

COURT FILE NO. 24-3162620  
COURT Court of King's Bench of Alberta  
JUDICIAL CENTRE Edmonton



IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985,  
c B-3, AS AMENDED

AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A  
PROPOSAL OF **KMC MINING CORPORATION**

DOCUMENT **APPLICATION (First Stay Extension, Administration Charge, Interim  
Financing Charge and Other Relief)**

ADDRESS FOR  
SERVICE AND  
CONTACT  
INFORMATION OF  
PARTY FILING THIS  
DOCUMENT

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**NOTICE TO THE RESPONDENT(S)**

This application is made against you. You are a respondent.

You have the right to state your side of this matter before the Court.

To do so, you must be in Court when the application is heard as shown below:

Date	December 9, 2024
Time	2:00 p.m.
Where	<a href="https://albertacourts.webex.com/meet/virtual.courtroom86">https://albertacourts.webex.com/meet/virtual.courtroom86</a>
Before Whom	Justice M.E. Burns

Go to the end of this document to see what you can do and when you must do it.

**Remedy sought:**

1. The applicant, KMC Mining Corporation (“**KMC**”) seeks an Order under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“**BIA**”), on the terms substantially as set out in the draft Order attached hereto as **Schedule “A”** including but not restricted to the following relief:
  - (a) an Order abridging time for service and deeming service of this Application to be good and sufficient;
  - (b) extending the 30-day time period within which KMC is required to file a proposal, ending on January 4, 2025 (the “**Stay Period**”), by an additional 45-day period ending February 18, 2025 (the “**Stay Extension**”);
  - (c) declaring that:
    - (i) KMC’s legal counsel, FTI Consulting Canada Inc. (“**FTI**”) in its capacity as proposal trustee of KMC (the “**Proposal Trustee**”) and the Proposal Trustee’s legal counsel (collectively, the “**Administrative Professionals**”), be paid their reasonable fees and disbursements incurred in and in preparation for the Consolidated Proposal Proceeding; and
    - (ii) the Administrative Professionals, as security for their reasonable professional fees and disbursements incurred both before and after the granting of the requested Order, shall have the benefit of and are hereby granted a security and charge (the “**Administration Charge**”) on all present and after-acquired property of KMC (the “**Property**”), which charge shall be in the aggregate amount of \$500,000;
  - (d) approving a secured, interim financing facility in the maximum principal amount of \$6,000,000 (the “**Interim Financing Facility**”) created pursuant to a letter loan agreement dated December 6, 2024 (the “**Commitment Letter**”) between the Syndicate (as defined below) (the “**Interim Lender**”) and KMC;
  - (e) authorizing KMC to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the “**Definitive Documents**”), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof;
  - (f) declaring that the Property is subject to a security and charge (the “**Interim Lender’s Charge**”) in favour of the Interim Lender to secure the payment and performance of the Interim Financing Facility and KMC’s indebtedness and obligations under the Definitive Documents, liabilities and obligations under the Interim Financing Agreement;
  - (g) declaring the Interim Lender shall be treated as unaffected in any proposal filed by KMC under the BIA or any plan of arrangement or compromise filed by KMC under the *Companies’ Creditors Arrangement Act*, RSC 1985, c. C-36 (“**CCAA**”) with respect to any advances made under the Definitive Documents;
  - (h) approving and granting priority to the following charges (collectively the “**Charges**”) and that the Charges rank, as between themselves, in the following order of priority:

- (i) first, the Administration Charge (to a current maximum of \$500,000); and
  - (ii) second, Interim Lender's Charge (to a current maximum of \$6,000,000);
- (i) declaring that the Charges do not attach to or otherwise apply to affect any other secured creditors other than the Syndicate and The Klemke Foundation, including equipment lessors, of KMC claiming security interests, trusts, liens, charges, deemed trusts, or encumbrances in the Property of KMC, provided however that KMC is at liberty to apply at a subsequent date, on notice to any potentially affected parties, whether under the BIA or such other statute or legislation as applicable, for an order declaring the Charges, or such further and other charges as may be requested by KMC, rank in priority to the claims of any other secured creditor of KMC, or in priority to any other person with a claim in the nature of a secured claim, as may be appropriate in the circumstances; and
  - (j) authorizing KMC to sell, with prior approval of the Proposal Trustee, Property during the Stay Period up to the aggregate total of \$1,000,000.
2. A Sealing Order with respect to the First Confidential Affidavit of Daniel Klemke ("**Confidential Supplementary Affidavit**") until further order of this Honourable Court or consent of KMC.
  3. Such further and other relief as the circumstances may require and the Court deems appropriate.

#### **Grounds for making this Application:**

##### Background

4. KMC is a corporation registered pursuant to the laws of the Province of Alberta, was founded in 1949 and derives most of its business from large-scale oil sands projects, as well as engagement in extraction of other valuable materials. KMC's primary operations include mine development, contract mining and land reclamation.
5. As of November 25, 2024, KMC employed 61 full-time employees (of which 17 are located at its head office in Edmonton, Alberta and 42 are field employees working in Fort McMurray or a field office location maintained there).
6. On December 5, 2024, KMC filed a notice of intention to make a proposal ("**NOI**") pursuant to section 50.4(1) of the BIA (with said proceedings being the "**Proposal Proceedings**") naming FTI as the Proposal Trustee.
7. As a result of the NOI, all proceedings against KMC and its Property were automatically stayed for an initial period of thirty (30) days.

##### Need for Proposal Proceedings

8. KMC requires a stay of proceedings to permit it to be able to continue current business operations, while taking steps to restructure its business and financial affairs for the benefit of all its stakeholders. More specifically, KMC required a stay of proceedings to stabilize its business, ensure current

operations can continue without disruption and to develop and implement a plan for the orderly and efficient marketing and sale of their specialized assets.

9. KMC's total asset base consists primarily of specialized mining development equipment, including, *inter alia*, the Komatsu 930E, a haul truck which is over 24 feet tall and 30 feet wide and weighs more than 1 million pounds when loaded, or the Komatsu PC8000 hydraulic excavator, which is one of the largest hydraulic excavators in the world and weighs 1.6 million pounds when loaded. KMC's assets are niche products that require enhanced processes for their marketing and post-sale movement.
10. KMC's primary secured creditor is a syndicate of lenders led by ATB Financial and including Canadian Western Bank, Export Development Canada and Laurentian Bank of Canada (collectively the "**Syndicate**"). As of October 31, 2024, KMC is indebted to the Syndicate in the approximate amount of \$104,000,000. KMC has received a Notice of Default from the Syndicate.
11. KMC's other senior secured creditor is The Klemke Foundation, a private charitable foundation to which KMC is indebted in the approximate amount of \$49,290,859.
12. Additionally, KMC is indebted to heavy equipment lessors (in the approximate amount of \$52,649,983 as of October 31, 2024), light duty lessors (\$2,973,244) and unsecured trade payables (\$22,218,366).
13. Due to sudden and unexpected cancellation of its mining services by its most significant customer, Suncor Energy Inc. ("**Suncor**"), and with no prospect of replacement work in the immediate future, KMC does not have sufficient working capital to continue to pay its debts while maintaining adequate cash flows to continue operations over an extended period of time. While KMC does have certain work still ongoing which generates revenue on a monthly basis, the scope of the work is insufficient to allow KMC to continue to pay its debts generally as they come due.
14. KMC has been actively identifying opportunities for the sale of its fleet of equipment and has been searching for business opportunities that will allow it to discharge its obligations to its creditors, however given the specialized nature of the KMC equipment and its business, this process takes time and requires significant liquidity.
15. KMC, in discussions with the Syndicate and with their concurrence, took the step of filing the NOI as a means to maintain asset value, provide stability for its business, and afford it an opportunity to develop a plan to:
  - (a) seek certain Charges, including an Interim Lender's Charge, to ensure the stability of continued operations;
  - (b) monetize assets in an effort to retire the secured debt owed by KMC to the Syndicate and address the other obligations owing to the Klemke Foundation and equipment lenders;
  - (c) capture any equity in KMC's assets in excess of obligations owed to it in order to possibly fund a plan of arrangement to pay distributions to its unsecured creditors, if possible; and
  - (d) address any possible recourse against Suncor arising from the various terminations.
16. The filing of the NOI is a temporary measure given present Court availability. KMC intends to make application in January to have these proceedings taken up under the CCAA.

