336
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14. *Nortel Networks Corp. (Re)*, [2009] O.J. No. 1044 (Ont. S.C.J. [Comm. List])
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16. *Re Smurfit-Stone Container Canada Inc.*, 2009 CanLII 2493 (ONSC)
17. *Re Sino-Forest,* 2012 ONSC 2063
18. *Re Nortel Networks Corp.,* [2009] O.J. No. 3169 (S.C.J.)
19. *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41