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JUDICIAL CENTRE	CALGARY

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JUDICIAL CENTRE OF CALGARY
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Sep 3, 2024
CLERK OF THE COURT

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 **BENCH BRIEF OF CONIFER ENERGY INC.**

ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT

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Commercial List Chambers Application Scheduled for the 11th day of September, 2024 before The Honourable Justice D. R. Mah

TABLE OF CONTENTS

I. INTRODUCTION

1. This bench brief is provided on behalf of Conifer Energy Inc. ("**Conifer**") in support of its application for post-filing payment in respect of services provided to Razor Energy Corp. ("**Razor**") for the benefit of its stakeholders.

2. Conifer is a significant stakeholder of Razor. Razor relies on Conifer as the majority of its production is tied to the Conifer operated Judy Creek Gas Conservation Plant ("**Judy Creek Gas Plant**").[1] As a result on ongoing failures of Razor to meet its contractual obligations, Conifer locked out some but not all of Razor's production from the Judy Creek Gas Plant.

3. Razor has chosen not to pay contractual amounts required to fully re-enter the Judy Creek Gas Plant and has failed to pay the Post-Filing Arrears, notwithstanding Razor's obligation to do under the Agreement for the Ownership and Operation of the Judy Creek Gas Plant ("**CO&O**") and section 11.01 of the *Companies' Creditors Arrangement Act* ("**CCAA**").

4. Razor's ongoing failure is resulting in disproportionate harm to Conifer, as, not only is Conifer in essence involuntarily financing Razor's outstanding pre-filing amounts, but it is also owed $1.93 million in Post-Filing Arrears for providing continued services to Razor, which is increasing at approximately $250,000 a month. In addition, one of Razor's other service providers, Canadian Natural Resources Limited ("**CNRL**") is now seeking contribution from Conifer to offset the shortfalls they are facing as a result of Razor's failure to pay amounts owing.

5. CNRL is seeking more than $4.15 million from Conifer to cover Razor's arrears, including approximately $360,000 in CNRL Post-Filing Arrears.

6. Conifer submits that the relief sought is required to ensure that Conifer is not unfairly prejudiced by these proceedings that appear to have stalled out with Conifer being provided with no information on if or when the Corporate Transaction that was being pursued is proceeding.

7. For the reasons that follow, Conifer submits that the Application should be granted.

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[1] Affidavit #1 of Doug Bailey sworn on February 13, 2024 ("Bailey Affidavit #1) at paras. 11, 40.

II. STATEMENT OF FACTS

8. Conifer and Razor both own interests in the Judy Creek Gas Conservation Plant ("**Judy Creek Gas Plant**") and the South Swan Hills Unit. Conifer is the operator of the Judy Creek Gas Plant and Razor is the operator of the South Swan Hills Unit. As both Conifer and Razor own interests in the Judy Creek Gas Plant, they are both parties to the Agreement for the Ownership and Operation of the Judy Creek Gas Plant ("**CO&O**"), which includes the 1996 PASC Accounting Procedure (the "**Accounting Procedure**") and the 1999 Operating Procedure (the "**Operating Procedure**") that provide for the Operator's and Owners' respective obligations at the Judy Creek Gas Plant, including the Operator's obligation to set up a Joint Account and issue bills to Owners based on their allocated costs and expenses, and for Owners to pay these bills within 30 days.

9. In December 2023, after providing multiple notices to Razor in respect of its significant arrears of close to $8 million and Conifer's concerns with the accumulation of further arrears should Razor continue to fail to meet its obligations, Conifer exercised its rights under section 602(b)(ii) of the CO&O and stopped receiving and processing the majority of Razor's gas by physically closing and locking valves at 16 separate points within the South Swan Hills Gas Gathering System (the "**Locked Out Properties**").

10. On February 16, 2024, Razor brought an application as part of proposal proceedings under the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended ("**BIA**"), for a declaration that Conifer was in breach of the stay of proceedings pursuant to the Notice of Intention to Make a Proposal, filed on January 30, 2024 (the "**NOI**"), and for a direction that Conifer cease restricting Razor's access to the Judy Creek Gas Plant.

