

COURT FILE NUMBER 2401-02680

COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

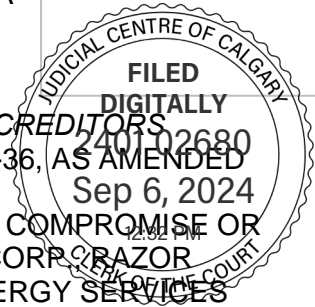
IN THE MATTER OF THE COMPANIES' CREDITORS' ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.

DOCUMENT **BENCH BRIEF OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.**

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**BENCH BRIEF OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP.,  
AND BLADE ENERGY SERVICES CORP.  
WITH RESPECT TO THE APPLICATION  
TO BE HEARD BY  
THE HONOURABLE JUSTICE D.R. MAH**

**September 11, 2024 at 10:00 a.m.**

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## I. INTRODUCTION

1. This Brief is filed by Razor Energy Corp. ("**Razor Energy**") in opposition to Conifer Energy Inc.'s ("**Conifer**") application filed on September 3, 2024 and returnable on September 11, 2024.
2. Razor Energy objects to the relief sought by Conifer in its application seeking, among other things: (i) payment of post-filing amounts owing by Razor to Conifer; (ii) payment of post-filing amounts owing to Canadian Natural Resources Inc. ("**CNRL**") and for which CNRL has issued an invoice to Conifer; and (iii) a charge in favour of Conifer to secure payment of items (i) and (ii) subordinate only to the Administration Charge and Directors' Charge.
3. Conifer, in effect, seeks to have this Court amend the terms of the Agreement for Ownership and Operation of the Judy Creek Gas Plant, dated effective March 1, 2011 (the "**Ownership and Operating Agreement**"), among Razor Energy (as successor to PennWest Energy Corporation) and Conifer (as successor to Pengrowth Energy Corporation), to confer a super-priority security interest in favour of Conifer over all of Razor Energy's property, assets, and undertaking, together with an immediate enforcement right, to which it is not contractually entitled. This new security interest, which encompasses more collateral than that which is held under the Ownership and Operating Agreement, is proposed to rank ahead of the first-ranking security interests of Arena Investors, LP ("**Arena**") and security held by other joint venture operators (such as CNRL), is overreaching, not appropriate in the circumstances and, together with the relief sought requiring Razor Energy to pay the amounts secured by such charge, is designed to compel Razor Energy to make payments to Conifer in the face of the stay of proceedings ordered in these proceedings.
4. Razor Energy submits that this Court should not exercise its discretion to grant any of the relief sought by Conifer. Such relief:
  - (i) Requires this Court to allow Conifer to enforce a payment obligation in the face of a stay of proceedings in a circumstance where Conifer has not expressly sought relief from the stay of proceedings;

- (ii) would constitute a material alteration of the status quo, as well as the parties' contractual rights, in favour of Conifer;
  - (iii) is fundamentally inconsistent with the nature of Conifer's rights under the Ownership and Operating Agreement as operator and co-owner of the Judy Creek facility;
  - (iv) is contrary to the relative priorities of the security currently held by Arena over the assets of Razor Energy in addition to the security held by Razor Energy's other working interest participants; and
  - (v) would result in Razor Energy having insufficient funds to continue operations which will most certainly result in the collapse of the corporate transaction.
5. Conifer is seeking a "leg up" over other creditors in this proceeding. It is seeking to elevate its security above all other security interests, together with a new right to compel immediate payment notwithstanding the CCAA stay.
6. Conifer does not satisfy the criterion for obtaining post-filing payments under section 11.01 of the *Companies' Creditors Arrangement Act* (the "CCAA"). At this stage of the restructuring, there is no basis on which Conifer should be entitled to unique advantages that no other creditor is obtaining. There is minimal prejudice to Conifer in remaining subject to the stay for the brief period required to determine if a restructuring of Razor Energy's business is possible. In the event that no such restructuring is available, Conifer has the security it bargained for over Razor Energy's share of the Functional Unit Participation (as defined in the Ownership and Operating Agreement) for any post-filing amounts.

