COURT FILE NUMBER	2401-02680
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
	IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF THE PLAN OF COMPROMISE OR ARRANGEMENT OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.
DOCUMENT	**SECOND SUPPLEMENTAL BENCH BRIEF OF RAZOR ENERGY CORP., RAZOR HOLDINGS GP CORP., AND BLADE ENERGY SERVICES CORP.**
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Clerk's Stamp

JUDICIAL CENTRE OF CALGARY
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Apr 8, 2024
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SECOND 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

April 10, 2024 at 10:00 a.m.

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I. INTRODUCTION

1. This supplemental bench brief (this "**Supplemental Brief**") is submitted by Razor Energy Corp. ("**Razor Energy**"), Razor Holdings GP Corp. ("**Razor Holdings**"), and Blade Energy Services Corp. ("**Blade**", and collectively with Razor Energy and Razor Holdings, the "**Razor Parties**"):

   (a) in response to Alberta Petroleum Marketing Commission's ("**APMC**") application, originally returnable on March 6, 2024 and adjourned to April 10, 2024 (the "**APMC Application**") seeking, among other relief: (i) an order directing Razor Energy to deliver, as part of future production splits, the Crown's royalty share of unremitted, royalties, for the month of January 2024 (the "**January 2024 Royalty Minerals**"), to APMC, as required under the direction of APMC, dated March 1. 2024 (the "**Direction**") under the *Petroleum Marketing Regulation*, Alta Reg 174/2006 (the "**Marketing Regulation**"); and, (ii) an order that, by virtue of section 11.1 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "**CCAA**"), the stay of proceedings (the "**Stay**"), as contemplated under the Amended and Restated Initial Order, granted on March 6, 2024, by the Honourable Justice M.E. Burns, does not apply to the Direction; and,

   (b) in support of the Razor Parties' cross-application (the "**Razor Application**") seeking a declaration that APMC is seeking "to enforce its rights as a creditor", as contemplated by section 11.1(4) of the CCAA.

2. This Supplemental Brief should be read in conjunction with the supplemental bench brief filed by the Razor Parties on March 6, 2024 (the "**First Supplemental Brief**"), which sets out, among other things, the background with respect to the dispute between APMC and the Razor Parties, the grounds for asserting that the APMC Relief is a monetary claim, and that any trust claims asserted by APMC are not effective in the within CCAA proceedings. All capitalized terms in this Supplemental Brief that are not otherwise defined herein shall have the same meaning as ascribed to such terms in the First Supplemental Brief.

3. APMC seeks to circumvent the CCAA and obtain a preferential payment, on an argument grounded on form over substance. The entire dispute concerns the payment of the January 2024 Royalty Minerals, in kind or in cash. This is not a dispute concerning Razor

Energy meeting post-filing regulatory obligations or a regulatory body issuing directions for which it will receive no financial benefit or in circumstances where the public is the direct beneficiary; such as in the case of regulations concerning safety or environmental reclamation obligations. APMC's primary role is to accept delivery of and deal with the Crown's royalty share of crude oil. APMC has issued the Direction, as an enforcement of its rights, in connection with the missed payment of the January 2024 Royalty Minerals. Such Direction was issued under and in accordance with a regulatory framework whose primary purpose is to govern the mechanism by which the Crown receives and collects its royalty interests under Crown Petroleum and Natural Gas Leases. In these circumstances, APMC is clearly seeking to enforce its rights as a creditor and, as a result, is caught by the Stay.

