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COURT: COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE: CALGARY

APPLICANTS: IN THE MATTER OF *THE COMPANIES' CREDITORS ARRANGEMENT*  
**(Respondents on ACT, R.S.C. 1985, c. C-36, AS AMENDED**  
**Application)**

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: BRIEF OF ALBERTA PETROLEUM MARKETING COMMISSION**

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**BRIEF OF ALBERTA PETROLEUM MARKETING COMMISSION**  
**For the Application scheduled for April 10, 2024 at 10:00 am**

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## INTRODUCTION

1. The Crown in Right of Alberta (the “Crown”) is the owner of reserves of crude oil. Each producer of crude oil from the Crown’s reserves is required to deliver the Crown’s royalty share to the Alberta Petroleum Marketing Commission (“APMC”), the agent of the Crown.
2. Razor Energy Corp. (“Razor”) decided not to deliver the Crown’s royalty share for January 2024, claiming that it was not required to do so because it had issued a notice of intention under the *Bankruptcy and Insolvency Act*,<sup>1</sup> RSC 1985, c B-3 (the “BIA”).<sup>2</sup>
3. Razor is wrong. The crude oil resource belongs to the Crown absolutely and the Crown’s royalty share of production continues to be owned by the Crown. The Crown’s rights to the royalty share are *in rem*. Razor never owned and was never entitled to own the Crown’s royalty share of production.
4. Neither the BIA nor the *Companies’ Creditors Arrangement Act*,<sup>3</sup> (“CCAA”) give Razor any ownership interest in the Crown’s royalty share. The Crown is not a creditor with a claim provable in bankruptcy. It is the owner of the royalty share, which Razor must deliver to it.
5. Razor continues to have the obligation to deliver the January 2024 royalty share to the Crown. Under the *Petroleum Marketing Regulation*,<sup>4</sup> APMC directed Razor to deliver the Crown’s royalty share of crude oil, a fungible commodity, to the APMC in equal and like quantity in subsequent months.

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<sup>1</sup> RSC 1985, c B-3 [**Authorities, Tab 10**].

<sup>2</sup> Affidavit #1 of Bradley Weicker filed March 6, 2024 at Exhibit “A” (“Weicker Affidavit #1”).

<sup>3</sup> RSC 1985 c C-36 [**Authorities, Tab 9**].

<sup>4</sup> AR 174/2006 [**Authorities, Tab 7**].

6. The CCAA proceedings and any stay under the CCAA cannot countenance conversion of Crown property. The CCAA applies with respect to the debtor's assets. It does not permit a debtor to take that which they do not own and convert it for their own benefit.
7. The Crown's royalty share of crude oil must be delivered in kind. While APMC has the discretion under the statutory scheme to charge Razor with payment of an amount of money instead of requiring Razor to deliver the Crown's royalty share, APMC has not exercised that discretion. The royalty share remains deliverable in kind. Nothing in the CCAA nor the BIA authorizes Razor to compel APMC to convert the Crown's ownership of the royalty in kind to a money charge.
8. The Crown's royalty share is not property of Razor that is held in a deemed statutory trust that is effaced by section 37 of the CCAA. Section 37 of the CCAA applies only to "property of the debtor" held in a statutory trust; not to property of a third party like the Crown. At most, Razor is "a trustee or agent" for the Crown in respect of the Crown royalty share. Razor's relationship to the Crown's royalty share as a trustee or agent is not a deemed trust created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share.
9. The stay in the order of Whitling J made February 28, 2024 does not apply to the direction to deliver issued by APMC on March 1, 2024. APMC is enforcing and administering the *Petroleum Marketing Regulation* in directing Razor to deliver Crown property. APMC is acting in the public interest to enforce a public duty. Further, section 11.1(2) of the CCAA exempts the APMC's direction because it is a proceeding that is taken in respect of the company by the APMC, a regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.

10. Razor has issued a notice of constitutional issue. However, there is no conflict that gives rise to a constitutional question between
- a. the CCAA and the BIA, and
  - b. the Crown's status of owner and rights as the owner of the Crown's royalty share and the related provisions of the *Mines and Minerals Act* and the *Petroleum Marketing Act* and *Regulation*.

## **PART I: FACTS AND LEGAL FRAMEWORK**

### **A. The Crown owns the Royalty Share**

11. The Crown owns the rights to minerals, including crude oil, in most of Alberta.<sup>5</sup> This ownership gives the Crown complete control over the exploitation of the resource.<sup>6</sup>
12. Constitutionally, the Alberta Legislature has exclusive legislative authority with respect to the development, conservation and management of natural resources in the Province.<sup>7</sup>
13. The legislative framework for crude oil royalties in Alberta reflects the underlying Crown ownership of its mineral resources, and the statutory terms under which producers are permitted to develop these resources and cause the Crown's royalty share of production to be delivered to it.

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<sup>5</sup> *Natural Resources Transfer Agreement*, 1930 (Alberta) (Schedule of Constitution Act, 1930, R.S.C. 1985, App. II, No. 26), **[Authorities, Tab 1]**; see also Peter W Hogg, "Constitutional Law of Canada, 5th Edition" at §29:1, online: (WL Can) Thomson Reuters Canada. **[Authorities, Tab 11]**.