## II. ISSUES

7. The issues this Bench Brief address are whether:
- (a) this Court should grant the relief requested by Conifer; and,
  - (b) the post-filing payments arise on account of a supply of goods and services as contemplated by section 11.01 of the CCAA.

### III. LAW AND ARGUMENT

#### A. The Ownership and Operating Agreement

8. Exhibit "A" to the Ownership and Operating Agreement makes specific provision for what is to occur if one of the Owners (i.e. Razor Energy) cannot pay its share of costs or expenses at any given time due to an insolvency or otherwise. The contractual rights of Conifer in the event of a failure by Razor Energy to make payments are as follows:

(a) Under Section 602(a) of Exhibit "A" to the Ownership and Operating Agreement:

Effective from the Effective Date, Operator shall have a lien and charge, which is first and prior to any other lien, charge, mortgage or other security interest, with respect to the Functional Unit Participation of each Owner in the Facility and such Owner's share of Functional Unit Products, to secure payment of such Owner's proportionate share of the costs and expenses incurred by the Operator for the Joint Account.

**Affidavit #1 of Doug Bailey sworn on February 13, 2024 (the "Bailey #1 Affidavit"), at Exhibit "B".**

(b) Under Section 602(b)(i)-(v) of Exhibit "A" to the Ownership and Operating Agreement:

If an Owner fails to pay or advance any of the costs or expenses incurred for the Joint Account which are to be paid or advanced by it within the time period prescribed by the Accounting Procedure, Operator may, without limiting Operator's other rights as contained in this Agreement or otherwise held at law or in equity:

- (i) charge such Owner compound interest, as computed Monthly, with respect to such unpaid amount from the Day such payment is due until the Day it is paid, at the rate of two percent (2%) per annum higher than the rate designated as the prevailing prime rate for Canadian commercial loans by the principal Canadian chartered bank used by Operator, regardless of whether Operator has notified such Owner in advance of its intention to charge interest with respect to such unpaid amount;
- (ii) withhold from such Owner any further information and privileges with respect to Joint Operations, including the right to vote pursuant to provisions of Article II, which information and privileges shall be conveyed or restored, as the case may be, to such Owner upon such default being fully rectified;
- (iii) set-off against the amount unpaid by such defaulting Owner, any sums due or accruing to such Owner from Operator in accordance with ALTERNATE A, immediately below:

ALTERNATE A. pursuant to this Agreement;

ALTERNATE B. pursuant to this Agreement and from any other agreement between Operator and such Owner, whether executed before or after the Effective Date;

- (iv) maintain an action or actions for such unpaid amounts and interest thereon on a continuing basis as such amounts are payable, but not paid by such defaulting Owner, as if the obligation to pay such amounts and the interest thereon were liquidated demands due and payable on the relevant date such amounts were due to be paid, without any right or resort of such Owner to set-off or counter-claim; and
- (v) treat the default as an immediate and automatic assignment to Operator of the proceeds of the sale of such Owner's share of Functional Unit Products. Service of a copy of this Agreement upon a purchaser of such Owner's share of Functional Unit Products, together with written notice from Operator, shall constitute a written irrevocable direction by such defaulting Owner to any such purchaser to pay to Operator the proceeds from any such sale up to the amount owed to Operator by such defaulting Owner hereunder (including any accrued interest with respect thereto), and such purchaser is authorized by such defaulting Owner to rely upon the statement of Operator as to the amount so owed to it by such Owner.

However, Operator may not exercise the rights granted in Paragraphs (iii) - (v) of this Subclause with respect to such default until at least thirty (30) Days following the issuance of a notice to such Owner specifying such default and requiring the same to be remedied.

