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COURT

COURT OF KING'S BENCH OF ALBERTA,
IN BANKRUPTCY AND INSOLVENCY

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

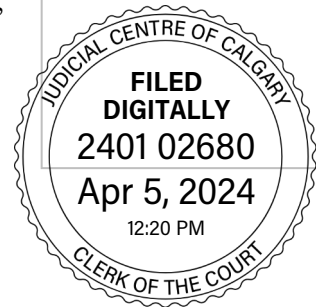
**BRIEF OF LAW AND ARGUMENT OF
ARENA INVESTORS LP**

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BENCH BRIEF OF ARENA INVESTORS LP
APPLICATION TO BE HEARD BY
THE HONOURABLE JUSTICE BURNS

April 10, 2024

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I. INTRODUCTION:

1. This brief of law is submitted by Arena Investors LP (“**Arena**”) in its capacity as a secured creditor of Razor Energy Corp. (“**Razor**”), Razor Holdings GP Corp. and Blade Energy Services Corp. (collectively the “**Respondents**”) in respect of the application filed by the Alberta Petroleum Marketing Commission (“**APMC**”) on March 6, 2024. The application concerns the intersection between two statutory schemes: Alberta’s regime for the reservation of the Crown’s royalty share in minerals, and the *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 (“**CCAA**”).¹
2. The APMC seeks an order directing Razor to deliver to the Crown its royalty share in Razor’s production of crude oil in January 2024 (the “**January 2024 Royalty Shares**”). It does so pursuant to a number of provincial statutes, which it argues entitle it to payment in kind notwithstanding the stay of proceedings established by the ongoing insolvency proceedings and with disregard to the order of priorities in insolvency proceedings.
3. Razor is engaged in the business of the development and production of oil and gas.² As a result, it is ordinarily obligated via provincial legislation to deliver to the Crown its royalty share. However, due to the imminent commencement of its insolvency proceedings, the royalty obligations owing to the Crown in respect of Razor’s January 2024 production were not delivered to the APMC by Razor.³ Subsequently, on January 30, 2024, the Respondents commenced formal insolvency proceedings by filing notices of intention to make proposals (the “**Proposal Proceedings**”) to their creditors pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“**BIA**”), which imposed a stay of proceedings respecting the Respondents and their property. On February 28, 2024, the Respondents converted their Proposal Proceedings to proceedings under the CCAA, with an initial order being granted the same day (the “**Initial Order**”). Amongst other things, the Initial Order continued the stay of proceedings preventing parties from commencing or continuing proceedings or exercising any rights or remedies against the Respondents. That stay has since been

¹ *Companies’ Creditors Arrangement Act*, RSC 1985, c C-36 [CCAA] [TAB 1].

² Affidavit #1 of Doug Bailey, sworn February 20, 2024 [First Bailey Affidavit] at para 15.

³ Second Report at para 19.

extended on two further occasions and remains in place until May 3, 2024.⁴ Despite this stay, on March 1, 2024, the APMC directed Razor Energy to deliver in kind to APMC, as part of the February 2024 royalty deliveries, crude oil of an equal quantity and like quality to the January 2024 Royalty Shares.⁵

4. While the APMC characterizes its claim as an ownership claim, it is fundamentally seeking relief in relation to a pre-filing claim which has been stayed by virtue of the Respondents' insolvency proceedings. The APMC, utilizing the enforcement mechanisms available to it under provincial legislation, is seeking recovery of the January 2024 Royalty Shares in kind. They have not yet taken the enforcement step available to them of demanding payment of the January 2024 Royalty Shares in equivalent monetary value, presumably because they recognize that that claim would be subject to the stay of proceedings and insolvency priority regime. Further, they assert that their claim is not a trust claim, likely because any such trust claim would be reduced to an unsecured claim under the CCAA.
5. Whether the APMC is seeking payment in kind or in equivalent monetary value is a distinction without a difference. The fact remains that they are seeking to enforce a pre-filing claim, which is presently stayed. Further, since the January 2024 Royalty Shares are no longer in Razor's possession, the APMC cannot assert its *in rem* right to recover its royalty share.
6. The APMC cannot establish either a statutorily-deemed trust nor a trust arising via operation of law, nor can it be asserted that the APMC does not constitute a creditor seeking enforcement of payment within the meaning of the CCAA. As a result, the APMC's claim is subject both to the stay of proceedings and the insolvency claims process. Finally, there is no principled basis to allow the APMC claim to proceed notwithstanding the stay of proceedings, as doing so would undermine the objectives of the single-proceeding model set out by Canada's insolvency legislation.

⁴ Second Report to the Court of FTI Consulting Canada Inc., in its Capacity as Monitor of Razor Energy Corp., Razor Holdings GP Corp., and Blade Energy Services Corp., dated March 18, 2024 [Second Report] at paras 3-5.