II. LAW

4. Section 11.1 of the CCAA states:

> **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.**

[Emphasis added]

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 at s. 11.1 [*CCAA*] [Book of Authorities ("BOA") TAB 1].**

III. ARGUMENT

A. The Stay takes precedence over provincial law.

5. The CCAA applies to and is binding upon the Crown. Section 40 of the CCAA states:

Act binding on Her Majesty

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

***CCAA* at s. 40 [BOA Tab 1].**

6. It is well established that a stay or order made under federal insolvency law will render provincial laws inoperative, to the extent of any operational conflict. In *Alberta (Attorney General) v. Moloney* ("***Moloney***"), 2015 SCC 51, Gascon J., stated:

> [18] A conflict is said to arise in one of two situations, which form the two branches of the paramountcy test: (1) there is an operational conflict because it is impossible to comply with both laws, or (2) **although it is possible to comply with both laws, the operation of the provincial law frustrates the purpose of the federal enactment**.
>
> […]
>
> [70] In fact, this would be tantamount to rendering the provincial law inoperative to the extent of the conflict even before a conflict is found. **Under the doctrine of paramountcy, this is precisely the remedy that courts grant once a conflict is found; it is not a tool courts can use to avoid finding a conflict. The remedy of not applying the provincial law cannot be determinative of whether a conflict exists in the first place. In this case, whether or not the province has discretion not to apply s. 102 is irrelevant**: see *Lafarge*, at para. 75. **The province chose to take advantage of the scheme. The question is whether it can do so while also complying with the BIA.**
>
> [71] This view, with which my colleague disagrees, appears to me to be consistent with this Court's jurisprudence on operational conflict. For instance, in *M & D Farm*,

the creditor held a mortgage on the debtors' family farm. After defaulting on the mortgage, the debtors obtained a stay of proceedings under the federal *Farm Debt Review Act*, R.S.C. 1985, c. 25 (2nd Supp.). While the stay was still in effect, the creditor sought, and was granted, leave under the provincial *Family Farm Protection Act*, C.C.S.M., c. F15, which authorized the immediate commencement of foreclosure proceedings. The question arose as to whether there was a conflict between the federal stay and the provincial leave. The Court concluded that there was an operational conflict (pp. 982-85), and this conclusion was later reaffirmed in *Lafarge*, at para. 82, and again in *Lemare Lake*, at para. 18. As I read *M & D Farm*, the fact that the debtors could choose to voluntarily pay the mortgage debt, as my colleague suggests, did not mean that there was no operational conflict. Nor was conflict avoided because the creditor could have chosen not to seek leave to commence foreclosure proceedings. **There was an operational conflict because the provincial law expressly authorized the very proceedings that the federal stay precluded.**

[72] More recently, in *Sun Indalex*, Deschamps J., with Moldaver J. concurring, found that there was an operational conflict (the Court was unanimous on this point). On the one hand, there was an order made under the federal *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, which authorized an insolvent company to obtain debtor-in-possession ("**DIP**") financing and granted priority to the DIP lender. On the other hand, the provincial *Personal Property Security Act*, R.S.O. 1990, c. P.10, gave priority to the administrator of the company's employee pension plans: para. 60. Deschamps J. did not avoid the operational conflict by concluding, for instance, that the debtor could have chosen not to seek DIP financing in the first place.

[Emphasis added]

***Alberta (Attorney General) v. Moloney*, 2015 SCC 51 at paras 18 and 70-72 per Gascon J. (Abella, Rothstein, Cromwell, Moldaver, Karakatsanis and Wagner JJ. concurring) [BOA TAB 3].**

7. While *Moloney* was decided under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, the CCAA is also federal legislation and the doctrine of operational paramountcy applies.

8. In the context of proceedings under the CCAA, the Stay is effective against regulatory claims, under provincial law, in any case where an operational conflict arises due to regulatory actions contravening the Stay or frustrating the purpose of the CCAA.