**Bailey #1 Affidavit, at Exhibit "B".**

9. The Owners have entered into a complex Ownership and Operating Agreement. The treatment of unpaid costs or expenses, and the rights which accrue to the operator (here, Conifer) in such event, are wholly defined under the Ownership and Operating Agreement. This is but one element of the multiple negotiated "give-and-takes" which the Owners have agreed to in the context of this co-ownership arrangement.
10. Nor does the CCCA Court provide the jurisdiction to vary a contract in the manner sought by Conifer.

***Allarco Entertainment Inc, Re, [2009 ABQB 503](#), at paras. 52 to 54 [Book of Authorities ("BOA") TAB 4].***

11. It is well-established that the purpose of the CCAA stay is to maintain the *status quo* and prevent particular creditors from taking steps to improve their position to the detriment of

other stakeholders. The relief requested by Conifer seeks this Court's assistance in doing exactly that.

*Agro Pacific Industries Ltd, Re*, [2000 BCSC 879](#) [*Agro Pacific Industries*], at para. 17 [BOA TAB 3], citing *Woodward's Ltd, Re*, [\(1993\), 77 BCLR \(2d\) 332 \(BCSC\)](#) [BOA TAB 11]. See also *Lightstream Resources Ltd, Re*, [2016 ABQB 665](#), at para. 5 [BOA TAB 6].

12. The Court in *Re Agro Pacific Industries* specifically cautioned against giving effect to attempts by a secured creditor to "better" the deal that was negotiated when the parties entered their contracts, stating that:

...it must be remembered that the relationships were made by the parties when they entered into commercial contracts, contracts that contemplated insolvency and litigation. Consequently, when that contemplation becomes reality, caution should be exercised in bettering the deal for specific creditors or classes of creditors. To do so alters commercial reality and might frustrate the legislative intent of maintaining the *status quo*. (emphasis added)

*Agro Pacific Industries*, at para. 20 [BOA TAB 3].

13. This statement was made in the context of acknowledging the priority interests of secured creditors. Despite this priority, the secured creditors are all equally subject to the principle that the *status quo* is to be maintained on filing under the CCAA. In this case, all secured creditors are stayed from enforcing their security. There is no basis for Conifer to obtain this Court's assistance in improving either the priority of its security, or its entitlement to maintain an action to collect amounts owing to it. On this latter point, the Ownership and Operating Agreement requires Conifer to commence an action if it wishes to enforce payment of amounts owing to it by way of obtaining a judgment. In asking the Court to require Razor Energy to pay amounts owing to it by September 20, 2024, Conifer is seeking a further amendment to the Ownership and Operating Agreement.
14. On this basis alone, the relief requested by Conifer should be refused.

**B. Payments Are Not Post-Filing Payments for Goods/Services**

15. Section 11.01 provides that the CCAA stay of proceedings cannot: (a) prohibit a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or (b) require the further advance of money or credit. Section 11.01 does not allow a party to seek an order compelling a CCAA applicant to make payments to post-filing suppliers of goods or

services. If Parliament had intended to provide such a remedy, then it would have provided same in the legislation.

CCAA, at s. 11.01 [BOA TAB 2].

16. Since section 11.01 constitutes an exception to the stay of proceedings, CCAA Courts have held that it must be interpreted narrowly.

See, for example, *Smith Brothers Contracting Ltd (Re) (Trustee of)*, [1998 CanLII 3844 \(BC SC\)](#) [*Smith Brothers*], at para. 41 [BOA TAB 7]; *Royal Bank v Cow Harbour Construction Ltd*, [2012 ABQB 59](#), at para. 18 [BOA TAB 6].

17. The mere fact that amounts may be owing under a contract during the post-filing period does not give rise to an automatic right to the creditor to require immediate payment of those amounts. It is well-established that it is necessary to consider the substance of the obligation to determine whether, properly characterized, it is the type of obligation that falls within section 11.01. This is because the effect of a conclusion that the supply of goods or services or the extension of credit fits within section 11.01 necessarily gives the particular creditor a “leg up” in relation to other creditors who are not getting paid in the post-filing period.

See *Smith Brothers*, at para. 26 [BOA TAB 8].