11. Razor asserted that the application was necessary and urgent because Razor required the revenue derived from the Locked Out Properties to fund its working capital requirements and its associated revenue that comprised a material portion of Razor's cash flow, and that it required ongoing cash flow to convert from the NOI to a proceeding pursuant to the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36, as amended (the "**CCAA**").[2]

[2] Bailey Affidavit #1.

12. The Honourable Justice Michael J. Lema issued his decision on February 21, 2024, directing Conifer to restore the system connections to the Locked Out Properties (the "**Decision**"). Justice Lema also held that Conifer could rely on its contractual rights pursuant to the CO&O for post-filing payment obligations or may choose to rely on other payment-enforcement rights that may be triggered by non-payment.[3]

13. After Razor asserted to Justice Lema that the revenue from the Locked Out Properties comprised a material portion of Razor's cash flow, Conifer reached out to Razor to discuss terms for providing access to the Judy Creek Gas Plant, which included providing payment in advance of services, in accordance with its contractual entitlement. Razor has not taken further steps to regain access to the Judy Creek Gas Plant.[4]

14. Since Razor issued the NOI and subsequently converted to a CCAA proceeding on February 28, 2024, Conifer has continued to process some of Razor's gas, around 830 e3m3 of gas per month, or around 1/3 of the volume of gas that Razor used to put through the Judy Creek Gas Plant before the Locked Out Properties' disconnection ("**Razor's Processed Gas**").

15. Further lock out of Razor's Processed Gas is not a viable option. Conifer cannot disconnect Razor's Processed Gas without also disconnecting the other Non-Operators/Owners and Non-Owners/Custom Users who are complying with their contractual obligations. This would require Conifer to contravene its obligations as Operator and would cause unnecessary harm to compliant Owners and Non-Owners/Custom Users.

16. Despite this ongoing service, Razor has refused to pay any post-filing amounts. Razor has not contemplated allocating any of its funds to Conifer for Razor's Processed Gas.[5] Razor has separately identified that it does not intend to address any of the post-filing amounts owed to Conifer despite its stated commitment to paying other suppliers and stakeholders post-filing payments, including paying other parties' processing fees.

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[3] *Blade Energy Services Corp. (Re),* 2024 ABKB 100 ("*Blade Energy*"). **[TAB 1]**
[4] Affidavit of Heather Wilkins affirmed June 3, 2024 at para. 10.
[5] Monitor's Fifth Report.

17. While Razor has been granted extensions to its stay of proceedings through the CCAA, these stay extensions have been without prejudice to the rights of Conifer in respect of any post-filing obligations owed to Conifer.

III. LAW AND ARGUMENT

A. The Stay does not Prevent Conifer from seeking Post-Filing Arrears

18. Section 11.02 of the CCAA allows a court to order a stay of proceedings on an initial application under the CCAA in respect of a debtor company. This is in keeping with the general policy underlying the CCAA, which is to allow a debtor corporation to restructure its corporate or financial affairs in a way that will permit it to continue on as a going concern, without being hampered by those who wish to enforce their previously bargained for rights.[6] This stay is similarly provided for in section 14 of Razor's Amended and Restated Initial Order ("**ARIO**") pronounced on March 6, 2024.

19. The stay however, does not apply to post-filing obligations of the Debtor. This Court has recognized that it would be unfair to require a person to continue to supply a debtor with goods or services during CCAA proceedings without that person being compensated for those goods, services or use.[7]

20. Section 11.01(a) of the CCAA allows for that compensation by enabling suppliers to demand immediate payment for providing services to the debtor company post-filing despite the Court's issuance of an initial or subsequent stay of proceeding. Section 11.01 of the CCAA provides:

> **Rights of suppliers**
>
> 11.01 No order made under section 11 [General power of the court] or 11.02 [Stays, etc.] has the effect of
>
> > (a) prohibiting a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made; or

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[6] *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2012 ABQB 59 at para 15 ("***Cow Harbour***") citing *Nortel* at para 15. **[TAB 2]**

[7] *Cow Harbour* at para 16.

