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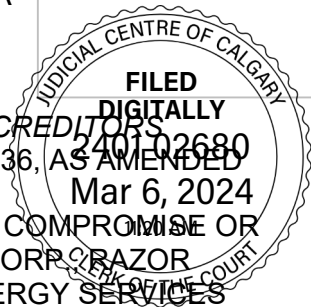
COURT COURT OF KING'S BENCH OF ALBERTA

JUDICIAL CENTRE CALGARY

Clerk's Stamp

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

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**SUPPLEMENTAL 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 M.E. BURNS**

**March 6, 2024 at 3:00 p.m.**

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## I. INTRODUCTION

1. The Alberta Petroleum Marketing Commissions (“**APMC**”) seeks, proprietary relief, by way of an Order: (i) directing Razor Energy Corp. (“**Razor Energy**”) to deliver, on or before March 12, 2024, additional crude oil to make up for the portion of Razor Energy’s pre-filing January production, that was not paid (the “**APMC Claim**”); (ii) determining that, by virtue of section 11.1 of the CCAA, the Stay granted in the within CCAA proceedings (the “**CCAA Proceedings**”) does not apply to the March 1, 2024 direction (the “**Direction**”) of APMC, directing Razor Energy, to pay, in kind, an amount equal to Razor Energy’s pre-filing missed January production (collectively, the “**APMC Relief**”). For clarity, there is no dispute regarding Razor Energy’s obligation to deliver any crude oil, post-filing.
2. The APMC Relief relates entirely to claims arising prior to the date Razor Energy commenced any formal insolvency proceedings, including the date of the Initial Order (as defined below). In short, APMC’s materials contain no articulable or legal basis as to why APMC has priority over Razor Energy’s creditors or its abandonment and reclamation obligations (“**AROs**”), in the face of the Supreme Court of Canada’s decision in *Orphan Well Association v Grant Thornton Ltd.*, 2019 SCC 5 (“**Redwater**”), other than the fact that, APMC is directing Razor Energy to pay its pre-filing obligations, in kind, rather than cash. The Direction to nominate further production, in February, to satisfy missed January production, has the sole purpose of constituting an enforcement of a missed payment; albeit in kind. The CCAA does not discriminate, payment in kind constitutes payment.

## II. ISSUES

3. The issues this Supplemental Bench Brief address are whether:
  - (a) the APMC application should be adjourned and heard on proper noticed, with full stakeholder participation;
  - (b) the APMC Claim constitutes a deemed trust;
  - (c) APMC’s deemed trust is not effective under the CCAA; and,
  - (d) the APMC Claim is stayed.

### **III. LAW AND ARGUMENT**

#### **A. The APMC Application should be adjourned.**

4. While a brief overview of the applicable statutory and legal framework has been provided below, there is no urgency to the relief sought by APMC. An adjournment of APMC's application is not prejudicial to APMC. APMC's claim for unpaid January production does not change as a result of the passage of time. If successful, APMC can be nominated a portion of subsequent production, rather than February's. The Applicants respectfully submit that it is unnecessary to hear or resolve the APMC Relief, at the Application, as:

- (a) there is no prejudice to APMC, if the determination of the APMC Relief, which relates to a pre-filing claim (as it relates to January 2024 production royalties) and is stayed pursuant to the Stay (as defined below), is deferred to a later date;
- (b) the Applicants are continuing to remit post-filing crown royalties, as is contemplated in the Applicants' cash flow forecast;
- (c) the APMC Relief seeks to enforce a payment obligation with respect to a statutory deemed trust, which is rendered inoperative under section 37 of the CCAA. There is no basis upon which the APMC Claim would entitle APMC to any proprietary (and preferential) remedy, as it seeks;
- (d) the APMC Relief seeks an immediate distribution of the Applicants' property, on account of a pre-filing obligation and such APMC Claim should be heard on notice to the full service list, including the Alberta Energy Regulator ("**AER**") and Orphan Well Association ("**OWA**") and the Applicants' creditors, all of whom have an interest in the outcome of the APMC Relief; and,
- (e) the Monitor has recommended that the parties be given additional time to attempt to reach a resolution to the dispute.

**First Report of the Monitor, dated March 5, 2024, at paras. 19 - 24 and Appendix "B".**

#### **B. The Royalty Framework is designed to collect payment, in kind or cash.**

5. As described below, the purpose of the statutory regime, including the provisions upon which APMC relies, is clearly intended to enforce payment, to APMC, on behalf of the Crown, of statutory royalty amounts.