<sup>6</sup> Peter W Hogg, "Constitutional Law of Canada, 5th Edition" at §29:3, online: (WL Can) Thomson Reuters Canada. **[Authorities, Tab 11]**.

<sup>7</sup> *Constitution Act*, 1867, Part VI s. 92A **[Authorities, Tab 2]**.

14. Under the *Mines and Minerals Act*:<sup>8</sup>

- a. there can be no disposition of an estate in a mineral, including crude oil, owned by the Crown unless the disposition is specifically authorized by that Act or another Act (s.11);
- b. the Minister of Energy and Minerals (the "Minister") may issue an agreement permitting the production of crude oil by an operator (s. 16);
- c. a royalty determined under that Act is reserved to the Crown on any crude oil recovered under an agreement (s.33);
- d. in respect of crude oil, the royalty reserved to the Crown is deliverable in kind (s. 34);
- e. the Crown is the owner of its royalty share of the crude oil at all times until that royalty share is disposed of by or on behalf of the Crown or until the Crown's title to that royalty share is transferred to a lessee or other person pursuant to the regulations, notwithstanding that its share is commingled with and indistinguishable from the lessee's share prior to or at the time of the disposal or transfer of title (s. 35); and
- f. there is implied in every disposition any and all reservations that are required to be made on the disposal of any mineral rights owned by the Crown (s.44).<sup>9</sup>

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<sup>8</sup> *Mines and Minerals Act*, RSA 2000, c M-17 [**Authorities, Tab 3**].

<sup>9</sup> *Mines and Minerals Act*, RSA 2000, c M-17 [**Authorities, Tab 3**].

Note: the definition of "disposition" reads:

1(1)(f) "disposition" means a grant, a transfer referred to in section 12 or an agreement;

"Agreement" is defined as

1(1)(a) "agreement" means an instrument issued pursuant to this Act or the former Act that grants rights in respect of a mineral, subsurface reservoir, or geothermal resource, but does not include a notification, a transfer referred to in section 12, a unit agreement or a contract under section 9(a);

## **B. The Alberta Petroleum Marketing Commission**

15. The APMC is the Crown's agent for receiving and dealing with Alberta's crude oil royalty volumes. APMC derives authority directly from the *Petroleum Marketing Act*<sup>10</sup> and a number of interrelated statutes and regulations.
16. APMC's primary role is to accept delivery of and deal with of the Crown's royalty share of crude in the public interest of Alberta. Section 15 of the *Petroleum Marketing Act* provides:

### **Dealing with Crown's royalty share**

**15** Subject to the regulations, the Commission shall

- (a) accept delivery of the Crown's royalty share of a hydrocarbon substance required to be delivered to the Commission pursuant to an agreement, a contract under section 9(a) of the *Mines and Minerals Act* or an enactment,
- (b) deal with the Crown's royalty share of the hydrocarbon substance in a manner that is, in the Commission's opinion, in the public interest of Alberta, and
- (c) engage in other hydrocarbon-related activities in a manner that is, in the Commission's opinion, in the public interest of Alberta.<sup>11</sup>

17. Under section 86(1) of the *Mines and Minerals Act* and section 3 of the 2009 and 2017 *Petroleum Royalty Regulations*,<sup>12</sup> producers that hold agreements to produce oil from the Crown's reserves must deliver the Crown's royalty share to APMC. Section 86 of the *Mines and Minerals Act* reads:

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<sup>10</sup> *Petroleum Marketing Act*, RSA 2000, c P-10 [Authorities, Tab 6].

<sup>11</sup> *Petroleum Marketing Act*, RSA 2000, c P-10, s. 15 [Authorities, Tab 6].

<sup>12</sup> *Petroleum Royalty Regulation*, 2009, AR 22/2008 at s. 3 [Authorities, Tab 4]; *Petroleum Royalty Regulation*, 2017, AR 212/2016 at s. 3 [Authorities, Tab 5].

**86(1)** Every agreement to which this section applies is subject to the condition that the Crown's royalty share of a mineral to which this section applies recovered pursuant to the agreement must be delivered to the Alberta Petroleum Marketing Commission.<sup>13</sup>

Section 3 of each of the *Petroleum Royalty Regulations* makes section 86 applicable to royalties for crude oil. It reads:

**3** Section 86 of the *Mines and Minerals Act* applies to all agreements granting petroleum and natural gas rights or petroleum rights and to crude oil obtained from petroleum recovered pursuant to those agreements.<sup>14</sup>

18. The *Petroleum Marketing Regulation*<sup>15</sup> establishes a system for crude oil royalty forecasting, delivery and settlement on a monthly basis.<sup>16</sup> APMC administers this system. Producers and pipeline shippers provide APMC with the information to facilitate the forecasting.
19. Razor has obligations through this legislative structure and the terms of its leases, to properly forecast and deliver the Crown's royalty share of production to APMC.<sup>17</sup>
20. Under this system of forecasting, delivery and settlement, the Crown's royalty share in respect of production in a calendar month is delivered and settled in the first part of the next month.

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<sup>13</sup> *Mines and Minerals Act*, RSA 2000, c M-17, s. 86 [**Authorities, Tab 3**].