18. The purpose of section 11.01 is to recognize that certain post-filing suppliers to the debtor company, like landlords, utility companies, true lessors under chattel leases, or providers of raw materials for the debtor’s business, can be compelled under the CCAA order to refrain from terminating executory contracts and to continue providing services during the post-filing period. The *quid pro quo* for this compelled supply is the statutory obligation for the debtor to continue to pay on a current basis during the post-filing period.

This relationship is clear from the reasoning of the Court in *Smith Brothers*, in which the Court connects the application of section 11.3 (the predecessor to section 11.01) with the provisions of the initial order precluding persons with executory contracts for the supply of goods and services from terminating those agreements during the stay period: *Smith Brothers*, paras. 7 to 10 [BOA TAB 8].

19. The Alberta Court of Appeal has held that creation of charges in CCAA proceedings should not be routine and determined on the merits of each case. Additionally, the Court of Appeal held that courts of first instance should “consider providing security for those



creditors whose claims will arise during the stay period and without whose provision of goods and services the business would not otherwise be able to continue”.

*Williston Wildcatters Oil Corporation v Peat Marwick Thorne Inc*, [1995 ABCA 427](#), at para. 7 [BOA TAB 10].

20. It necessarily follows that security should not be given unless the provision of goods and services are necessary to allow the business to be able to continue. Razor Energy has been able to continue in business despite continuing to be locked out of the Judy Creek gas plant.

**Affidavit #9 of Doug Bailey sworn on September 6, 2024, at para. 9.**

21. As the Quebec Court of Appeal has held, the CCAA does not require post-filing suppliers of goods and services to be paid, nor it does it provide an automatic charge for such suppliers. Instead, a charge may be ordered on a discretionary basis, and even then only if the supplier is involuntarily supplying goods pursuant to a court order compelling them to do so.

*Arrangement relatif à Gestion Eric Savard Inc*, [2019 QCCA 1434](#), at paras 19-20 [BOA TAB 5]: “Il est important de noter que cette disposition [CCAA s. 11.01J n’attribue aucune priorité en soi aux créanciers post-dépôt. Il appartient alors a ces créanciers d’obtenir un jugement qui modifiera l’ordonnance initiale s’ils souhaitent obtenir une sûreté judiciaire...>> (Unofficial translation : “It is important to note that this provision does not automatically grant priority to post-filing creditors. The onus is on those creditors to obtain a judgment modifying the initial order if they wish to obtain a court-ordered priority.”).

22. Section 11.01 was plainly not intended to apply in circumstances such as the case at bar. A joint venture is not a typical supply arrangement. It is a complex co-ownership relationship in which the parties have agreed to undertake a project for joint profit, based on a joint property interest in the subject matter of the contract.

**See, for example, *WCI Waste Conversion v ADI International Inc*, [2011 PECA 14](#), at paras. 258-259 [BOA TAB 9].**

23. In those circumstances, the parties pool their property and agree as co-owners to share risks and benefits of the project. The provisions of the joint venture agreement establish the terms on which those benefits and risks will be shared, as well as the consequences of the insolvency or other default of one of the co-venturers. The fact that both parties are share risks is a key factor distinguishing a joint venture relationship from a typical supplier arrangement.