6. Section 35 of the *Mines and Minerals Act*, R.S.A. 2000, c. M-17, states, in pertinent part:

**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.**

[...]

[Emphasis added]

*Mines and Minerals Act*, R.S.A. 2000, c. M-17 ("MMA"), at section 35 [Book of Authorities ("BOA")  
[BOA TAB 2]

7. The mechanism by which APMC, as the Crown agent, may enforce the obligations under sections 35 and 86 of the *Mines and Minerals Act*, is set out in the *Petroleum Marketing Regulation*, Alta. Reg. 174/2006 (the "**Marketing Regulation**").
8. Sections 12 and 13 of the Marketing Regulation create the following enforcement provision and state, in pertinent part:

**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.

[...]

(4) If a direction under subsection (1) is not complied with, then,

(a) to the extent that the quantity of crude oil delivered pursuant to the direction is less than the underdelivery balance or the aggregate of the underdelivery balances, as the case may be, specified in the direction, **the Commission may, in a monthly statement, charge the operator with the payment to the Commission of an amount of money equal to, whichever of the following amounts is shown in the monthly statement,**

(i) the amount calculated by multiplying the quantity of the undelivered royalty oil by the Commission's field price or respective field prices, as the case may be, for the delivery month or months in which the royalty oil was originally payable, or

(ii) the amount calculated by multiplying the quantity of the undelivered royalty oil by the Commission's field price or respective field prices, as the case may be, for the month or months in which the royalty oil should have been delivered in accordance with the direction,

[...]

(5) When an amount of money becomes owing to the Commission under subsection (4), the direction under subsection (1) ceases to apply.

#### **Money in lieu of royalty deficiency**

13(1) **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. [...]

[Emphasis added]

#### **Marketing Regulation, at sections 12 and 13 [BOA TAB 3]**

9. While the claim is framed as an "ownership" claim, it relates entirely to commingled assets (and such commingling is expressly contemplated by the statutory framework). In such comingled state, ownership is impossible to discern. Furthermore, when payment in kind is not made or a subsequent direction (like the one APMC issued on March 1, 2024) is not complied with, APMC obtains a right to elect to issue a monetary claim for any underdelivered amounts.

C. **The APMC claim is a deemed trust and such claims are not effective under the CCAA.**

10. Deemed trusts in favour of the Crown are not effective in CCAA proceedings. Section 37(1) of the CCAA states:

**Deemed trusts**

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, 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.**<sup>1</sup>

[Emphasis added]

CCAA, at section 37(1) [BOA TAB 1]

11. The authorities are clear, a Court must assess the true nature of a deemed proprietary interest in favour of the Crown, rather than simply relying upon references to a “trust” or, in the case at bar, to “ownership”.

*Canada v Canada North Group Inc.*, 2021 SCC 30 [“Canada North”], at para. 4 [BOA TAB 5]

12. While the *Mines and Minerals Act* uses language of “ownership”, it is a statutory deemed trust. As set out above, when examined holistically, the statutory mechanism is intended to enforce payment, either in-kind or in cash, of royalties owing to the Crown. Specifically, the Crown’s royalty share of the mineral produced in a given month (the “**Royalty Mineral**”), is at all times commingled with all produced minerals which are property of Razor Energy. Section 3(b) of the Marketing Regulation implicitly recognizes this issue and states that “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**” [emphasis added].

Marketing Regulation, at section 3(b) [BOA TAB 3]

13. Section 35 of the *Mines and Minerals Act* is not sufficient to create a true proprietary interest. It is inconsistent with a true ownership interest, in which the property would be

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<sup>1</sup> Section 37(1) of the CCAA is substantively identical to subsection 67(2) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3: “**Deemed trusts** (2) Subject to subsection (3), notwithstanding 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 bankrupt shall not be regarded as held in trust for Her Majesty for the purpose of paragraph (1)(a) unless it would be so regarded in the absence of that statutory provision.”



identifiable and any bailee or trustee of the property would not be free to dispose of it. As in *Henfrey Samson Belair Ltd. v British Columbia*, [1989] 2 S.C.R. 24:

“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. In an attempt to meet this problem, s. 18(1)(b) states that tax collected shall be deemed to be held separate from and form no part of the collector’s money, assets or estate. But, as the presence of the deeming provision tacitly acknowledges, the reality is that after conversion the statutory trust bears little resemblance to a true trust.** There is no property which can be regarded as being impressed with a trust. Because of this, s. 18(2) [of the British Columbia *Social Service Tax Act*] goes on to provide that the unpaid tax forms a lien and charge on the entire assets of the collector, an interest in the nature of a secured debt.