⁵ First Report to the Court of FTI Consulting Canada Inc., in its Capacity as Monitor of Razor Energy Corp., Razor Holdings GP Corp., and Blade Energy Services Corp., dated March 5, 2024 [First Report] at para 22.

7. Arena therefore respectfully requests that APMC's application for delivery of the Crown's royalty share of Razor's January 2024 production be dismissed.

II. ISSUES:

8. The application brought by APMC requires consideration of the following issues:
 - (a) What type of interest is held by the Crown in respect of the January 2024 Royalty Shares?
 - (b) Does the APMC constitute a creditor within the meaning of the CCAA, such that its claim is subject to the stay of proceedings and the priority regime under the Act?

III. LAW & ANALYSIS:

a. Background

9. The APMC advances its argument regarding the January 2024 Royalty Shares according to the statutory scheme set out by the *Mines and Minerals Act*, RSA 2000, c M-17 (the "*Mines and Minerals Act*"),⁶ the *Petroleum Marketing Act*, RSA 2000, c P-10 (the "*Marketing Act*"),⁷ and the *Petroleum Marketing Regulation*, Alta Reg 174/2006 (the "*Marketing Regulation*").⁸
10. Section 86(1) of the *Mines and Minerals Act* mandates that a royalty share of crude oil recovered from petroleum pursuant to agreements granting rights to minerals or geothermal resources issued under the Act must be delivered to the APMC.⁹ The Act further specifies that such royalties shall be deliverable to the Crown in kind.¹⁰ Finally, the *Mines and Minerals Act* also establishes an ownership interest on behalf of the Crown in its royalty share, even prior to delivery. Section 35 of the Act states:

⁶ *Mines and Minerals Act*, RSA 2000, c M-17 [*Mines and Minerals Act*] [TAB 2].

⁷ *Petroleum Marketing Act*, RSA 2000, c P-10 [*Marketing Act*] [TAB 3].

⁸ *Petroleum Marketing Regulation*, Alta Reg 174/2006 [*Marketing Regulation*] [TAB 4].

⁹ *Mines and Minerals Act*, s 86(1) [TAB 2].

¹⁰ *Mines and Minerals Act*, s 34(3)(a) [TAB 2].

(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.

(3) If under the regulations or a contract or agreement under section 9 the quantity of the royalty on a mineral is calculated on the basis of all or any of the products obtained by processing that mineral or by reprocessing the products obtained by processing that mineral, unless otherwise provided a reference to the mineral in any provision in this Act or the regulations respecting the royalty on the mineral shall be read as a reference to the product obtained by the processing or reprocessing, as the case may be.

11. The *Marketing Act* and *Marketing Regulation* together provide the framework under which the APMC may secure and enforce delivery of the royalty shares owed to it under the *Mines and Minerals Act*. Section 12 of the *Marketing Regulation* permits the APMC to direct producers to make up any shortfall in royalty deliveries. While the statutory scheme generally contemplates that royalties are to be delivered in kind, the *Marketing Regulation* also allows the APMC to charge producers with payment in a sum equivalent to the underdelivered royalty share.¹¹
12. In contrast to these obligations under the royalty legislative scheme, the CCAA provides that following an application by a debtor company, a court may make an order staying any further proceedings in any action, suit or proceeding against the company.¹² The Initial Order, as amended and extended, contains provisions mandating such a stay.¹³ In particular, section 14 provides that during the stay period,

¹¹ *Marketing Regulation*, ss 12(4), 13, 14 [TAB 4].

¹² CCAA, s 11.02 [TAB 1].

¹³ Initial Order, s 15; Amended Order, ss 14-15.

no proceeding or enforcement process in any court (each, a “**Proceeding**”) shall be commenced or continued against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.

13. Furthermore, section 15 provides in part that:

During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being “**Persons**” and each being a “**Person**”), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court [...]

14. The CCAA is clear that it is binding upon the Crown.¹⁴ Moreover, section 38 of the CCAA states that all claims of the Crown, including secured claims, rank as unsecured claims for the purposes of CCAA proceedings.¹⁵ This rule is only subject to certain narrowly defined exceptions. One pertains to income tax and pension legislation, none of which are relevant in the present circumstances.¹⁶ Another exception to the rule is applicable to actions, suits or proceedings undertaken by regulatory bodies in respect of a debtor company, so long as those proceedings do not constitute the enforcement of a payment ordered by that regulatory body or the court.¹⁷
15. As a result, in order for the APMC to circumvent the stay of proceedings and assert its claim to the Royalty Share, it must demonstrate either (i) that the APMC constitutes a regulatory body which is not acting as a creditor seeking to enforce a payment it had ordered to be made, or (ii) that it owns the in-kind delivery of the royalty share it is seeking, which would prevent the application of the CCAA proceedings to that property.