(b) requiring the further advance of money or credit.

21. Paragraph 19 of the ARIO also grants suppliers the authority to demand immediate payment for services provided after the date of the ARIO, and provides:

> 19. Nothing in this Order has the effect of prohibiting a Person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided on or after the date of this Order nor shall any Person, where applicable, be under any obligation on or after the date of this Order to advance or readvance any monies or otherwise extend any credit to the Applicants.

22. Courts have similarly interpreted post-filing indebtedness in the context of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**") holding that stays of proceedings pursuant to s. 69(1) of the BIA do not apply to new indebtedness incurred by a debtor after it has gone bankrupt, including indebtedness arising from goods and services supplied.[8]

23. Justice Lema similarly confirmed in the Decision that "when it comes to future services, Conifer and Razor have the same rights and liabilities under their agreements as before i.e. without any limitations arising from or otherwise affected by the stay of proceedings".[9]

B. Razor has an obligation to pay all outstanding Post-Filing Arrears to Conifer pursuant to the CO&O

24. Pursuant to s. 601 of the Operating Procedure, Owners are obligated to pay for their respective portions of joint operation costs and expenses (the "**Joint Account**"). In accordance with its obligations as Operator and pursuant to s. 102 of the Accounting Procedure, Conifer has billed Razor on or before the last day of each month for its proportionate share of the Joint Account.[10] On this basis, Razor is obligated to pay each bill associated with the Post-Filing Arrears within thirty days of receipt.

25. This obligation exists even where Razor disputes the charges. Section 107 of the Accounting Procedure states:

> 107. Adjustment and Right to Protest/Question Bills

[8] *Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd*, 2010 BCCA 469 at para 31 **[TAB 3]**; *Schendel Mechanical Contracting (Re)*, 2021 ABQB 893 at para 26. **[TAB 4]**
[9] *Blade Energy* at para 97.
[10] Affidavit of Heather Wilkins affirmed September 3, 2024 ("Wilkins Affidavit #3") at para. 18.

> (a) A Non-Operator shall not withhold payment of any portion of a bill presented by the Operator due to protest or question related to such a bill unless there is a significant item under dispute and the Operator agrees to the Non-Operator withholding payment for the disputed item. Questions by the Non-Operator related to bills shall be responded to by the Operator within fourteen (14) days of receipt of the Non-Operator's query. In the event the Operator agrees that the questioned charges require adjustment, such adjustment shall be made by the Operator within thirty (30) days after such agreement to the adjustment. Notwithstanding the foregoing provisions, the Operator shall not unreasonably deny the Non-Operator's request to withhold payment for significant disputed charges which require adjustment and for which written notice has been received.

26. Conifer has not received any formal dispute regarding its post-filing obligations nor has Conifer agreed to permit Razor withholding payment.[11]

27. Razor remains an Owner and continues to derive benefit from the Judy Creek Gas Plant both through the ongoing processing of its gas and the operation and maintenance of the Judy Creek Gas Plant to which it has an ownership interest. In fact, Razor has been pursuing a transaction which includes the sale of its interest in the Judy Creek Gas Plant.[12]

C. Razor has an obligation to pay all outstanding Post-Filing Arrears to Conifer pursuant to the CCAA

28. In addition to Razor's contractual obligation to pay Conifer, the CCAA also provides for payment of post-filing obligations for services rendered.

29. Section 11.01 of the CCAA and paragraph 19 of the ARIO are intended to seek to address risk to suppliers, by enabling suppliers to demand immediate payment for providing services. This is in recognition of the important role that suppliers play in the success of a restructuring process.[13]

30. It is in accordance with this authority that Conifer is seeking payment, to ensure that it is not required to continue to advance credit for the benefit of Razor and its stakeholders to its own detriment.