9. Furthermore, in proceedings under the CCAA, the supervising Court retains jurisdiction to override or intervene in the regulatory process itself. Although such jurisdiction is found under section 11 of the CCAA, rather than section 11.02, it is illustrative of the interplay

between the CCAA and provincial regulatory regimes. As recently summarized by Osborne J. in *BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645:

> 46. **CCAA courts have granted regulatory stays over licences** where, absent such a stay, the applicable regulators were likely to suspend or cancel licences due to the commencement of the CCAA proceeding. **Other courts have observed that permitting the immediate termination of the licenses of a debtor company would not avoid social and economic losses but rather would amplify them**. See: *Re Just Energy Corp.*, at para. 87; *Abbey Resources Corp., Re*, (29 July 2021) Saskatoon Q.B. No. 733 of 2021 (SKQB); *Original Traders Energy Ltd. et al.*, (30 January 2023) Toronto, Ont Sup Ct [Commercial List] CV-23-00693758-00CL (Initial Order) at para. 19.
>
> 47. Canadian courts **have also granted stays to prevent the Canada Revenue Agency from seeking to enforce its rights through regulatory actions related to an excise licence for a cannabis company during the period in which it was under protection in an insolvency regime**: *Tantalus Labs Ltd., Re*, 2023 BCSC 1450 ("**Tantalus**") and *Aleafa Health Inc.* SISP Approval Order August 22, 2023 [CV-23-00703350-00CL].
>
> [Emphasis added]

***BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645, at paras 46-47 [BOA TAB 4].**

10. Therefore, if there is operational conflict between the CCAA and the Marketing Regulation or APMC's Direction, to the extent APMC is seeking to enforce its rights as a creditor, the CCAA prevails. In such circumstances, APMC's Direction should be stayed, so that: (i) the Razor Parties are allowed to complete their restructuring proceedings; (ii) creditors' and stakeholders' priority rights are respected; and, (iii) Razor Energy's abandonment and reclamation obligations, estimated to be approximately $115-$123 million, are addressed prior to any distributions being made on account of pre-filing obligations, as required pursuant to the Supreme Court of Canada's decision in *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 ("***Redwater***").

B. APMC is clearly seeking to enforce its rights as a creditor in pursuing the January 2024 Royalty Minerals obligation.

11. APMC, in issuing the Direction, is seeking to enforce its rights, as a creditor, for an unsecured pre-filing royalty amount. APMC's bench brief asserts that it is "enforcing and administrating the *Petroleum Marketing Regulation* in directing Razor [Energy] to deliver Crown property".

Bench Brief of APMC, filed on April 2, 2024 at para. 66 ["APMC Brief"].

12. There are few reported decisions considering when a regulatory body is seeking to enforce its rights as a creditor, as contemplated under section 11.1(4) of the CCAA; outside of the context of environmental remediation regulations. While the present circumstances are far more clear cut, as the entire purpose of the Direction is designed to obtain a financial benefit, existing environmental decisions are instructive in determining when a regulatory action will constitute a financial claim.

13. The leading case is *Newfoundland and Labrador v. AbitibiBowater Inc.*, 2012 SCC 67 ("***AbitibiBowater***"). The Supreme Court of Canada, in *AbitibiBowater*, framed the issue as follows:

> "2 **Regulatory bodies may become involved in reorganization proceedings when they order the debtor to comply with statutory rules. As a matter of principle, reorganization does not amount to a licence to disregard rules. Yet there are circumstances in which valid and enforceable orders will be subject to an arrangement under the CCAA.** One such circumstance is where a regulatory body makes an environmental order that explicitly asserts a monetary claim.
>
> 3 **In other circumstances, it is less clear whether an order can be treated as a monetary claim.** The appellant and a number of interveners posit that an order issued by an environmental body is not a claim under the CCAA if the order does not require the debtor to make a payment. **I agree that not all orders issued by regulatory bodies are monetary in nature and thus provable claims in an insolvency proceeding, but some may be, even if the amounts involved are not quantified at the outset of the proceeding.** In the environmental context, the CCAA court must determine whether there are **sufficient facts indicating the existence of an environmental duty that will ripen into a financial liability owed to the regulatory body that issued the order. In such a case, the relevant question is not simply whether the body has formally exercised its power to claim a debt. A CCAA court does not assess claims — or orders — on the basis of form alone. If the order is not framed in monetary terms, the court must determine, in light of the factual matrix and the applicable statutory framework, whether it is a claim that will be subject to the claims process.**
>
> [Emphasis added]