¹⁴ CCAA, s 40 [TAB 1].

¹⁵ CCAA, s 38(1) [TAB 1].

¹⁶ CCAA, s 38(2)-(3) [TAB 1].

¹⁷ CCAA, s 11.1 [TAB 1].

16. As will be demonstrated below, neither of these propositions has been satisfied.

b. The Crown's Interest in the January 2024 Royalty Shares Constitutes an Unsecured Claim

17. The APMC contends that the January 2024 Royalty Share does not constitute a payment owed to it, but rather that it is property owned by the Crown. Therefore, per the APMC, it merely seeks delivery of Crown property, and thus does not infringe the stay of proceedings.

18. The APMC's position cannot stand. First, the APMC does not seek to recover the January 2024 Royalty Shares; rather it seeks to receive an in-kind payment of crude oil as compensation for the January 2024 Royalty Shares that were supposed to have been delivered in February 2024. The January 2024 Royalty Shares have, in all likelihood, been delivered to third-party marketers, and are unrecoverable. As a result, the APMC cannot enforce its *in rem* rights, contrary to what it asserts in its submissions. As a result, the APMC's interest constitutes a claim against a debtor which is in turn captured by the stay of proceedings and the priority regime.

19. Second, the language contained in the *Mines and Minerals Act* and associated legislation is not sufficient to establish a statutory trust on behalf of the Crown.

20. Third, even if it is accepted that the Crown has a statutory trust, that trust is negated by operation of the CCAA.

i. The Crown does not own the Oil Production it seeks to Recover

21. The *Mines and Minerals Act* and associated legislation do not establish an ownership interest on the part of the Crown which is applicable in these circumstances. The Crown's royalty share is a tangible, physical quantity of oil which is determined on a monthly basis, as opposed to a credit or debit applied to a lessee's account. The Crown is reserved a royalty share on any mineral recovered pursuant to an agreement.¹⁸ The royalty share of oil

¹⁸ *Mines and Minerals Act*, s 33 [TAB 2].

production is calculated at the point of first measurement, and is delivered at the point where the royalty share is calculated.¹⁹ When crude oil recovered pursuant to an agreement is delivered to a field delivery point during a delivery month, the Crown's royalty share of that crude oil is deemed to be delivered first.²⁰

22. When discussing the January 2024 Royalty Shares, what is truly being referenced is that first specific physical quantity of oil calculated at Razor's first point of measurement, and which ought to have been delivered during that month. This is the tangible, physical quantity of oil in which the Crown holds a ownership for Razor's January 2024 production.
23. However, Razor no longer possesses the January 2024 Royalty Shares, because it was likely transferred to third party oil marketers long ago, albeit in violation of section 11 of the *Mines and Minerals Act*. Although the Crown maintains ownership in the January 2024 Royalty Shares until such time as they are disposed of by or on behalf of the Crown,²¹ the January 2024 Royalty Shares have been transferred to arm's length third parties, and are now untraceable and unrecoverable.
24. In other words, Razor converted the January 2024 Royalty Shares. These royalty shares cannot be returned or otherwise provided to APMC on behalf of the Crown. This conversion took place independently from any alleged authority under the CCAA.
25. This does not mean that the APMC and the Crown are without recourse to recover damages arising from a lessee's failure to deliver the Crown's in-kind royalty share. Sections 12 and 13 of the *Marketing Regulation* permit the APMC to direct an operator to remedy a deficient delivery by making a future delivery in kind to the APMC of crude oil in equal quantity and of like quality to the under-delivery balance, or to make a payment of money in lieu. Further, at common law, APMC may claim damages against Razor for the value of the converted January 2024 Royalty Shares.²²

¹⁹ *Mines and Minerals Act*, s 34(3) [TAB 2].

²⁰ *Marketing Regulation*, s 2(3)(b) [TAB 4].

²¹ *Mines and Minerals Act*, s 35(1) [TAB 2].

²² Philip Osborne, *The Law of Torts*, 6th ed (Irwin Law, Toronto: 2020) at 328 [TAB 5].