<sup>14</sup> *Petroleum Royalty Regulation*, 2009, AR 22/2008 at s. 3 [**Authorities, Tab 4**]; *Petroleum Royalty Regulation*, 2017, AR 212/2016 at s. 3 [**Authorities, Tab 5**].

<sup>15</sup> *Petroleum Marketing Regulation*, AR 174/2006 [**Authorities, Tab 7**].

<sup>16</sup> Described in terms of the general principles in the Affidavit of Bradley Weicker sworn March 6, 2024 (Weicker Affidavit #2) at paras 3 and 4; and in terms of Razor specifically in the Weicker Affidavit #1 at paras 7 to 9 and in Weicker affidavit #2 at para 5.

<sup>17</sup> Weicker Affidavit #1, para 5.



21. In order to manage the logistics of actual deliveries and address the practicalities of crude oil trade cycles, which happen in advance of a delivery month, the legislative framework requires producers to forecast the Crown's royalty share of production for delivery to APMC.<sup>18</sup>
22. Actual final deliveries are determined through Crown royalty production splits which are settled by producers usually between the tenth and twelfth day of the month following the delivery month.<sup>19</sup>
23. If a producer does not deliver or underdelivers the Crown's royalty share in any month, APMC can direct delivery of that royalty share in another month. Section 12(1) of the *Petroleum Marketing Regulation* provides:

**Direction to deliver royalty deficiency**

**12(1)** If there is an underdelivery balance at a battery for a delivery month, the Commission, by a notice given to the operator of the battery for that delivery month, may direct that the default under the agreement or agreements resulting from the deficient delivery be remedied by the delivery in kind to the Commission of crude oil in equal quantity and of like quality to the underdelivery balance

- (a) in the month in which the direction is given,
- (b) in a particular subsequent month, or
- (c) in instalments in 2 or more particular subsequent months,

whichever is specified in the direction.<sup>20</sup>

24. APMC is a Crown agent and exercises all of its powers as an agent of the Crown.<sup>21</sup>

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<sup>18</sup> The *Petroleum Marketing Regulation* reflects the intention that normal oil industry practice is followed by producers when forecasting Crown volumes. APMC has the ability to determine what constitutes normal oil industry practice *Petroleum Marketing Regulation*, s. 16(4), **[Authorities, Tab 7]**.

<sup>19</sup> Weicker Affidavit #1 at para 4.

<sup>20</sup> *Petroleum Marketing Regulation*, AR 174/2006 s. 12(1) **[Authorities, Tab 7]**.

<sup>21</sup> *Petroleum Marketing Act*, RSA 2000, c P-10, s. 8(1) **[Authorities, Tab 6]**.

### **C. Razor Energy's refusal to deliver the Crown's royalty share for January 2024**

25. In December 2023, Razor forecasted the delivery of Crown royalty oil to the APMC for the January 2024 delivery month. During January 2024, draft pipeline shipper balances, and final draft shipper balances, continued to reflect Crown royalty oil deliveries to APMC from Razor based on production forecasts.<sup>22</sup>
26. About February 12, 2024, Razor filed final Crown royalty production splits for January 2024 showing no Crown royalty oil being delivered to the APMC for the delivery month of January 2024.<sup>23</sup>
27. Razor failed to deliver 934.8 cubic meters of crude oil of Crown royalty oil to APMC for the delivery month of January 2024.<sup>24</sup>
28. On February 27, 2024, Alberta Energy and Minerals sent an email to Razor asking why there was no delivery of royalties for January production.<sup>25</sup>
29. In a response on the same day, Razor stated that it had commenced restructuring proceedings on January 30 by filing a Notice of Intention to Make a Proposal ("NOI") pursuant to section 50.4(1) of the *Bankruptcy and Insolvency Act* ("BIA"). Razor said that it "was advised by its lawyers and FTI [the Trustee] that January oil royalties were stayed as part of this process and accordingly Razor did not deliver any royalty for January production."<sup>26</sup>

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<sup>22</sup> Weicker Affidavit #1, para 7.

<sup>23</sup> Weicker Affidavit #1, para 8.

<sup>24</sup> Weicker Affidavit #1, para 9.

<sup>25</sup> Weicker Affidavit #1, Exhibit A at p. 8.

<sup>26</sup> Weicker Affidavit #1, Exhibit A at p. 8.

30. On February 28, 2024, general counsel for APMC responded advising that Razor had failed to recognize the Crown's continuing estate, ownership and title to the Crown royalty share and that Razor did not merely owe a cash royalty obligation:

The advice to withhold the Crown's royalty share of crude oil production fails to recognize the Crown's continuing estate, ownership and title to that royalty share. It mistakenly assumes that Razor Energy has somehow acquired title to the Crown share and simply owes a cash royalty obligation in return, which is not true.

We would ask for your immediate attention to clarify this issue, rescind the former advice to withhold the Crown's royalty share deliveries, and confirm steps that will be taken to rectify the suspended deliveries.<sup>27</sup>

31. On March 1, 2024, two separate things happened:

- a. Razor provided a copy of the February 28, 2024 Order by the Honourable Justice N.J. Whiting. No notice of the application for this order had been provided to APMC before this.<sup>28</sup>
- b. APMC directed Razor to make up the underdelivery balance by the delivery in-kind to APMC of crude oil of an equal quantity and of like quality to the January royalty deficiency volumes as part of its February 2024 delivery month.<sup>29</sup>

32. Razor has confirmed in their filings with this Court and in representations to the APMC that they will deliver the Crown's royalty share to the APMC for their February 2024 and March 2024 production.