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[11] Wilkins Affidavit #3 at para. 23.
[12] Third Report of the Monitor at para 20.
[13] CCAA Initial Order Explanatory Note. **[TAB 5]**

31. The purpose of the CCAA and reorganization under the CCAA is intended to benefit the debtor company's creditors and to maximize creditor recovery in addition to benefitting the debtor.[14] The Supreme Court noted in *Callidus*, expanded on the general objectives of the insolvency regime, adopting the view of Dr. Sarra:

> The Canadian insolvency regime is based on the assumption that creditors and the debtor share a common goal of maximizing recoveries. The substantive aspect of fairness in the insolvency regime is based on the assumption that all involved parties face real economic risks. Unfairness resides where only some face these risks, while others actually benefit from the situation.[15]

32. In this instance, Razor is paying certain companies processing fees and other post-filing obligations but not Conifer. In doing so, Razor is not only depriving Conifer of its entitlement to payment but also treating Conifer unfairly.

33. Courts have recognized that the CCAA should not be used where the debtor is unable to finance its operating costs and where the process will put the financial well-being of the majority of its creditors at risk.[16] At this point in time it is unclear as to whether Razor cannot pay its operating costs which include the Arrears or is simply choosing not to pay them. However, in any event, Conifer should not be required to continue to advance credit to Razor or required to pay third parties who are owed money by Razor, as its financial well-being is being put at risk and will continue to deteriorate should this process continue without Conifer receiving payment.

D. <u>This Honourable Court has the Authority to Grant the Relief Sought</u>

34. During CCAA proceedings, section 11 of the CCAA provides the Court with broad jurisdiction to advance the purposes of the statute by making any order that it considers "appropriate." Section 11 of the CCAA states:

> 11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, **the court**, on the application of any person interested in the matter, **may**, subject to the restrictions set out in this Act, on notice to any other person or

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[14] Lloyd W Houlden, Geoffrey B Morawetz & Dr Janis P Sarra, Bankruptcy and Insolvency Law of Canada, 4th ed (Toronto: Thomson Reuters Canada, 2009) (loose-leaf updated 2024) at §19.4, citing Quintette Coal Ltd v Nippon Steel Corp, (1990) 80 CBR (NS) 98 (SC) **[TAB 6]**; *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10 ("*Callidus*"). **[TAB 7]**

[15] *Supra* at para 75, citing Janis P Sarra, "The Oscillating Pendulum: Canada's Sesquicentennial and Finding the Equilibrium for Insolvency Law" in Janis P Sarra, ed, Annual Review of Insolvency Law 2016 (Toronto: Carswell, 2017) at 30.

[16] *Hunters Trailer & Marine Ltd.,* 2000 ABQB 952 at paras 16-18. **[TAB 8]**

> without notice as it may see fit, **make any order that it considers appropriate in the circumstances.** [emphasis added]

35. As articulated by the Supreme Court of Canada in *Century Services*, "appropriateness" under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA.[17] The purpose of the CCAA is not to disadvantage creditors but rather to try to provide a constructive solution for all stakeholders and where all stakeholders are treated as advantageously and fairly as the circumstances permit.[18]

36. As it stands, Conifer is taking on a disproportionate risk in its ongoing involuntary financing of Razor's arrears. Conifer is not only being deprived of amounts owed to it but may also now be forced to contribute to Razor's failure to pay other stakeholders.

37. As identified above, the Court has the jurisdiction to order immediate payment to Conifer for the Arrears. Conifer submits that this is the option that best resolves the unfairness, disadvantage and significant risk to Conifer.

38. Conifer also seeks a priority charge or in the alternative the grant of a constructive trust as against the Property to protect Conifer in respect of further post-filing arrears.