26. However, these remedies do not create new property rights in favour of the Crown. Rather, they simply provide statutory mechanisms for the APMC to recover damages on the Crown's behalf regarding under-deliveries of its in-kind royalty share, either by payment in-kind or by payment of money, in addition to any common law rights.
27. APMC implicitly acknowledges that it is not enforcing an *in rem* right as against the January 2024 Royalty Shares because it characterizes its efforts to recover the deficiency as a "make up [for the] underdelivery balance."²³
28. That is, APMC is, in fact, seeking compensation for the underdelivery balance rather than seeking the return of its property. In this regard, the Crown and APMC are in no different position than any other creditor, such as a lender who is entitled to repayment under a credit agreement, but who is subject to the stay provisions of the CCAA.
29. The APMC is effectively asserting that the Crown enjoys a "floating" ownership right over all minerals produced under an agreement so as to ensure that the Crown receives its royalty share. This is completely inconsistent with the provisions of the *Mines and Minerals Act* and the *Marketing Regulation*, which clearly articulate specific and tangible portions of minerals that form the Crown's royalty share.
30. Had the legislature intended to provide the Crown with a "floating" ownership right over all minerals produced under an agreement, it could have used clear language deeming such ownership rights. The legislature chose not to do so, and instead provided statutory mechanisms to direct an operator to compensate the Crown for any royalty share deficiency, either by payment of money or in-kind, that don't require commencement of a legal action. These mechanisms give rise to a claim against a debtor in a CCAA proceeding, and are therefore captured by the stay provided by the CCAA.
31. Contrary to the submissions of the APMC, section 44 of the *Mines and Minerals Act* does not reflect the principle that the Crown's right to and title to its royalty share continues to

²³ Applicant's Brief at para 31(b).

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.²⁴

32. Rather, section 44 of the *Mines and Minerals Act* provides as follows:

44. Implied reservations to Crown

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 in right of Alberta.

33. In the context of the case at hand, the term "disposition" is defined under the *Mines and Mineral Act* to mean the mineral leases granted by the Crown in favour of Razor.²⁵
34. Section 44 of the *Mines and Minerals Act* simply provides that the reservations owned by the Crown in right of Alberta are implied into every crown mineral lease agreement that Razor holds. In its materials Razor accepts that it must reserve a royalty share for the Crown under its agreements, and it has committed to paying all post-filing royalty shares. This section, however, does not impress the Crown's ownership on all produced oil to secure the delivery of the January 2024 Royalty Shares. In this regard, the interpretation advanced by the APMC is in direct conflict with the other provisions of the *Mines and Minerals Act* and the *Marking Regulation* that specifically identify the portion of produced oil that forms the royalty share and is owned by the Crown.
35. Moreover, any claim advanced by the APMC is subject to the priority regime for distributions. As stated above, Arena is a secured creditor of Razor and Razor Holdings GP Corp. In addition, Razor, Razor Holdings GP Corp, and another related entity titled Razor Royalties Limited Partnership are all parties to a Second Amended and Restated Term Loan Agreement dated June 16, 2023 (the "**Arena Loan Agreement**") with Arena via its administrative agent, 405 Dolomite LLC. That agreement made available three senior secured term loan facilities.²⁶

²⁴ Applicant's Brief at para 54.

²⁵ *Mines and Minerals Act*, at s. 1(f) & 1(a) [TAB 2].

²⁶ First Bailey Affidavit at para 52.

36. The Arena Loan Agreement is secured in favour of 405 Dolomite LLC, as agent, by, among other things, a \$50,000,000.00 secured debenture granted by Razor and Razor Royalties Limited Partnership with respect to all of the respective petroleum and natural gas interests, debenture pledge agreements granted by Razor and Razor Royalties Limited Partnership with respect to such debentures, and securities pledges granted by Razor with respect to one hundred percent of the limited partnership units in Razor Royalties Limited Partnership and one hundred percent of the common shares in Razor Holdings GP Corp.²⁷ Moreover, Arena, through 405 Dolomite LLC, as agent, has registered a security agreement for all of the present and after-acquired property of Razor Royalties Limited Partnership, Razor Holdings GP Corp., and Razor.²⁸
37. In contrast, the APMC has no registered security interests within the Alberta Personal Property Registry in favour of Razor or any of the Applicants, as of January 2024.²⁹ As a result, the APMC's claim is subject to the priority regime, and by extension, Arena's registered security interests.

ii. The Statutory Scheme does not Establish a Statutory Trust in Favour of the Crown

38. Furthermore, the *Mines and Minerals Act* and associated legislation does not contain sufficiently explicit wording to establish a statutory trust in the January 2024 Royalty Shares on behalf of the Crown.
39. Applying the 'modern approach' to statutory interpretation, which requires that the words of a statute must be read "in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament",³⁰ to the text of the *Mines and Minerals Act* and associated legislation does not suggest that the legislative scheme was intended to establish a statutory trust for the benefit of the Crown in regard to the January 2024 Royalty Shares. Any language referring to a trust is absent from the relevant provisions of that legislation, as set out above.

²⁷ First Bailey Affidavit at para 54.

²⁸ Exhibits 'N', 'P', and 'Q' to the First Bailey Affidavit.

²⁹ Exhibits 'N', 'O', 'P', and 'Q' to the First Bailey Affidavit.

³⁰ *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193 [TAB 6].