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<sup>27</sup> Weicker Affidavit #1, Exhibit B at p. 11.

<sup>28</sup> Weicker Affidavit #1, para 13.

<sup>29</sup> Weicker Affidavit #1, para 11 and Exhibit C at pp. 13 and 14.

## **PART 2: ISSUES**

- A. Does the CCAA apply to deprive the Crown of its ownership interest in the Crown's royalty share?
- B. Does discretion granted to the APMC to take payment of money instead of the royalty in kind convert the Crown's ownership of its royalty share into a debt?
- C. Does Razor hold the Crown's royalty share in a deemed statutory trust?
- D. Does the order of Whitling J made February 28, 2024 apply to the direction issued by APMC?
- E. Is there a conflict between the CCAA or the BIA and the *Mines and Minerals Act* or *Petroleum Marketing Regulation* that gives rise to a constitutional question?

## **PART 3: ARGUMENT**

### **A. THE CCAA DOES NOT APPLY TO DEPRIVE THE CROWN OF ITS OWNERSHIP INTEREST IN THE CROWN'S ROYALTY SHARE**

33. In respect of the Crown's royalty share, APMC, as agent of the Crown, is not a creditor of Razor. Neither the CCAA nor the BIA, which constrains the ambit of the claims to which the CCAA applies, limits the Crown's ownership of its royalty share.
34. The Crown royalty share is an *in rem* right. The Court of Appeal has held that:
- Alberta held an *in rem* interest in the hydrocarbons as they came out of the ground, and, when they were sold, the proceeds, under the scheme of the Alberta Act, went straight to Alberta. The producer could never be anything more than a trustee or agent.<sup>30</sup>

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<sup>30</sup> *Excel Energy Inc. v. Alberta*, 196 AR 67 (CA) at para 7 [**Authorities, Tab 12**]. Although this statement was in the in the context of income tax legislation, the principle applies in this context.

35. A fundamental principle of insolvency proceedings under the CCAA and the BIA is that it provides recourse to the debtor's assets only - only the debtor's own assets are available for distribution to its creditors -- *nemo dat non quod habet*.
36. The Crown owns the crude oil when it is in the ground. Razor only has the right to extract the oil subject to Razor delivering to the APMC, as agent of the Crown, the royalty share of the oil. The Crown's ownership of the royalty share is unbroken from the point that it is in the ground to the point when it is disposed of by or on behalf of the Crown.
37. Section 35 of the *Mines and Minerals Act* confirms this:

**Crown as owner**

**35(1)** The Crown in right of Alberta is the owner of its royalty share of the mineral at all times until that royalty share is disposed of by or on behalf of the Crown or until the Crown's title to that royalty share is transferred to a lessee or other person pursuant to the regulations, notwithstanding that its share is commingled with and indistinguishable from the lessee's share prior to or at the time of the disposal or transfer of title.

**(2)** If, at the place where the Crown's royalty share of a mineral is to be delivered to the Crown in right of Alberta, the Crown's royalty share of the mineral is commingled with the lessee's share of the mineral so that the Crown's royalty share cannot be identified, the Crown in right of Alberta is entitled to the quantity of the mineral of equivalent quality that is equal to the Crown's royalty share.<sup>31</sup>

38. Section 35 expressly confirms Crown ownership of its royalty share in a fungible commodity. This accords with the common law.<sup>32</sup>

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<sup>31</sup> *Mines and Minerals Act*, RSA 2000, c M-17, s. 35 [**Authorities, Tab 3**].

<sup>32</sup> *Carter v. Long & Bisby*, 1896 CanLII 18 (SCC), 26 SCR 430 [**Authorities, Tab 13**]:  
"Where the owner of chattels, having the legal property in them, has had his property mixed with similar chattels belonging to other persons so that out of the mass thus commingled the chattels originally belonging to each person are indistinguishable, as in the case which has so frequently

39. Razor never acquired an ownership interest in the Crown's royalty share of crude oil production that could make it part of Razor's property for the purpose of BIA or CCAA proceedings. At all times, the Crown retains actual ownership and title to its share of production, notwithstanding that its royalty share may be co-mingled with Razor's production.
40. As the Crown's royalty share never became part of Razor's assets, the Crown's royalty share is not subject to the CCAA process. This is clear from the following passage from *Newfoundland and Labrador v. AbitibiBowater Inc.*:

One of the central features of the CCAA scheme is the single proceeding model, which ensures that most claims against a debtor are entertained in a single forum. Under this model, the court can stay the enforcement of most claims **against the debtor's assets** in order to maintain the status quo during negotiations with the creditors.<sup>33</sup> [emphasis added]

Where the asset in issue is not the "debtor's asset" the CCAA does not shield the asset from recovery by the owner.

41. This focus on the "debtor's asset" is repeated in the majority decision in *Orphan Well Association v. Grant Thornton Ltd.*<sup>34</sup> In its commentary on *AbitibiBowater*, the Court said:

[115] The equitable distribution of **the bankrupt's assets** is one of the purposes of the BIA. It is achieved through the collective proceeding model. Creditors of the bankrupt

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happened of a quantity of saw-logs being thus mixed, the rule at common law is that where this has been done without fraud or wrong an original owner is entitled to take from the mass an equivalent in quantity and quality for the property which he has lost by the mixing, and he is treated as having a legal title to such property."