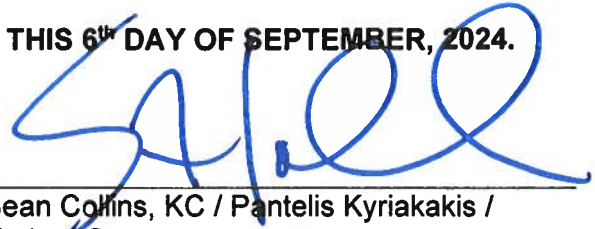
24. Thus, in the case of the Ownership and Operating Agreement between Conifer and Razor Energy, the obligations to pay costs and expenses must be understood in the context of the relationship of the joint venture parties, viewed as a whole. There is no court order compelling Conifer to continue processing Razor Energy's petroleum and natural gas and incurring costs to do so. Conifer itself admits that the decision to continue processing Razor Energy's petroleum and natural gas was made by Conifer in its sole discretion, for the benefit of itself.
25. Moreover, unlike a typical supplier of services or raw materials to a debtor company's business, Conifer, as Operator appointed under the Ownership and Operating Agreement, is also the 54.789910% owner of the Judy Creek facility. It therefore exercises substantial control over the business for its own benefit that extends beyond the provision of services or raw materials. It does not take its directions from Razor Energy, which has no power to establish the terms on which the business will be operated. Conifer is directed by the Management Committee under the Ownership and Operating Agreement.
26. Unlike in most typical supply arrangements, the inability of Razor Energy, due to insolvency, to pay the costs and expenses associated with Conifer's business decision to continue to produce Razor Energy's gas is expressly addressed in the Ownership and Operating Agreement. Conifer should not be entitled to use section 11.01 of the CCAA – a provision that was plainly designed to address a different issue – to give itself rights over and above those that it bargained for.
27. Nor has Conifer demonstrated, applying any test applicable under the CCAA, that it is entitled to the super-priority security interest over Razor Energy's property that it seeks. There is no such right under section 11.01 of the CCAA and, moreover, for the reasons as set out above, the circumstances of this case does not render the relief sought by Conifer appropriate.
28. None of the authorities relied upon by Conifer stand for the proposition that a debtor company must pay for all amounts that come due in the post-filing period, regardless of the character of those amounts. Nor do the cases cited by Conifer involve a complex co-ownership relationship in which one co-owner is seeking to treat the other as a mere supplier of goods or services to the other co-owner in order to obtain (and secure) post-filing payments.

29. On the basis of the foregoing, and by extension, Conifer's request for payment to it by Razor Energy for all post-filing amounts owed by Razor Energy to CNRL that CNRL now seeks from Conifer similarly must be denied. Additionally, the nature of the Conifer's claim cannot fit within the purview of section 11.01 of the CCAA inasmuch as such claim does not arise on account of Conifer supplying goods or services to Razor Energy nor does such claim represent Conifer advancing money or credit to Razor Energy.

**IV. CONCLUSION**

30. Razor Energy respectfully requests that this Honourable Court dismiss Conifer's application.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 6<sup>th</sup> DAY OF SEPTEMBER, 2024.**

A handwritten signature in blue ink, appearing to read 'S. Collins', is written over a horizontal line.

Sean Collins, KC / Pantelis Kyriakakis /  
Nathan Stewart  
Counsel to the Applicants,  
Razor Energy Corp., Razor Holdings GP  
Corp., and Blade Energy Services Corp.

## V. LIST OF AUTHORITIES

### **Pleadings**

1. Appendix "A" to the Fifth Report of the Monitor, dated July 12, 2024, being the Sixth Cash Flow Forecast for the period ending October 13, 2024;

### **Statutes**

2. *Companies' Creditors Arrangement Act*, [R.S.C. 1985, c. C-36](#), at section 11.01;

### **Case Law**

3. *Agro Pacific Industries Ltd, Re*, [2000 BCSC 879](#);
4. *Allarco Entertainment Inc, Re*, [2009 ABQB 503](#);
5. *Arrangement relatif à Gestion Eric Savard Inc*, [2019 QCCA 1434](#);
6. *Lightstream Resources Ltd, Re*, [2016 ABQB 665](#);
7. *Royal Bank v Cow Harbour Construction Ltd*, [2012 ABQB 59](#);
8. *Smith Brothers Contracting Ltd (Re) (Trustee of)*, [1998 CanLII 3844 \(BC SC\)](#);
9. *WCI Waste Conversion v ADI International Inc*, [2011 PECA 14](#);
10. *Williston Wildcatters Oil Corporation v Peat Marwick Thorne Inc*, [1995 ABCA 427](#); and,
11. *Woodward's Ltd, Re*, [\(1993\), 77 BCLR \(2d\) 332 \(BCSC\)](#).