40. This conclusion is reinforced when section 35 of the *Mines and Minerals Act* is compared to provisions which have been recognized to establish a statutorily-deemed trust in favour of the Crown. For example, sections 227(4) and (4.1) of the *Income Tax Act*, RSC 1985, c 1 (5th Supp) (“**ITA**”)³¹ state that:

(4) Every person who deducts or withholds an amount under this Act is deemed, notwithstanding any security interest (as defined in subsection 224(1.3)) in the amount so deducted or withheld, to hold the amount separate and apart from the property of the person and from property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for the security interest would be property of the person, **in trust for Her Majesty** and for payment to Her Majesty in the manner and at the time provided under this Act.

(4.1) Notwithstanding any other provision of this Act, the *Bankruptcy and Insolvency Act* (except sections 81.1 and 81.2 of that Act), any other enactment of Canada, any enactment of a province or any other law, where at any time an amount deemed by subsection 227(4) to be **held by a person in trust for Her Majesty** is not paid to Her Majesty in the manner and at the time provided under this Act, property of the person and property held by any secured creditor (as defined in subsection 224(1.3)) of that person that but for a security interest (as defined in subsection 224(1.3)) would be property of the person, equal in value to the amount so deemed to be held in trust is deemed

(a) to be held, from the time the amount was deducted or withheld by the person, separate and apart from the property of the person, **in trust for Her Majesty** whether or not the property is subject to such a security interest, and

(b) to form no part of the estate or property of the person from the time the amount was so deducted or withheld, whether or not the property has in fact been kept separate and apart from the estate or property of the person and whether or not the property is subject to such a security interest

and is property beneficially owned by Her Majesty notwithstanding any security interest in such property and in the proceeds thereof, and the proceeds of such property shall be paid to the Receiver General in priority to all such security interests.³²

³¹ *Income Tax Act*, RSC 1985, c 1 (5th Supp) [ITA] [TAB 7].

³² ITA, ss 227(4)-(4.1) [emphasis added] [TAB 7].

41. In contrast, the *Mines and Minerals Act*, *Marketing Act* and *Marketing Regulation* do not possess such explicit language.

iii. Even if a Statutory Trust is Present it is Negated by the CCAA

42. Finally, even if it is accepted that the relevant statutory scheme establishes a statutory trust in favour of the Crown, akin to that established by provisions such as sections 227(4) of the ITA, that statutory trust is rendered inoperative by section 37(1) of the CCAA, which restricts the applicability of statutorily-deemed trusts in proceedings under that Act. That provision states:

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, property of a debtor company 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.³³

43. Subsection (2) establishes certain exceptions relating to income tax, pension, and employment insurance legislation – for example, sections 227(4) and (4.1) of the ITA are explicitly exempted.³⁴
44. However, in contrast to the statutory trusts established via the ITA, the relevant provisions of the *Mines and Minerals Act* and other legislation are not expressly exempted from the operation of section 37 of the CCAA. Accordingly, it must be examined whether the Crown would possess a trust in the January 2024 Royalty Shares apart from the operation of the *Mines and Minerals Act* and other relevant legislation. This requirement is imposed both by statute and via jurisprudence.³⁵ The results of such an examination clearly indicate that the requirements of a trust arising via operation of law are not met in these circumstances.
45. In *Henfrey*, the Supreme Court analyzed whether a provincial statute purporting to create a priority for unpaid sales taxes via a statutory-deemed trust was effective to remove the unpaid taxes in question from the property of the bankrupt under the BIA. There, the

³³ CCAA, s 37(1) [TAB 1].

³⁴ CCAA, s 37(2) [TAB 1].

³⁵ CCAA, s 37(1) [TAB 1]; [1989] 2 SCR 24, 1989 CarswellBC 351 [*Henfrey* cited to CarswellBC] [TAB 8].

majority of Justices of the Supreme Court held that a provincial statutorily-deemed trust was only effective under the BIA if that deemed trust met the preconditions of a trust arising through law.³⁶ According to the majority, to hold otherwise would be to permit the provinces to each legislate their own priorities, creating a different scheme of distribution from province to province.³⁷ The same holds true in regard to the CCAA.

46. Accordingly, in order for the APMC to demonstrate that the January 2024 Royalty Shares are held in trust by Razor for the benefit of the APMC, it would need to demonstrate the requirements for a trust arising under general principles of law. While the APMC does not appear to advance a trust claim in its materials filed with the Court, that is in effect the remedy it is seeking, as well as what the legislation attempts to accomplish. Further, the APMC states in its brief at paragraph 64 that “if there is a trust, it exists independently of any statutory provision.”