See also Janis Sarra, Geoffrey B. Morawetz, L.W. Houlden, *The 2022-2023 Annotated Bankruptcy and Insolvency Act*, Carswell, 2023 at §5.82 [**Authorities, Tab 14**].

<sup>33</sup> 2012 SCC 67 at para 21 [**Authorities, Tab 15**]

<sup>34</sup> 2019 SCC 5 at paras. 115 and 118 [**Authorities, Tab 16**].

wishing to enforce a claim provable in bankruptcy must participate in the collective proceeding. Their claims will ultimately have the priority assigned to them by the BIA. This ensures that the bankrupt's assets are distributed fairly.

....

[118] However, only claims provable in bankruptcy must be asserted within the single proceeding. **Other claims are not stayed upon bankruptcy and continue to be binding on the estate.** [Emphasis added]

42. A CCAA order does not and cannot convey title in an asset owned by a third party to a debtor or to a purchaser of an asset under a CCAA approval and vesting order. The principle *nemo dat non quod habet* continues to apply. The CCAA does not create title for a debtor in an asset where none existed before the proceedings began and cannot transfer title. This point is made in *Quicksilver Resources Canada Inc (Re)*:

I would suggest that it would be an abuse of CCAA orders to interpret them as the Court's confirmation that title the seller does not possess may be vested in the buyer free of claims to ownership by the true owner. The better interpretation is that a CCAA order may vest off certain claims against title, **but does not create title.** <sup>35</sup> [emphasis added]

43. The point is also made in *8640025 Canada Inc. (Re)*:

[58] In my opinion, the documented evidence of Telephone Corp. that some of the assets scheduled to the APA belonged to it or other entities not before the Court, in combination with the inability of the Monitor to confirm that the assets were all the property of the Petitioners, precluded the ability of the Court to approve the asset purchase agreement presented for approval. The CCAA Court had no jurisdiction to authorize the sale of assets other than the assets of the Petitioners and TNW Networks Corp. <sup>36</sup>

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<sup>35</sup> 2018 ABQB 653 at para 57 [Authorities, Tab 17].

<sup>36</sup> 2017 BCCA 303 at para 58 [Authorities, Tab 18].

**B. APMC'S DISCRETION TO TAKE PAYMENT INSTEAD OF ROYALTY IN KIND DOES NOT CONVERT THE CROWN'S OWNERSHIP OF ITS ROYALTY SHARE INTO A DEBT**

44. Razor has failed to deliver the Crown's royalty share to APMC and now attempts to characterize the Crown's right to its royalty share as a "claim" within the scope of the CCAA. This is incorrect. As part of the regulatory scheme under which producers may exploit Crown resources, APMC has directed that Razor deliver to it Crown owned property.
45. While APMC is given a discretion in certain circumstances to convert the Crown's royalty share into an obligation to pay an amount of money,<sup>37</sup> APMC has not done so in the case.
46. Razor in essence seeks to have this Court compel APMC to exercise its discretion under s. 13 of the *Petroleum Marketing Regulation* to create a claim within the scope of the CCAA.
47. Under the legislative scheme applicable to the Crown's royalty share the Crown is entitled to its royalty share in kind unless a regulation provides otherwise. Section 34(3) of the *Mines and Minerals Act* provides:
- (3) Except as otherwise provided by the regulations,
    - (a) the royalty reserved to the Crown in right of Alberta shall be deliverable in kind,
    - ....
48. In order for title to the Crown royalty share to be transferred to a producer and the royalty in kind obligation to be converted into money payable to the Crown,

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<sup>37</sup> *Petroleum Marketing Regulation*, AR 174/2006 s. 12(4), 13 and 14(1) [**Authorities, Tab 7**]



the *Mines and Minerals Act* requires a regulation.<sup>38</sup> Section 36(2)(h) and (i) of the *Mines and Minerals Act* provide:

(2) The Lieutenant Governor in Council may make regulations

...

(h) respecting the transfer of title to the Crown's royalty share of a mineral to the lessee or any other person after the recovery of the mineral;

(i) respecting the determination and payment to the Crown of compensation in respect of the Crown's royalty share of a mineral, where the Crown's title to that share is transferred pursuant to regulations under clause (h);....

49. Unlike other hydrocarbons (e.g. bitumen<sup>39</sup>) where there is a regulation providing for transfer of title to producers and for cash royalties in lieu of in kind deliveries, production from the Crown's crude oil reserves requires delivery of the Crown's royalty share in kind to APMC.

50. The *Mines and Minerals Act* and the *Petroleum Marketing Act* provide for a regulatory scheme to deal with deficiencies in the delivery of the Crown royalty share. Section 36(3) of the *Mines and Minerals Act* allows for regulations that provide the Minister with the discretion to determine whether to insist on deliveries in kind or to charge the producer with payment to the APMC of an amount of money:

36(3) Without limiting the powers of the Lieutenant Governor in Council under subsection (2)(g), regulations may be made under that clause

(a) respecting the powers of the Minister, in the event of a deficiency in deliveries of the quantity of the Crown's royalty share of a

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<sup>38</sup> See *Mines and Minerals Act*, section 1(1)(y) "royalty compensation" means money payable to the Crown in right of Alberta as compensation pursuant to regulations made under section 36(2)(i)".