... Nor does the argument that the tax money remains property of the Crown throughout withstand scrutiny. ...

[Emphasis added]

*British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24, at p. 34 and 35 [BOA TAB 4].

14. In *Canada v Canada North Group Inc.*, 2021 SCC 30, the Supreme Court of Canada considered the nature and priority of the deemed trust under section 227(4.1) of the *Income Tax Act*, R.S.C. 1985, c. 1 (5<sup>th</sup> Supp.) (“ITA”), which is specifically excepted from the application of section 37(1) of the CCAA (as discussed below), pursuant to section 37(2) of the CCAA. Côté J. in a concurring majority opinion held that:

“In all cases where a supervising court is faced with a deemed trust, **the court must assess the nature of the interest established by the empowering enactment, and not simply rely on the title of deemed trust. In this case, when the relevant provisions of the ITA are examined in their entirety, it is clear that the ITA does not establish a proprietary interest because Her Majesty’s claim does not attach to any specific asset.**

[...] Property held in trust cannot be said to belong to the trustee because “in equity, it belongs to another person” (*Henfrey*, at p. 31). **However, a close examination of the nature of the interest created by s. 227(4.1) of the ITA reveals that it does not create this type of interest because “[t]he employer is not actually required to hold the money separate and apart, the usual fiduciary obligations of a trustee are absent, and the trust exists without a res. The law of tracing is similarly corrupted”** (R. J. Wood and R. T. G. Reeson, “The Continuing Saga of the Statutory Deemed Trust: *Royal Bank v. Tuxedo Transportation Ltd.*” (2000), 15 B.F.L.R. 515, at p. 532). In other words, **the key**

**attributes that allow the common law to refer to beneficial ownership as being a proprietary interest are missing.**

[...] For the same reason as in *Henfrey*, the statement that property is deemed to be removed from the debtor's estate is equally ineffective at preventing a judge from ordering super priorities over the debtor's property. **Because the deemed trust does not attach to specific property and the debtor remains free to alienate any of its assets, no property is actually removed from the debtor's estate.**

[Emphasis added]

*Canada North*, at paras. 4, 47, 53 (per Côté J.) [BOA TAB 5].

15. All of these factors are present with respect to the APMC Claim. Accordingly, the APMC Claim is not a "true" trust claim. Rather, it relates to a statutory mechanism for the enforcement of payment obligations owed to the Crown; the reference to "ownership" is merely intended to secure payment of the underlying royalty. The Applicants' payment obligations, in respect of pre-filing claims, are stayed pursuant to the Initial Order and the CCAA, which is federal legislation.
16. Furthermore, as APMC rights for under delivery are against the operator and include the issuance of a monetary claim, such rights are *in personam*, akin to a security interest; not *in rem* property rights.

**D. The APMC Claim is stayed.**

17. Section 40 of the CCAA confirms that the CCAA is binding upon the Crown:

**Act binding on Her Majesty**

**40** This Act is binding on Her Majesty in right of Canada or a province.

**CCAA, at section 40 [BOA TAB 1]**

18. On February 28, 2024, the Honourable Justice N.J. Whitting granted an Initial Order (the "**Initial Order**") in respect of the Applicants, under and pursuant to the CCAA. The Initial Order, and the proposed form of Amended and Restated Initial Order ("**ARIO**") sought by the Application, are substantially in the form of the Alberta Template CCAA Initial Order; including the following provisions, all of which are identical to the model order.

19. Paragraph 14 of the Initial Order established a stay of proceedings (the “**Stay**”) against the Applicants and a related party, Razor Royalties Limited Partnership, and states:

**NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**

14. Until and including March 8, 2024, or such later date as this Court may order (the “**Stay Period**”), **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.**

[Emphasis added]

Initial Order, at section 14.

20. Paragraph 15 of the Initial Order states:

**NO EXERCISE OF RIGHTS OR REMEDIES**

15. 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 nonstatutory 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; [...]**

Initial Order, at section 15.

21. It is well established that all financial and payment obligations, relating to a pre-filing period, are stayed by the stay of proceedings established under the CCAA; and accordingly, failure to pay a pre-filing claim does not give rise to an enforceable remedy during the applicable stay period.
22. The APMC Claim is, a pre-filing claim, caught by the standard provision of the Initial Order (including the ARIO).