47. The common law test for establishing a trust requires the ‘three certainties’. These are certainty of intention, certainty of objects, and certainty of subject matter.³⁸ The Court of Appeal of Alberta has previously confirmed that in most statutory trusts,

only the third certainty will be in play. Certainty of intention and certainty of objects will usually be satisfied by the terms of the statute. If the statute uses the word “trust”, the intention is clear. Usually the intended beneficiary of the trust will also be obvious. The only potential for uncertainty is over the assets that are covered by the trust.³⁹

48. Here, both certainty of intention and certainty of subject matter are in question. As stated above, the statutory scheme does not explicitly state that the Crown’s royalty shares are to be held in trust, casting the requirement of certainty of intention in doubt. As the Supreme Court has stated, “[w]here Parliament has sought to protect certain Crown claims through statutory deemed trusts and intended that these deemed trusts continue in insolvency, it has

³⁶ *Henfrey* at paras 41-44 [TAB 8].

³⁷ *Henfrey* at para 42 [TAB 8].

³⁸ Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters’ Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021) at 5.I [TAB 9]; *Iona Contractors Ltd v Guarantee Company of North America*, 2015 ABCA 240 [*Iona*] at para 34 [TAB 10].

³⁹ *Iona* at para 36 [citations omitted] [TAB 10].

legislated so explicitly and elaborately.”⁴⁰ Although this statement was made in regard to a federal statute, it holds equal force here.

49. Furthermore, significant issues arise when assessing whether certainty of subject matter is present. This requirement mandates that “[f]or a trust to be validly created, it must also be possible to identify clearly the property that is to be subject to the trust.”⁴¹
50. In *Henfrey*, the Supreme Court found that the provincial statutory trust regarding tax proceeds was ineffective due to uncertainty of subject matter. Fundamentally, this was due to the significant comingling of the purported trust assets with other assets. As the majority explained,

At the moment of collection of the tax, there is a deemed statutory trust. At that moment the trust property is identifiable and the trust meets the requirements for a trust under the principles of trust law. The difficulty in this, as in most cases, is that the trust property soon ceases to be identifiable. The tax money is mingled with other money in the hands of the merchant and converted to other property so that it cannot be traced. At this point it is no longer a trust under general principles of law.⁴²

51. Similarly, the Supreme Court emphasized the importance of the requirement for certainty of subject matter when analyzing statutory trusts in *Canada v Canada North Group Inc* (“*Canada North*”).⁴³ There, Justice Côté wrote that “[w]ithout certainty of subject matter, equity cannot know which property the debtor has a fiduciary obligation to maintain in the beneficiary’s interest”, thus preventing a finding that a trust arising through operation of law was present.⁴⁴ Furthermore, although the Supreme Court divided 3-2-3-1, three of the four justices who wrote reasons agreed that section 227(4.1) of the ITA, excerpted above, did not constitute a trust at law due to the inability to specify the exact subject matter of the trust, with Justice Moldaver, writing for himself, declining to comment on the issue.⁴⁵

⁴⁰ *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60 [*Century Services*] at para 45 [TAB 11].

⁴¹ Waters, Gillen & Smith at 5.III [TAB 9].

⁴² *Henfrey* at para 45 [TAB 8].

⁴³ 2021 SCC 30 [*Canada North*] [TAB 12].

⁴⁴ *Canada North* at para 51 [TAB 12].

⁴⁵ *Canada North* at paras 57, 120, 193, 255 [TAB 12].

52. The same considerations are at play here. No trust arises through application of the common law, because it is impossible to ascertain exactly what property is subject to that trust.
53. Accordingly, there is no basis to conclude that the Crown has a proprietary interest via trust law in the January 2024 Royalty Shares. As stated above, the APMC is simply seeking to enforce payment owed to it by Razor.

c. The APMC Constitutes a Creditor Within the Meaning of the CCAA

54. Based on the preceding discussion, the Crown's claim constitutes an attempt to enforce a debt or obligation. Therefore, it is subject to section 38 of the CCAA and accordingly is ranked as an unsecured claim, as there has otherwise not been any registration of a security interest that would elevate its claim pursuant to section 39 of the CCAA. In the present circumstances, there is no reason to allow the APMC to circumvent the stay established by the CCAA proceedings.
55. As stated above, the CCAA does provide an exception to the stay of proceedings applicable to certain actions undertaken by regulatory bodies. However, that exception is narrow, and explicitly does not include the enforcement of payment where the regulatory body seeks to enforce its rights as a creditor. The relevant provision states:

11.1(1) 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.

(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.**

(3) On application by the company and on notice to the regulatory body and to the persons who are likely to be affected by the order, the court may order that subsection (2) not apply in respect of one or more of the actions, suits or proceedings taken by or before the regulatory body if in the court's opinion

(a) a viable compromise or arrangement could not be made in respect of the company if that subsection were to apply; and

(b) it is not contrary to the public interest that the regulatory body be affected by the order made under section 11.02.

(4) If there is a dispute as to whether a regulatory body is seeking to enforce its rights as a creditor, the court may, on application by the company and on notice to the regulatory body, make an order declaring both that the regulatory body is seeking to enforce its rights as a creditor and that the enforcement of those rights is stayed.⁴⁶

56. Arena accepts that the definition of regulatory body is broad such that it captures the APMC. However, Arena submits that the APMC is not entitled to an exception to the stay of proceedings pursuant to section 11.1(2) as the APMC is in fact attempting to enforce payment against Razor.