***Newfoundland and Labrador v. AbitibiBowater Inc., Re*, 2012 SCC 67, at paras 2-3 [*AbitibiBowater*] [BOA TAB 5].**

14. Accordingly, it is clear that a regulatory order need not be expressed in strictly monetary terms in order to constitute a claim provable in bankruptcy.[1] The issue is instead whether

[1] Section 2(1) of the CCAA defines the term "claim" as follows: "***claim*** means any indebtedness, liability or obligation of any kind that would be a claim provable within the meaning of section 2 of the *Bankruptcy and Insolvency Act*;"

the order or direction by the regulatory body "will ripen into" a financial liability or, is, in substance, a claim that will be subject to a claims process.

15. The Supreme Court of Canada in *AbitibiBowater* set out the following three point test for determining whether a regulatory body, in seeking to enforce a remedy against a debtor company, is acting in the capacity as a creditor:

> "**First, there must be a debt, a 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.**"
>
> [Emphasis added]

***AbitibiBowater*, at para 26 [BOA TAB 5].**

a. In seeking enforcement for Razor Energy's obligation to pay the missed January 2024 Royalty Minerals, APMC is acting as a creditor.

16. In seeking to enforce the payment of the January 2024 Royalty Minerals, APMC is acting as a creditor. Regarding the first component of the test, the mere act of asserting an enforcement power against a debtor company is sufficient to confirm that a regulator is acting *qua* creditor. Specifically:

> "The BIA's definition of a provable claim, which is incorporated by reference into the CCAA, requires the identification of a creditor. Environmental statutes generally provide for the creation of regulatory bodies that are empowered to enforce the obligations the statutes impose. **Most environmental regulatory bodies can be creditors in respect of monetary or non-monetary obligations imposed by the relevant statutes. At this first stage of determining whether the regulatory body is a creditor, the question whether the obligation can be translated into monetary terms is not yet relevant.** This issue will be broached later. **The only determination that has to be made at this point is whether the regulatory body has exercised its enforcement power against a debtor. When it does so, it identifies itself as a creditor, and the requirement of this stage of the analysis is satisfied**."
>
> [Emphasis added]

***AbitibiBowater*, at para 27 [BOA TAB 5].**

17. APMC has conceded that it is exercising enforcement powers.

APMC Brief at paras 9, 66.

18. Furthermore, the purpose of the Direction is to "make up the undelivered balance by the delivery in-kind to APMC, as part of the February 2024 production month, crude oil of an equal quantity and of like quality to the January royalty deficiency volumes." The Direction is clearly an enforcement tool, available to APMC, in connection with missed payments.

Affidavit of Bradley Weicker, sworn on March 5, 2024, at para 11 ["Weicker Affidavit #1"].

19. On this basis, the first stage of the *AbitibiBowater* test is clearly satisfied.

b. The January 2024 Royalty Minerals obligation was incurred before Razor Energy commenced any insolvency proceedings.

20. The missed January 2024 Royalty Minerals payment is a pre-filing obligation. The second aspect of the *AbitibiBowater* test requires examining the time at which the regulatory obligation arose:

> 28 The enquiry into the second requirement is based on s. 121(1) of the BIA, which imposes a time limit on claims**. A claim must be founded on an obligation that was "incurred before the day on which the bankrupt becomes bankrupt".** Because the date when environmental damage occurs is often difficult to ascertain, s. 11.8(9) of the CCAA provides more temporal flexibility for environmental claims:
>
> > 11.8. . . .
> >
> > (9) A claim against a debtor company for costs of remedying any environmental condition or environmental damage affecting real property of the company shall be a claim under this Act, whether the condition arose or the damage occurred before or after the date on which proceedings under this Act were commenced.
>
> 29 **The creditor's claim will be exempt from the single proceeding requirement if the debtor's corresponding obligation has not arisen as of the time limit for inclusion in the insolvency process. This could apply, for example, to a debtor's statutory obligations relating to polluting activities <u>that continue after the reorganization</u>**, because in such cases, the damage continues to be sustained after the reorganization has been completed.
>
> [Emphasis added]