### Interim Financing

17. KMC requires the Interim Financing Facility of up to \$6,000,000 to alleviate cash constraints, stabilize its business, ensure current operations can continue without disruption and to develop and implement a plan for the orderly and efficient marketing and sale of their specialized assets.
18. The Interim Financing Facility is currently limited to what is reasonably necessary to fund KMC's operations during December 2024 and January 2025. Without the Interim Financing Facility, KMC would have a cash shortfall.

### Charges

19. The Charges, as hereinafter defined, are necessary to ensure the restructuring is successful, with priority amongst the charges as follows:
  - (a) First – Administrative Charge in the amount of \$500,000 to secure payment of the reasonable professional fees and disbursements of Administrative Professionals; and
  - (b) Second – Interim Lender's Charge in the amount up to \$6,000,000 to secure repayment of funds advanced to KMC pursuant to the Interim Financing.
20. At this Application, KMC does not seek that the Charges apply, at this time, to any other secured creditors of KMC other than the Syndicate and The Klemke Foundation, provided however that KMC is at liberty to apply, on notice to any potentially affected parties, at a subsequent date, whether under the BIA or such other statute or legislation, for an order declaring the Charges, or such further and other charges, in priority to any other secured creditor of KMC, or in priority to any other person as may be determined appropriate.

### Stay Extension

21. KMC requires an extension of the Stay Period to stabilize its business, ensure current operations can continue without disruption and to develop and implement a plan for the orderly and efficient marketing and sale of their specialized assets.
22. The Stay Extension is appropriate for, *inter alia*, the following reasons:
  - (a) KMC has acted and continues to act in good faith and with due diligence;
  - (b) no creditor will be materially prejudiced by the requested Stay Extension; and
  - (c) the Stay Extension at this stage, in consideration Court availability, is necessary to allow KMC sufficient time to finalize a Proposal or otherwise restructure its business.
23. The Proposal Trustee supports the Stay Extension.

### Sale of Certain Property

24. Certain Property of KMC which is not required for ongoing operations, including surplus or redundant assets, may be able to be sold to third parties during the Stay Period and as such, and so long that

any sale is supported by the Proposal Trustee, it is appropriate to permit KMC to sell Property up to the aggregate amount of \$1,000,000 without further Court approval.

### Sealing Order

25. The Confidential Supplementary Affidavit contains commercially sensitive information with respect to the Property of KMC and the valuation of said Property. The Sealing Order is necessary and appropriate with respect to the Confidential Supplementary Affidavit as:
- (a) disclosure of the information would be detrimental to marketing efforts for the Property;
  - (b) if the requested Sealing Order is not granted, creditor recoveries may be reduced;
  - (c) reasonable alternative measures will not prevent the risk; and
  - (d) the benefits of the Sealing Order to the process and all stakeholders outweigh the deleterious effects on the rights and interests of the public in accessing the information at this time.

### Conclusion

26. KMC's senior secured lenders have been provided advance notice of this Application and support the granting of the relief sought herein.
27. The relief sought is appropriate in the circumstances.
28. KMC further relies upon on the grounds set out in the Affidavit of Daniel Klemke sworn on December 6, 2024, and such further and other grounds as counsel for KMC may advise and this Honourable Court may permit.