**[Authorities, Tab 3]**

<sup>39</sup> *Oil Sands Royalty Regulation*, AR 223/2008, ss. 1(1)(qq), 26(3), 27(3) and 31(1) **[Authorities, Tab 8]**.

mineral under an agreement in a month, to require that the default under the agreement resulting from the deficient delivery be remedied in a subsequent month by either

- (i) the delivery in kind to the Crown of the deficient quantity in that subsequent month, or
- (ii) the payment to the Crown in that subsequent month of an amount of money determined in accordance with the regulations as the value to the Crown of the deficient quantity,

**whichever the Minister directs;**<sup>40</sup>

[Emphasis added]

51. Section 19 of the *Petroleum Marketing Act* provides:

19(1) The Lieutenant Governor in Council may make regulations

...

(e) respecting the respective rights, powers, liabilities and obligations of the Commission, lessees and others in the event that the quantity of a hydrocarbon substance delivered to the Commission in a month is less than or greater than the Crown's royalty share of the hydrocarbon substance actually payable in respect of that month;

(f) providing for any matter in connection with or incidental to the administration of sections 15 to 18.

(2) Without limiting the powers of the Lieutenant Governor in Council under subsection (1)(e), regulations may be made under that subsection

(a) respecting the powers of the Commission, in the event of a deficiency in deliveries of the quantity of the Crown's royalty share of a hydrocarbon substance under an agreement in a month, notwithstanding any provision to the contrary in the *Mines and Minerals Act* or a regulation under that Act,

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<sup>40</sup> *Mines and Minerals Act*, RSA. 2000, c M-17, s. 36(3) [Authorities, Tab 3]

- (i) to accept the payment of money instead of delivery of the deficient quantity, or
- (ii) to direct the payment to the Commission of an amount of money determined by it in accordance with the regulations as the value to the Crown of the deficient quantity;<sup>41</sup>

52. Section 12 to 14 of the *Petroleum Marketing Regulation* are provisions made under the *Mines and Minerals Act* and *Petroleum Marketing Act* that deal with deficiencies in the delivery of the Crown's royalty share.

53. If there is an underdelivery of the Crown's royalty share, the APMC may direct that the underdelivery be remedied by delivery in kind in a subsequent delivery month. Section 12(1) of the *Petroleum Marketing Regulation* provides:

**12(1)** If there is an underdelivery balance at a battery for a delivery month, the Commission, by a notice given to the operator of the battery for that delivery month, may direct that the default under the agreement or agreements resulting from the deficient delivery be remedied by the delivery in kind to the Commission of crude oil in equal quantity and of like quality to the underdelivery balance

- (a) in the month in which the direction is given,
- (b) in a particular subsequent month, or
- (c) in instalments in 2 or more particular subsequent months,

whichever is specified in the direction.<sup>42</sup>

54. This provision reflects the principle that the Crown's right to and title to its royalty share continues to adhere to any oil extracted from the Crown's reserves under an agreement with a producer regardless of the period within which it is recovered.<sup>43</sup>

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<sup>41</sup> *Petroleum Marketing Act*, RSA 2000, c P-10, s. 19(1)(e)-(f) and (2)(a) [**Authorities, Tab 6**]

<sup>42</sup> *Petroleum Marketing Regulation*, AR 174/2006 s. 12(1) [**Authorities, Tab 7**]

<sup>43</sup> *Mines and Minerals Act*, RSA 2000, c M-17, s. 44 [**Authorities, Tab 3**]

55. If after a direction under section 12(1) of the *Petroleum Marketing Regulation*, the producer fails to deliver in accordance with that direction, the APMC is granted a discretion to either:
- a. continue to insist on delivery of the Crown's royalty share in kind,<sup>44</sup> or
  - b. charge the producer with a sum calculated in accordance with the regulation in compensation for the Crown's royalty share that was not delivered.<sup>45</sup>
56. The key to both section 12 and 13 of the *Petroleum Marketing Regulation* is that the provisions give the APMC the discretion on whether to convert the obligation to deliver the Crown royalty share in kind into an obligation to pay money. If APMC charges the producer with payment of money, the direction to deliver Crown royalty share under section 12(1) ceases to apply.<sup>46</sup>
57. In the case of Razor, the APMC has not exercised the discretion to charge Razor with an amount of money as a result of its failure to deliver the Crown royalty share. Nothing in the CCAA compels the APMC to exercise a discretion given to it under the *Petroleum Marketing Regulation* to convert the Crown's ownership of the Crown's royalty share of crude oil into a charge for an amount of money.
58. This principle was recognized by the Alberta Court of Appeal in *PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited*:
- It is true that this Board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It

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<sup>44</sup> Where the APMC determines to continue to insist on delivery in kind of the Crown's royalty share, section 12(2) of the *Petroleum Marketing Regulation* allows the APMC to include a number of months of deficiencies in a direction and section 12(3) allows the APMC to direct or consent to postponement of delivery in kind of all or part of the volume of royalty share to a later month or months *Petroleum Marketing Regulation*, AR 174/2006 s. 12(2)-(3) **[Authorities, Tab 7]**.