***AbitibiBowater*, at paras 28-29 [BOA TAB 5].**

21. The January 2024 Royalty Minerals obligation arose entirely prior to the Filing Date, being January 30, 2024. This is not in dispute. There is also no dispute concerning the payment of any post-filing Crown royalty obligations; all of which have been paid by Razor Energy.

c. It is possible and, in fact, easy, to attach a monetary value to the January 2024 Royalty Minerals obligation.

22. It is not only possible to attach a monetary value to the January 2024 Royalty Minerals obligation; its calculation is prescribed under the Marketing Regulation.

23. The third and final aspect of the *AbitibiBowater* test is satisfied where it is possible to attach a monetary value to the regulatory obligation. Specifically:

> 30 **With respect to the third requirement, that it be possible to attach a monetary value to the obligation, the question is whether orders that are not expressed in monetary terms can be translated into such terms**. I note that when a regulatory body claims an amount that is owed at the relevant date, that is, when it frames its order in monetary terms, the court does not need to make this determination, because what is being claimed is an "indebtedness" and therefore clearly falls within the meaning of "claim" as defined in s. 12(1) of the CCAA.
>
> 31 However, orders, which are used to address various types of environmental challenges, may come in many forms, including stop, control, preventative, and clean-up orders (D. Saxe, "Trustees' and Receivers' Environmental Liability Update", 49 C.B.R. (3d) 138, at p. 141). **When considering an order that is not framed in monetary terms, courts *must look at its substance* and apply the rules for the assessment of claims.**
>
> [Emphasis added]

***AbitibiBowater*, at paras 30-31 [BOA TAB 5].**

24. As set out in the First Supplemental Brief, it is simple to ascertain a monetary value for the January 2024 Royalty Minerals obligation, as the exact quantum of the underdelivered crude oil in issue is known; 934.8 m^3.

Weicker Affidavit #1 at para. 9.

25. Further, section 13(1) of the Marketing Regulation specifically provides a mechanism for calculating and converting any unpaid payment in kind, to cash. Specifically, section 13(1) states:

> **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.
>
> [Emphasis added]

***Petroleum Marketing Regulation*, Alberta Regulation 174/2006 [*Marketing Regulation*], at section 13(1) [BOA TAB 2].**

26. APMC's attempt to circumvent a payment obligation by issuing a Declaration that such payment be made in kind, rather than in cash, is irrelevant and futile. As stated in *AbitibiBowater*, the Court must look at the substance of the Direction; which seeks to enforce the missed payment of a pre-filing obligation.

27. While in the present circumstances it is clear, and even explicitly prescribed, that the Direction can be converted into a monetary value, even in circumstances where a debtor company is "required to spend resources in response" to the actions of a regulator, Courts have found that it may be possible to assign a value to the regulator's claim.

28. In *Terrace Bay Pulp Inc.*, a case where the Court held that the regulator was *not* acting as a creditor, the decision was based upon the proposition that the debtor companies were not required to expend resources to respond to an OHSA proceeding as their participation was voluntary. As stated by the Court:

> 38 **The second type of financial obligation is the expenditure of resources to defend its actions. I do not doubt that if Terrace Bay makes a decision to defend the action, it will incur a financial obligation. However, it does, in this case, have a choice. It can choose to either defend or not to defend the OHSA Proceedings**. That is not to suggest that the choice is an enviable one. Clearly it is not. However, the fact remains that Terrace Bay can **either choose to incur a financial obligation, by defending, or not to incur a financial obligation, by not defending**. In this respect, the Nortel and Northstar decisions are distinguishable.