### **Material or evidence to be relied on:**

29. This Application and the Draft Order;
30. Affidavit of Daniel Klemke sworn December 6, 2024;
31. First Confidential Supplementary Affidavit of Daniel Klemke sworn December 6, 2024;
32. The first report of the Proposal Trustee, to be filed; and
33. Such further and other evidence as counsel may advise and this Honourable Court may permit.

### **Applicable Rules:**

34. Rules 1.3(1), 6.1, 6.11, 6.12, 11.27, 13.5 and Part 6, Division 4 of the *Alberta Rules of Court*; and
35. Such further and other Rules as counsel may advise and this Honourable Court may permit.

**Applicable Acts and regulations:**

36. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended, and in particular Part III, Division I and section 50.4(9) thereof; and
37. Such further and other Acts and regulations as counsel may advise and this Honourable Court may permit.

**Any irregularity complained of or objected relied on:**

38. None.

**How the application is proposed to be heard or considered:**

39. Via Webex on the Commercial List.

**WARNING**

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and at the time shown at the beginning of the form. If you intend to rely on an affidavit or other evidence when the application is heard or considered, you must reply by giving reasonable notice of the material to the applicant.

**Schedule "A"**

Draft Order



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File # 204-219113

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LAWYERS MEDIATORS  
2800 Rice Howard Place  
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Edmonton, Alberta Canada T5J 3V9

**DATE ON WHICH ORDER PRONOUNCED:**

**DECEMBER 9, 2024**

**NAME OF JUSTICE WHO MADE THIS ORDER:**

**JUSTICE M.E. BURNS**

**LOCATION OF HEARING:**

**EDMONTON, ALBERTA**

**UPON** the Application of **KMC Mining Corporation (“KMC”)**; **AND UPON** having read the Affidavit of Daniel Klemke and the Affidavit of Service, filed, and noting service of this Application on KMC’s first secured lender, being a syndicate of lenders led by ATB Financial and including Canadian Western Bank, Export Development Canada and Laurentian Bank of Canada (collectively the **“Syndicate”**) and KMC’s second priority security lender, The Klemke Foundation; **AND UPON** reading the Report of FTI Consulting Canada Inc. in its capacity as proposal trustee of KMC (**“Proposal Trustee”**) dated December 2024; **AND UPON** being advised that the secured creditors who are likely to be affected by the charges created herein (the Syndicate and The Klemke Foundation) have been provided notice of this application and do not oppose the relief sought by KMC; **AND UPON** hearing

counsel for KMC, counsel for the Proposal Trustee, counsel for the Syndicate and counsel for The Klemke Foundation; **IT IS HEREBY ORDERED AND DECLARED THAT:**

### **SERVICE**

1. The time for service of the notice of application for this order (the “**Order**”) is hereby abridged and deemed good and sufficient and this application is properly returnable today.

### **EXTENSION OF TIME TO FILE A PROPOSAL**

2. The time within which KMC is required to file a proposal to its creditors with the Official Receiver, under section 50.4 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the “**BIA**”) is extended to February 18, 2025 (as extended from time to time, the “**Stay Period**”).

### **ADMINISTRATION CHARGE**

3. The Proposal Trustee, counsel to the Proposal Trustee, and counsel to KMC shall be paid their reasonable fees and disbursements (including any pre-filing fees and disbursements related to these proceedings), in each case at their standard rates and charges, by KMC as part of the costs of these proceedings. KMC is hereby authorized and directed to pay the accounts of the Proposal Trustee, counsel for the Proposal Trustee and counsel for KMC on a monthly basis and, in addition, KMC is hereby authorized to pay to the Proposal Trustee, counsel to the Proposal Trustee, and counsel to KMC, if requested retainers in the respective amount[s] of up to \$50,000, to be held by them as security for payment of their respective fees and disbursements outstanding from time to time.
4. The Proposal Trustee and its legal counsel shall pass their accounts from time to time.
5. The Proposal Trustee, counsel to the Proposal Trustee, if any, and KMC's counsel, as security for the professional fees and disbursements incurred both before and after the granting of this Order, shall be entitled to the benefits of and are hereby granted a charge (the “**Administration Charge**”) on the Property, which charge shall not exceed an aggregate amount of **\$500,000 (Five Hundred Thousand Dollars)**, as security for their professional fees and disbursements incurred at the normal rates and charges of the Proposal Trustee and such counsel, both before and after the making of this Order in respect of these proceedings. The Administration Charge shall have the priority set out in paragraphs 12 and 14 hereof.