<sup>45</sup> *Petroleum Marketing Regulation*, AR 174/2006 s. 12-14 **[Authorities, Tab 7]**.

<sup>46</sup> *Petroleum Marketing Regulation*, AR 174/2006 s. 12(5) **[Authorities, Tab 7]**.

may, under Sections 91(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the Board has not done so in this case. Rather it is simply in the course of enforcing observance of a part of the general law of Alberta.<sup>47</sup>

59. APMC has acted similarly in this matter. It could charge Razor with the payment of an amount of money. It has not done so. APMC has directed that Razor deliver to it the Crown’s royalty share in the course of observance of the general law of Alberta (which requires producers deliver the Crown royalty share to APMC).

**C. RAZOR ENERGY DOES NOT HOLD THE CROWN’S ROYALTY SHARE IN A DEEMED STATUTORY TRUST**

60. The Crown’s royalty share is not property deemed to be held in trust through a provision of federal or provincial legislation. As described above, the Crown owns its royalty share absolutely under the *Constitution Act 1930* and under the terms of the *Mines and Minerals Act*, which make clear that its interest is that of an owner.

61. Section 37(1) of the CCAA<sup>48</sup> provides:

<b>Deemed trusts</b>	<b>Fiducies présumées</b>
37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, <b>property of a debtor company</b> shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision. [emphasis added]	37 (1) Sous réserve du paragraphe (2) et par dérogation à toute disposition législative fédérale ou provinciale ayant pour effet d’assimiler certains biens à des biens détenus en fiducie pour Sa Majesté, aucun <b>des biens de la compagnie débitrice</b> ne peut être considéré comme tel par le seul effet d’une telle disposition. [emphasis added]

<sup>47</sup> *PanAmericana de Bienes y Servicios v. Northern Badger Oil & Gas Limited*, 81 DLR (4th) 280 (1991) at para 34 [Authorities, Tab 19].

<sup>48</sup> *Companies’ Creditors Arrangement Act*, RSC, 1985, c C-36 [Authorities, Tab 9].

62. Section 37 applies to “property of a debtor company” being held in trust for Her Majesty. The Crown’s royalty share is not and never was the “property of the debtor” which was deemed by statute to be held for the Crown. It was always the property of the Crown.

63. At most, Razor is “a trustee or agent”<sup>49</sup> in respect of the Crown royalty share. This is not a deemed trust created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share.

64. If there is a trust, it exists independently of any statutory provision.<sup>50</sup>

**D. THE ORDER OF WHITLING J MADE FEBRUARY 28, 2024 DOES NOT APPLY TO THE DIRECTION ISSUED BY APMC UNDER SECTION 12 OF THE PETROLEUM MARKETING REGULATION**

“As a matter of principle, bankruptcy does not amount to a licence to disregard rules.”<sup>51</sup>

65. The direction made by the APMC under section 12 of the *Petroleum Marketing Regulation* is not a claim provable in a bankruptcy.

66. As set out above, APMC is enforcing and administering the *Petroleum Marketing Regulation* in directing Razor to deliver Crown property. APMC is acting in the public interest to enforce a public duty – Razor must deliver the Crown royalty share of production.

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<sup>49</sup> *Excel Energy Inc. v. Alberta*, 196 AR 67 (CA) at para 7 [**Authorities, Tab 12**].

<sup>50</sup> For example, the obligation of an agent to a principal for the property received as agent: Janis Sarra, Geoffrey B. Morawetz, L.W. Houlden, *The 2022-2023 Annotated Bankruptcy and Insolvency Act*, Carswell, 2023 at §5.82 [**Authorities, Tab 14**], or a constructive or resulting trust see for example, *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 SCR 795 at para 20; *Pettkus v. Becker*, [1980] 2 SCR 834 at pp. 847 and 848 [**Not reproduced**].

<sup>51</sup> *Orphan Wells Association v. Grant Thornton Ltd.*, 2019 SCC 5 at para 118 [**Authorities, Tab 16**].

67. Alternatively, section 11.1 of the CCAA exempts APMC's direction from the effect of Whitling J's order.

68. Section 11.1(1) of the CCAA<sup>52</sup> has a broad definition of a regulatory body:

<b>Meaning of regulatory body</b>	<b>Définition de organisme administratif</b>
<b>11.1 (1)</b> In this section, regulatory body means a person or body that has powers, duties or functions relating to the enforcement or administration of an Act of Parliament or of the legislature of a province and includes a person or body that is prescribed to be a regulatory body for the purpose of this Act.	<b>11.1 (1)</b> Au présent article, organisme administratif s'entend de toute personne ou de tout organisme chargé de l'application d'une loi fédérale ou provinciale; y est assimilé toute personne ou tout organisme désigné à ce titre par règlement.

APMC is a regulatory body within this definition.