***Re Terrace Bay Pulp Inc.,* 2013 ONSC 5111 at para 38 [BOA TAB 7].**

29. In contrast with *Re Terrace Bay Pulp Inc.*, Razor Energy will be forced to expend "resources", *i.e.* property, in order to comply with APMC's Direction. There is no scenario in which Razor Energy does not expend resources; either cash or in kind.

30. As (i) APMC is clearly acting as a "creditor" (which it has admitted, by stating it is "enforcing" the obligations) in issuing the Direction; (ii) for the payment of the January

2024 Royalty Minerals obligation, which arose prior to the Filing Date and the commencement of any insolvency proceedings by Razor Energy; and, (iii) such January 2024 Royalty Minerals obligation can easily, and in accordance with the Marketing Regulation, be ascribed a monetary value, APMC clearly falls within section 11.1(4) of the CCAA.

31. Accordingly, APMC can not simultaneously fit within section 11.1(2) of the CCAA as, in the present circumstances, APMC seeks the "enforcement of a payment", and should be bound by the Stay.

C. APMC is not acting in the "public interest" as contemplated in *Redwater*.

32. APMC claims that in issuing the Direction, seeking payment of the January 2024 Royalty Minerals obligation, it is "acting in the public interest to enforce a public duty."

33. As the Direction and APMC's corresponding enforcement efforts satisfy the *AbitibiBowater* test and, thereby, constitute an enforcement of a payment, this cannot be the case. APMC is clearly acting as a creditor.

34. Furthermore, when determining whether a regulator is acting for the public interest and public good, the Supreme Court of Canada, in *Redwater*, stated:

> [122] In my view, both concerns raised by the Regulator have merit. As I will demonstrate, *Abitibi* should not be taken as standing for the proposition that a regulator is always a creditor when it exercises its statutory enforcement powers against a debtor. On a proper understanding of the "creditor" step, it is clear that the Regulator acted in the public interest and for the public good in issuing the Abandonment Orders and enforcing the LMR requirements and that it is, therefore, not a creditor of Redwater. **It 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.** Although **this conclusion is sufficient to resolve this aspect of the appeal,** for the sake of completeness, I will also demonstrate that the chambers judge erred in finding that, on these facts, there is sufficient certainty that the Regulator will ultimately perform the environmental work and assert a claim for reimbursement. To conclude, I will briefly comment on why the effects of the end-of-life obligations do not conflict with the priority scheme in the BIA.
>
> …
>
> [127] Returning to the analysis, I note that the unique factual matrix of *Abitibi* must be kept in mind. In that case, Newfoundland and Labrador expropriated most of AbitibiBowater's property in the province without compensation. Subsequently, AbitibiBowater was granted a stay under the CCAA. It then filed a notice of intent

to submit a claim to arbitration under the *North American Free Trade Agreement between the Government of Canada, the Government of the United Mexican States and the Government of the United States of America*, Can. T.S. 1994 No. 2 ("NAFTA"), for losses resulting from the expropriation. In response, Newfoundland's Minister of Environment and Conservation ordered AbitibiBowater to remediate five sites pursuant to the *Environmental Protection Act*, S.N.L. 2002, c. E-14.2 ("EPA"). Three of the five sites had been expropriated by Newfoundland and Labrador. The evidence led to the conclusion that "the Province never truly intended that Abitibi was to perform the remediation work", but instead sought a claim that could be used as an offset in connection with AbitibiBowater's NAFTA claim (*Abitibi*, at para. 54). **In other words, the Province sought a financial benefit from the remediation orders.**