### **INTERIM FINANCING**

6. KMC is hereby authorized and empowered to obtain and borrow under a credit facility from the Syndicate (the “**Interim Lender**”) to finance KMC's working capital requirements and other general corporate purposes and capital expenditures, provided that borrowings under such

credit facility shall not exceed **\$6,000,000 (Six Million Dollars)** unless permitted by further order of this Court.

7. The Interim Financing Facility shall be on the terms and subject to the conditions set forth in the Interim Financing Commitment Letter ("**Commitment Letter**") attached as Exhibit "L" to the Affidavit of Daniel Klemke sworn December 6, 2024.
8. KMC is hereby authorized and empowered to execute and deliver such credit agreements, mortgages, charges, hypothecs, and security documents, guarantees and other definitive documents (collectively, the "**Definitive Documents**"), as are contemplated by the Commitment Letter or as may be reasonably required by the Interim Lender pursuant to the terms thereof, and KMC is hereby authorized and directed to pay and perform all of its indebtedness, interest, fees, liabilities, and obligations to the Interim Lender under and pursuant to the Commitment Letter and the Definitive Documents as and when the same become due and are to be performed, notwithstanding any other provision of this Order.
9. The Interim Lender shall be entitled to the benefits of and is hereby granted a charge (the "**Interim Lender's Charge**") on the Property to secure all obligations under the Definitive Documents incurred on or after the date of this Order which charge shall not exceed the aggregate amount advanced on or after the date of this Order under the Definitive Documents. The Interim Lender's Charge shall not secure any obligation existing before this the date this Order is made. The Interim Lender's Charge shall have the priority set out in paragraphs 12 and 14 hereof.
10. Notwithstanding any other provision of this Order:
  - (a) the Interim Lender may take such steps from time to time as it may deem necessary or appropriate to file, register, record or perfect the Interim Lender's Charge or any of the Definitive Documents;
  - (b) upon the occurrence of an event of default under the Definitive Documents or the Interim Lender's Charge, the Interim Lender, upon **ten (10) days** notice to KMC and the Proposal Trustee, may exercise any and all of its rights and remedies against KMC or the Property under or pursuant to the Commitment Letter, Definitive Documents, and the Interim Lender's Charge, including without limitation, to cease making advances to KMC and set off and/or consolidate any amounts owing by the Interim Lender to KMC against the obligations of KMC to the Interim Lender under the Commitment Letter, the Definitive Documents or the Interim Lender's Charge, to

make demand, accelerate payment, and give other notices, or to apply to this Court for the appointment of a receiver, receiver and manager or interim receiver, or for a bankruptcy order against KMC and for the appointment of a trustee in bankruptcy of KMC; and

- (c) the foregoing rights and remedies of the Interim Lender shall be enforceable against any trustee in bankruptcy, interim receiver, receiver or receiver and manager of KMC or the Property.

11. The Interim Lender shall be treated as unaffected in any proposal filed by KMC under the BIA or any plan of arrangement or compromise filed by KMC under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36 ("**CCAA**") with respect to any advances made under the Definitive Documents.