57. When assessing whether a regulatory body is acting as a creditor and attempting to enforce a payment, the applicable test is that set out by the Supreme Court in *Newfoundland and Labrador v AbitibiBowater Inc* (“*Abitibi*”).⁴⁷ Per that decision, three requirements must be present in order to establish that an order issued by a regulatory agency is in fact a monetary claim subject to the claims process. First, there must be a debt, liability or an obligation to a creditor. Second, the debt, liability or obligation must be incurred before the debtor becomes bankrupt. Third, it must be possible to attach a monetary value to the debt, liability, or obligation.⁴⁸

58. In this case, the second and third requirements will be analyzed first. In regard to the second requirement, there is no dispute that the APMC’s claim relating to the January 2024 Royalty Shares arose prior to the commencement of insolvency proceedings by Razor.

59. Turning to the third requirement, as to whether a monetary value may be attached to the debt, liability or obligation, the Supreme Court explained in *Abitibi* that when assessing this branch of the test, “the question is whether orders that are not expressed in monetary

⁴⁶ CCAA, s 11.1 [headings omitted and emphasis added] [TAB 1].

⁴⁷ 2012 SCC 67 [*Abitibi*] [TAB 13].

⁴⁸ *Abitibi* at para 26 [TAB 13].

terms can be translated into such terms.”⁴⁹ Accordingly, where a regulatory body claims an amount owing at a later date and frames its order in monetary terms, there is no determination to be made by the court as the requirement has clearly been met.⁵⁰ This is squarely the case here. It is evident that a monetary value may be assigned to the January 2024 Royalty Shares – this is expressly contemplated by sections 12(4) and 13 of the *Marketing Regulation*, which state that the APMC may charge producers a monetary sum equivalent to the amount of undelivered royalties owed.⁵¹ Those provisions also explicitly set out how that monetary value may be determined. For example, section 13(1) states that:

If there is an underdelivery balance at a battery for a delivery month, the Commission, in a monthly statement sent to the operator of the battery, may charge the operator with the payment to the Commission of an amount of money calculated by multiplying the underdelivery balance by the Commission’s field price for that underdelivery balance for that month.⁵²

As a result, the third branch of the *Abitibi* test is satisfied, and per the Supreme Court, there is accordingly no need to consider the “sufficient certainty” portion of the third requirement to the test.⁵³

60. Finally, the jurisprudence also indicates that the first step of the test is also met in these circumstances. The APMC is acting as a creditor of Razor, and does not fall under the exception outlined by the Supreme Court in *Orphan Well Association v Grant Thornton Ltd* (“*Redwater*”).⁵⁴
61. In *Redwater*, the Supreme Court of Canada indicated that in certain circumstances under the *Abitibi* test, a regulatory body will be acting in a regulatory capacity regarding a debtor company rather than as a creditor, thereby exempting that regulatory body’s claims from the claim process. Per the majority of the Court, this occurs where the regulatory body is “acting in a *bona fide* regulatory capacity and does not stand to benefit financially.”⁵⁵ Thus,

⁴⁹ *Abitibi* at para 30 [TAB 13].

⁵⁰ *Abitibi* at para 30 [TAB 13].

⁵¹ *Marketing Regulation*, ss 12(4), 13 [TAB 4].

⁵² *Marketing Regulation*, s 13(1) [TAB 4].

⁵³ *Abitibi* at para 30 [TAB 13].

⁵⁴ 2019 SCC 5 [*Redwater*] [TAB 14].

⁵⁵ *Redwater* at para 128 [TAB 14].

where a regulatory body seeks to enforce duties which are owed to the public at large, and which are not based upon the financial gain of the regulator or the government, it may be found that the regulatory body is not acting as a creditor under the *Abitibi* test.⁵⁶ For example, the majority stated in regard to the environmental reclamation obligations at issue in *Redwater* that “[i]t is the public, not the Regulator or the General Revenue Fund, that is the beneficiary of those environmental obligations; the province does not stand to gain financially from them.”⁵⁷

62. Subsequent applications of *Redwater* where a regulatory body was found not to constitute a creditor for the purposes of the *Abitibi* test have overwhelmingly been limited to the environmental context.⁵⁸ This is because such environmental obligations are owed to the public-at-large, and do not have an underlying financial motivation.
63. In contrast, the duties which the APMC seeks to enforce in this case are squarely financial in nature. The collection of the Crown’s royalty share is not analogous to the obligations considered in decisions such as *Redwater*, *Eye Hill*, *Mantle*, *Manitok*, and *Trident*. Enforcement of payment of the January 2024 Royalty Shares, whether in kind or for money in lieu of, does not approach the broad public considerations encompassed by environmental remediation. Instead, the province, via the APMC, stands to gain financially from the claim advanced by the APMC. Moreover, financial gain is the primary, if not the only, motivation for the royalty share statutory scheme.
64. As a result, the APMC constitutes a creditor within the meaning of the *Abitibi* test, and accordingly its claim is stayed pursuant to section 11.1 of the CCAA.