39. Courts have recognized that it may be appropriate to impose terms under section 11 to protect a party from unreasonable risk associated with the advancement of money or credit.[19] In *Arrangement relatif à Gestion Éric Savard inc.,* the Court recognized that priorities for services provided can be sought and provided by the Court. [20]

40. Under its inherent powers, the Court can create a security interest for creditors who supply goods and services to the debtor after the filing of a CCAA petition and can provide for the priority and ranking of such a security interest with respect to other security holders.[21]

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[17] *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60 at para 70 ("***Century Services***"). **[TAB 9]**
[18] *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6 at para 205 **[TAB 10]**; *Century Services* at para 70.
[19] *Re Air Canada (2003)*, 43 C.B.R. (4th) 1, 2003 CanLII 36792 at paras. 24-25. **[TAB 11]**
[20] *Arrangement relatif à Gestion Éric Savard inc.,* 2019 QCCA 1434 at paras. 17-24. **[TAB 12]**
[21] Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, The 2024 Annotated Bankruptcy and Insolvency Act, Toronto: Thomson Carswell, 2024, pp. 1464-1465, commenting on *Re Smoky River Coal Ltd*, 2000 ABQB 621, aff'd in 2001 ABCA 209 **[TAB 13]**

41. It has also been recognized that section 11.4 provides the court with general jurisdiction to declare a supplier to be a "critical supplier" enabling the provision of a critical supplier's charge.[22]

42. In addition to the power to grant a charge, the Ontario Superior Court of Justice, has found that a counterparty's entitlement to be paid for post-filing good and services provided under an executory contract can be protected by a declaration of a constructive trust.[23] The requirements for unjust enrichment and a constructive trust are all present here: there has been an enrichment of the estate by Conifer's provision of services; there has been a corresponding deprivation because Conifer has not been paid; and there is no juristic reason for Razor to not pay Conifer.

IV. CONCLUSION

43. Conifer believes that the relief sought in its Application aligns with the purpose of the CCAA, to not only create a process that is in the benefit of the debtor company but also to its various stakeholders and complies with the CO&O to which Conifer and Razor are both parties.

V. RELIEF SOUGHT

44. For the reasons set out above, Conifer respectfully request that this Honourable Court grant the following relief:

(a) **Payment of Post-Filing Arrears** – An order requiring Razor to immediately pay to Conifer all Post-Filing Arrears for gas processing services Conifer continues to provide to Razor at the Judy Creek Gas Plant and the South Swan Hills Unit.

(b) **Payment of CNRL Post-Filing Arrears** – An order requiring Razor to immediately pay to Conifer the full amount of CNRL Post-Filing Arrears that CNRL is seeking from Conifer due to Razor's non-payment for its expenses at Swan Hill Unit No. 1 and Swan Hills Gas Gathering System.

(c) **Priority as a Creditor for the Post-Filing Arrears and CNRL Post-Filing Arrears –** If this Court finds that immediate payment of the Post-Filing Arrears

[22] *Canwest Publishing Inc.,* 2010 ONSC 222 at para 47-51. **[TAB 14]**
[23] *General Motors Corporation v. Peco, Inc.,* 2006 CanLII 4758 at paras. 17-31. **[TAB 15]**

wherever situate including all proceeds thereof, which ranks only behind the Administration Charge and Directors' Charge.

ALL OF WHICH IS RESPECTFULLY SUBMITTED at Calgary, Alberta this 3rd day of September, 2024.

Estimated Time for Argument: 30 minutes

BENNETT JONES LLP

Per: 

Keely Cameron/ Sarah Aaron
Counsel for the Applicant,
Conifer Energy Inc.