#### **PRIORITY OF CHARGES**

12. The Charges shall constitute a security interest and charge on the Property and shall rank in priority to all and claims of the Syndicate and The Klemke Foundation only. The Charges specifically do not attach to or otherwise apply to affect any other secured creditors, including equipment lessors, of KMC claiming security interests, trusts, liens, charges, deemed trusts, or encumbrances in the Property of KMC, provided however that KMC is at liberty to apply at a subsequent date, on notice to any potentially affected parties, whether under the BIA or such other statute or legislation as applicable, for an order declaring the Charges, or such further and other charges as may be requested by KMC, rank in priority to the claims of any other secured creditor of KMC, or in priority to any other person with a claim in the nature of a secured claim, as may be appropriate in the circumstances.
13. The filing, registration or perfection of the Administration Charge and the Interim Lender's Charge (collectively, the "**Charges**") shall not be required, and the Charges shall be enforceable for all purposes, including as against any right, title or interest filed, registered, recorded or perfected subsequent to the Charges coming into existence, notwithstanding any such failure to file, register, record or perfect.
14. The ranking as between the Charges shall be as follows:
  - (a) First, the Administration Charge;
  - (b) Second, the Interim Lender's Charge.
15. Except as otherwise provided herein, or as may be approved by this Honourable Court, KMC shall not grant any encumbrances over the Property that rank in priority to, or *pari passu* with, any of the Charges, unless KMC obtains the prior written consent of the beneficiaries of the

Charges (the “**Chargees**”) or further order of this Court.

16. The Charges shall not be rendered invalid or unenforceable and the rights and remedies of the Chargees thereunder shall not otherwise be limited or impaired in any way by:
- (a) the pendency of these proceedings and the declarations of insolvency made in this Order;
  - (b) any application(s) for bankruptcy order(s) issued pursuant to the BIA, or any bankruptcy order made pursuant to such applications;
  - (c) the filing of any assignments for the general benefit of creditors made pursuant to the BIA;
  - (d) the provisions of any federal or provincial statutes; or
  - (e) any negative covenants, prohibitions or other similar provisions with respect to borrowings, incurring debt or the creation of encumbrances, contained in any existing loan documents, lease, sublease, offer to lease or other agreement (collectively, an “**Agreement**”) that binds KMC, and notwithstanding any provision to the contrary in any Agreement:
    - (i) neither the creation of the Charges nor the execution, delivery, perfection, registration or performance of any documents in respect thereof, shall create or be deemed to constitute a new breach by KMC of any Agreement to which they, or any one of them, is a party;
    - (ii) none of the Chargees shall have any liability to any person whatsoever as a result of any breach of any Agreement caused by or resulting from the creation of the Charges, or the execution, delivery or performance of the Interim Financing Facility; and
    - (iii) the payments made by KMC pursuant to this Order and the granting of the Charges, do not and will not constitute preferences, fraudulent conveyances, transfers at undervalue, oppressive conduct or other challengeable or voidable transactions under any applicable law.

#### **SALE OF PROPERTY**

17. During the Stay Period, and if approved by the Proposal Trustee, KMC is authorized to sell and dispose of redundant or non-material assets not exceeding \$1,000,000 in the aggregate provided that any sale that is either (i) in excess of the above thresholds, or (ii) in favour of a person related to KMC (within the meaning of section 4(2) of the BIA), shall require authorization by this Court.

**ALLOCATION**

18. Any interested Person may apply to this Court on notice to any other party likely to be affected for an order to allocate the Administration Charge and the Interim Lender's Charge amongst the various assets comprising the Property.

**GENERAL**

19. Service of this Order may be effected by facsimile, electronic mail, personal delivery or courier. Service is deemed to be effected the next business day following transmission or delivery of this Order.
20. Any interested party (including KMC and the Proposal Trustee) may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to any other party or parties likely to be affected by the order sought or upon such other notice, if any, as this Court may order.
21. This Order and all of its provisions are effective as of 12:01 a.m. Mountain Standard Time on the date of this Order.

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Justice of the Court of King's Bench of Alberta