⁵⁶ *Redwater* at para 135 [TAB 14].

⁵⁷ *Redwater* at para 122 [emphasis added] [TAB 14].

⁵⁸ *Eye Hill (Rural Municipality) v Saskatchewan*, 2023 SKCA 120 [*Eye Hill*] [TAB 15]; *Re Mantle Materials Group, Ltd*, 2023 ABKB 488 [*Mantle*], leave to appeal to ABCA refused, 2023 ABCA 302 [TAB 16]; *Manitok Energy Inc (Re)*, 2022 ABCA 117 [*Manitok*] [TAB 17]; *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839 [*Trident*] [TAB 18].

IV. CONCLUSION:

65. APMC is a Crown agency that, among other things, collects the Crown's royalty share of oil production. It does not explore or produce crude oil on its own, but rather, it collects the Crown's royalty share from third parties, such as Razor, who are permitted to extract crude oil pursuant to mineral lease agreements.
66. The APMC's submissions, when viewed in their entirety, essentially describe an agency or trust relationship between the Crown and Razor with respect to the production, collection and delivery of the Crown's royalty share; however, the APMC avoids characterizing its claim as a trust claim, and attempts to skip the priority queue by asserting a proprietary claim to recover unpaid royalty amounts, likely because any trust claim is doomed to fail by operation of the CCAA.
67. The APMC's creative attempt to recharacterize an unsecured damages claim as a proprietary claim must also fail. The crude oil that it owns has been transferred to arm's length third parties, and it has no property in the in-kind crude oil payment that it seeks as compensation for the royalty share payment deficiency.
68. The claim for the January 2024 Royalty Shares is subject to the stay of proceedings, and there is no principled basis by which that stay of proceedings should be lifted with respect to the APMC claim. The Supreme Court has previously stressed the importance of the single-proceeding model within insolvency, stating that this model avoids the inefficiency and chaos created by individual proceedings to recover claims commenced by individual debtors.⁵⁹ Permitting the APMC's claim regarding the January 2024 Royalty Shares to proceed notwithstanding the stay of proceedings would undermine these important legislative objectives. Arena submits that it would also undermine lender confidence in Alberta's oil and gas industry more generally, by creating yet another obligation that would in effect have priority over both secured and unsecured creditors alike.
69. For the reasons set out above, Arena requests that this Honourable Court grant the relief sought and dismiss the APMC's application regarding the January 2024 Royalty Shares.

⁵⁹ *Century Services* at para 22 [TAB 11].

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 4TH DAY OF APRIL, 2024.

FASKEN MARTINEAU DUMOULIN LLP

Per: 

Jessica L. Cameron/Anthony Mersich
Solicitor for the Applicants

LIST OF AUTHORITIES

1. *Companies' Creditors Arrangement Act*, RSC 1985, c C-36.
2. *Mines and Minerals Act*, RSA 2000, c M-17.
3. *Petroleum Marketing Act*, RSA 2000, c P-10.
4. *Petroleum Marketing Regulation*, Alta Reg 174/2006.
5. Philip Osborne, *The Law of Torts*, 6th ed (Irwin Law, Toronto: 2020).
6. *Rizzo & Rizzo Shoes Ltd (Re)*, [1998] 1 SCR 27 at para 21, 154 DLR (4th) 193.
7. *Income Tax Act*, RSC 1985, c 1 (5th Supp).
8. *British Columbia v Henfrey Samson Belair Ltd*, [1989] 2 SCR 24, 1989 CarswellBC 351.
9. Donovan WM Waters, Mark R Gillen & Lionel D Smith, *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Thomson Reuters Canada, 2021).
10. *Iona Contractors Ltd v Guarantee Company of North America*, 2015 ABCA 240.
11. *Century Services Inc v Canada (Attorney General)*, 2010 SCC 60.
12. *Canada v Canada North Group Inc*, 2021 SCC 30.
13. *Newfoundland and Labrador v AbitibiBowater Inc*, 2012 SCC 67.
14. *Orphan Well Association v Grant Thornton Ltd*, 2019 SCC 5.
15. *Eye Hill (Rural Municipality) v Saskatchewan*, 2023 SKCA 120.
16. *Re Mantle Materials Group, Ltd*, 2023 ABKB 488.
17. *Manitok Energy Inc (Re)*, 2022 ABCA 117.
18. *Orphan Well Association v Trident Exploration Corp*, 2022 ABKB 839.