69. Section 11.1(2) exempts regulatory bodies from orders made under section 11.02 of the CCAA.<sup>53</sup> It provides:

<b>Regulatory bodies — order under section 11.02</b>	<b>Organisme administratif — ordonnance rendue en vertu de l'article 11.02</b>
(2) Subject to subsection (3), no order made under section 11.02 affects a regulatory body's investigation in respect of the debtor company or an action, suit or proceeding that is taken in respect of the company by or before the regulatory body, other than the enforcement of a payment ordered by the regulatory body or the court.	(2) Sous réserve du paragraphe (3), l'ordonnance prévue à l'article 11.02 ne porte aucunement atteinte aux mesures — action, poursuite ou autre procédure — prises à l'égard de la compagnie débitrice par ou devant un organisme administratif, ni aux investigations auxquelles il procède à son sujet. Elles n'ont d'effet que sur l'exécution d'un paiement ordonné par lui ou le tribunal.

<sup>52</sup> *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s. 11.1(1) [**Authorities, Tab 9**].

<sup>53</sup> *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s. 11.1(2) [**Authorities, Tab 9**].

70. If a regulatory body falls within the ambit of section 11.1(2) of the CCAA, it may be made subject to an order under section 11.02, but only on application to the Court on notice to the regulatory body and on specific enumerated grounds. Razor has not made an application under s. 11.1(4).<sup>54</sup>
71. The APMC had no notice of the application before Whitling J. (and indeed, no awareness of the existence of the order until March 1, 2024).<sup>55</sup> Further, the order does not purport to override the effect of section 11.1(2).
72. APMC was exercising a power to enforce a public duty for the public interest in issuing the direction to Razor under section 12 of the *Petroleum Marketing Regulation* to deliver the Crown's royalty share to the APMC.
73. The core function of the APMC is to accept delivery of the Crown's royalty share of hydrocarbon substances and deal with the Crown's royalty share of the hydrocarbon substance in a manner that is, in the APMC's opinion, in the public interest of Alberta.<sup>56</sup> A direction under section 12 is essential to the execution of that purpose.
74. This is not a case like *AbitibiBowater Inc.* where the order at issue was a colourable attempt to create an obligation to pay money to the Crown. Here, the direction is focused solely on reserving to the Crown the Crown's own property.
75. The APMC has other regulatory functions that include the power to impose penalties.<sup>57</sup> Had this case involved the imposition of penalties under those

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<sup>54</sup> *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36, s. 11.1(4) [**Authorities, Tab 9**].

<sup>55</sup> Weicker Affidavit #1 at para 13.

<sup>56</sup> *Petroleum Marketing Act*, RSA 2000, c P-10, s. 15(2) [**Authorities, Tab 6**].

<sup>57</sup> For example, the APMC has the power under the *Petroleum Marketing Regulation*, AR 174/2006 to impose financial penalties in respect of inaccurate reporting (s. 7) and under or overdeliveries (s. 8) [**Authorities, Tab 7**].



provisions, the law in *AbitibiBowater Inc.* may have applied. However, this case is about the Crown's ownership of its royalty share.

**E. THERE IS NO CONFLICT BETWEEN THE *MINES AND MINERALS ACT* AND REGULATION AND THE CCAA OR BIA**

76. APMC is aware of the Notice of Constitutional Question issued by Razor on March 26, 2024. APMC reserves the right to respond to any constitutional arguments that may be filed by Razor or any other party in relation to that Notice.

77. There is no conflict between the *Mines and Minerals Act* and *Petroleum Marketing Regulation* and the CCAA or BIA. The Crown owns the Crown royalty share. Razor has no proprietary interest in the Crown royalty share.

78. APMC's application does not seek to re-order priorities amongst creditors, APMC only seeks to have the Court affirm the Crown ownership interest in the Crown royalty share and its rights as owner under the *Mines and Minerals Act*, *Petroleum Marketing Act* and *Petroleum Marketing Regulation*.

79. Where it is not necessary, the Court should not find a conflict. In *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5, the Supreme Court of Canada addressed the doctrine of paramountcy – "Conflict must be defined narrowly so that each level of government may act as freely as possible within its respective sphere of constitutional authority."<sup>58</sup>

80. APMC's authority to direct that a producer deliver the Crown royalty share does not conflict with the CCAA or BIA.

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<sup>58</sup> *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at para 66 [**Authorities, Tab 16**].

#### **PART 4: RELIEF SOUGHT**

81. APMC requests that this Court:

- a. declare that the Crown's claim to its royalty share is that of an owner and is not a claim provable under the BIA or CCAA;
- b. direct Razor to deliver to APMC as part of the Crown royalty production splits for the April 2024 delivery month, the Crown's royalty share in respect of the Respondents' January 2024 production;
- c. declare that by virtue of section 11.1 of the CCAA, the stay in paragraph 15 of the order of February 28, 2024, as extended, does not apply to the direction issued by the APMC on March 1, 2024; and
- d. award costs of this Application to APMC.

All of which is respectfully submitted this 2<sup>nd</sup> day of April, 2024.

#### **SHORES JARDINE LLP**



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## PART 5: TABLE OF AUTHORITIES

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4. *Petroleum Royalty Regulation*, 2009, AR 22/2008
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6. *Petroleum Marketing Act*, RSA 2000, c. P-10
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8. *Oil Sands Royalty Regulation*, AR 223/2008
9. *Companies' Creditors Arrangement Act*, RSC, 1985, c C-36
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12. *Excel Energy Inc. v. Alberta*, 196 AR 67 (CA)
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