**E. Section 11.1 of the CCAA**

23. The Weicker Affidavit contends that the Stay may not apply to APMC due to the operation of Section 11.1 of the CCAA. Razor Energy joins issue with such contention and submits that Section 11.1 does not assist APMC. Section 11.1 of the CCAA provides:

**Meaning of *regulatory body***

**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.

**Regulatory bodies - order under section 11.02**

**(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.

**Exception**

**(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.

**Declaration — enforcement of a payment**

**(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.

**CCAA, at section 11.1 [BOA TAB 1]**

24. Razor Energy submits, to the extent APMC is a "regulatory body", a proposition which Razor Energy reserves the right to dispute, APMC is nevertheless clearly seeking to enforce rights as a creditor.

25. The Supreme Court of Canada in *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 established a three part test to determine whether a regulatory body, in seeking to enforce a remedy against a debtor, is acting in the capacity as a creditor.

*Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443 [“*Abitibi*”]  
[BOA TAB 6]

26. The test is as follows:

- (a) There must be a debt, a liability, or an obligation to a creditor;
- (b) The debt, liability or obligation must be incurred before the debtor becomes bankrupt; and,
- (c) It must be possible to attach a monetary value to the debt, liability or obligation.

*Abitibi*, at para 26 [BOA TAB 6]

27. In the matter at bar:

- (a) APMC, as noted above, is enforcing a claim for a debt or obligation, owed by Razor Energy (being the portion of undelivered January production);
- (b) It is common cause that the liability or obligation was incurred prior to Razor Energy commencing any insolvency proceedings; and,
- (c) It is possible, indeed simple, to attach a monetary value to the debt, liability or obligation. The volume of under delivered crude oil in issue is 934.8 m<sup>3</sup>.

28. Section 13(1) of the Marketing Regulation provides one mechanism for easily ascertaining the monetary value:

**Money in lieu of royalty deficiency**

**13(1)** 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.

**(2)** The Commission may not charge a battery operator with the payment of an amount of money under subsection (1) of this section in respect of an

underdelivery balance for a delivery month if a notice has been given under section 12(1) in respect of the same underdelivery balance.

**Marketing Regulation, at section 13 [BOA TAB 3]**

**F. The APMC claim should be heard on notice and with full stakeholder participation**

29. *Redwater* clarified that: (i) AROs in the oil and gas context do not constitute claims provable in bankruptcy, unless the test set out in *AbitibiBowater Inc. v Newfoundland and Labrador*, 2012 SCC 67, is met; and, (ii) distributions should not be made from the estate of an insolvent entity until all AROs have been satisfied.

30. The Applicant, Razor Energy Corp., is subject to abandonment and reclamation obligations of approximately \$115 - \$123 million.

**Affidavit of Doug Bailey, sworn on February 20, 2024, at para. 29(d).**

31. The APMC Claim seeks an immediate distribution, in kind, of property of Razor Energy. Parties, including the AER and OWA have received less than one full day's notice. It is respectfully submitted that it would be inappropriate to pronounce a direction to pay or transfer assets, of an insolvent entity, subject to significant AROs, to a pre-filing creditor, in respect of a monetary claim, without all affected stakeholders and creditors having an opportunity to respond.

32. Additionally, as any deemed trust in respect of the APMC Claim is ineffective in proceedings under the CCAA, the APMC Claim is not a priority claim. The payment or performance of APMC's unsecured, *in personam*, APMC Claim, by the Applicants, would likely constitute a preference.

33. For the foregoing reasons, it is respectfully submitted that the APMC Claim should not be determined at the Application but rather, in the event that the parties are unable to arrive at a commercial resolution, heard on notice to the service list at a later date.

**IV. CONCLUSION**

34. The Applicants respectfully request that this Honourable Court adjourn the AMPC Application.

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

*“McCarthy Tétrault LLP”*

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Sean Collins / Pantelis Kyriakakis / Nathan  
Stewart

Counsel to the Applicants,  
Razor Energy Corp., Razor Holdings GP  
Corp., and Blade Energy Services Corp.

## V. LIST OF AUTHORITIES

### **Statutes**

1. *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, at sections 11.1, 37(1), and 40;
2. *Mines and Minerals Act*, R.S.A. 2000, c. M-17, at section 35;
3. *Petroleum Marketing Regulation*, Alta. Reg. 174/2006, at sections 3(b), 12 and 13;

### **Case Law**

4. *British Columbia v. Henfrey Samson Belair Ltd.*, [1989] 2 S.C.R. 24;
5. *Canada v Canada North Group Inc.*, 2021 SCC 30; and,
6. *Newfoundland and Labrador v AbitibiBowater Inc.*, 2012 SCC 67, [2012] 3 S.C.R. 443.