[128] In this appeal, it is not disputed that, in seeking to enforce Redwater's end-of-life obligations, the Regulator is acting in a *bona fide* regulatory capacity **and does not stand to benefit financially**. **The Regulator's ultimate goal is to have the environmental work actually performed, for the benefit of third-party landowners and the public at large. There is no colourable attempt by the Regulator to recover a debt, nor is there an ulterior motive on its part, as there was in *Abitibi*. The distinction between the facts of this appeal and those of *Abitibi* becomes even clearer when one examines the comprehensive reasons of the chambers judge in Abitibi.** The crux of the findings of Gascon J. (as he then was) is found at paras. 173-76:

> . . . **the Province stands as the direct beneficiary, from a monetary standpoint, of Abitibi's compliance with the EPA Orders. In other words, the execution in nature of the EPA Orders would result in a definite credit to the Province's own "balance sheet".** Abitibi's liability in that regard is an asset for the Province itself.
>
> With all due respect, this is not regulatory in nature; it is rather purely financial in reality. This is, in fact, closer to a debtor-creditor relationship than anything else.
>
> This is quite far from the situation of the detached regulator or public enforcer issuing order for the public good. **Here, the Province itself derives the direct pecuniary benefit from the required compliance of Abitibi to the EPA Orders. The Province stands to directly gain in the outcome. None of the cases submitted by the Province bear any similarity to the fact pattern in the present proceedings.**
>
> **From this perspective, it is the hat of a creditor that best fits the Province, not that of a disinterested regulator.**

(*AbitibiBowater Inc., Re*, 2010 QCCS 1261, 68 C.B.R. (5th) 1)

…

[135] Based on the analysis in *Northern Badger*, it is clear that the Regulator is not a creditor of the Redwater estate. The end-of-life obligations the Regulator seeks to enforce against Redwater are public duties. **Neither the Regulator nor**

> **the Government of Alberta stands to benefit financially from the enforcement of these obligations.** These public duties are owed, not to a creditor, but, rather, to fellow citizens, and are therefore outside the scope of "provable claims".
>
> [Emphasis added]
>
> ***Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5 at paras 122, 127-128, and 135 [*Redwater*] [BOA TAB 6].**

35. The Petroleum and Natural Gas Leases, which are tied to, *inter alia*, the *Mines and Minerals Act* (Alberta) and the Marketing Regulations along with Razor Energy's obligation thereunder, state:

> RESERVING **AND PAYING** to his Majesty,
>
> (a) in respect of each year during which this Lease remains in effect, a clear yearly rental computed at the rate prescribed by, and payable in accordance with, the Mines and Minerals Act, and
>
> (b) **the royalty on all Leased Substances recovered pursuant to this Lease, that is now or may hereafter from time to time be prescribed by, and that is payable in accordance with, the Mines and Minerals Act**, such royalty to be calculated free of any deductions except those that are permitted under the Mines and Minerals Act.
>
> [Emphasis added]
>
> **Affidavit #5 of Doug Bailey, sworn on April 5, 2024, at paras 4-5 and Exhibit "A".**

36. APMC's Direction and enforcement efforts concerning the unpaid January 2024 Royalty Minerals, are clearly a payment obligation, from which APMC and the Government of Alberta stand to benefit from, financially. That is their sole purpose. From this perspective, APMC is clearly acting as a creditor.

IV. CONCLUSION

37. The Applicants respectfully request that this Honourable Court: (i) dismiss the AMPC Application; and, (ii) grant the Razor Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 5th DAY OF APRIL, 2024.

"*McCarthy Tétrault LLP*"
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 and 40;
2. *Petroleum Marketing Regulation*, Alta. Reg. 174/2006, at section 13(1);

Case Law

3. *Alberta (Attorney General) v. Moloney*, 2015 SCC 51;
4. *BZAM Ltd. Plan of Arrangement*, 2024 ONSC 1645;
5. *Newfoundland and Labrador v. AbitibiBowater Inc.*, Re, 2012 SCC 67;
6. *Orphan Well Association v. Grant Thornton Ltd.*, 2019 SCC 5; and,
7. *Re Terrace Bay Pulp Inc.,* 2013 ONSC 5111.