VI. TABLE OF AUTHORITIES

1. *Blade Energy Services Corp. (Re)*, 2024 ABKB 100
2. *Royal Bank of Canada v Cow Harbour Construction Ltd*, 2012 ABQB 59
3. *Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd*, 2010 BCCA 469
4. *Schendel Mechanical Contracting (Re)*, 2021 ABQB 893
5. CCAA Initial Order Explanatory Note
6. Lloyd W Houlden, Geoffrey B Morawetz & Dr Janis P Sarra, Bankruptcy and Insolvency Law of Canada, 4th ed (Toronto: Thomson Reuters Canada, 2009) (loose-leaf updated 2024) at §19.4, citing Quintette Coal Ltd v Nippon Steel Corp, (1990) 80 CBR (NS) 98 (SC)
7. *9354-9186 Québec Inc v Callidus Capital Corp*, 2020 SCC 10
8. *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60
9. *Hunters Trailer & Marine Ltd.*, 2000 ABQB 952
10. *Sun Indalex Finance, LLC v. United Steelworkers*, 2013 SCC 6
11. *Re Air Canada (2003)*, 43 C.B.R. (4th) 1, 2003 CanLII 36792
12. *Arrangement relatif à Gestion Éric Savard inc.*, 2019 QCCA 1434
13. Lloyd W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, The 2024 Annotated Bankruptcy and Insolvency Act, Toronto: Thomson Carswell, 2024, pp. 1464-1465, commenting on Re Smoky River Coal Ltd, 2000 ABQB 621, aff'd in 2001 ABCA 209
14. *Canwest Publishing Inc.*, 2010 ONSC 222
15. *General Motors Corporation v. Peco, Inc.*, 2006 CanLII 4758

ALBERTA TEMPLATE CCAA INITIAL ORDER EXPLANATORY NOTES

Alberta Template Orders Committee
Calgary/Edmonton, Alberta

INTRODUCTION

In February 2006 the Alberta Template Orders Committee ("Alberta Committee")[1] finalized an Alberta Template Receivership Order for Alberta.[2] The favourable receipt of the Alberta Template Receivership Order led to the development of the Alberta Template CCAA Initial Order ("CCAA Initial Order")

As with the Alberta Template Receivership Order, for reasons of commonality, practicality and efficiency, the Alberta Committee considered it appropriate to use the Ontario CCAA Initial Order (Long Form)[3] ("Ontario Order") as a starting point, focusing on those areas where the Alberta practice or legislation diverged from that in Ontario.

The CCAA Initial Order is not meant to be the last word in either draftsmanship or applicability to each situation. Rather, consistent with the philosophy applied to the Alberta Template Receivership Order, the CCAA Initial Order is meant to serve as a starting point from which any additions, amendments or deletions can be black-lined and brought to the attention of the Justice from whom the order is sought. The assistance of members of the judiciary to the Alberta Committee does not mean that there is any "arrangement" with the Court that a CCAA order will be granted in all instances where the proposed order approximates the CCAA Initial Order, or at all. In each application, the discretion of the presiding Justice will be completely unfettered by the use or non-use of the CCAA Initial Order.

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[1] The Alberta Committee consists of Darren Bieganek, Q.C., Robert Anderson, Q.C., Jeremy Hockin Q.C., David Mann, Rick Reeson, Q.C., Randal van der Mosselaer, Adam Maerov, Carole Hunter and Chuck Russell, Q.C., Josef Kruger, Q.C. with input from Justice K.M. Horner, Justice K.M. Eidsvik, and Justice K.G. Neilsen.

[2] The Alberta Template Orders Committee, "The New Template Version No. 1, February 2006" (2006), 18 Comm. Insol. R. 37.

[3] T. Reyes and S. Bomhoff, "The New Standard Form Template CCAA First-Day Orders Explanatory Notes for Long Form and Short Form CCAA Orders, Versions Dated July 25, 2006" (2006), 18 Comm. Insol. R. 93 ("Ontario Explanatory Notes").

CLAUSE BY CLAUSE REVIEW OF THE CCAA INITIAL ORDER

The following headings correspond to the headings in the CCAA Initial Order, and identify the paragraphs contained within those headings under discussion in these notes. Capitalized terms are defined as in the CCAA Initial Order.

SERVICE [PARA. 1, SEE ALSO STYLE OF CAUSE AND PREAMBLE]

The CCAA Initial Order contemplates the initial application will be made by the debtor company in open court, on notice to affected parties (see, for example, the notes to paragraphs 31-36 below). The preamble references service and those who made submissions at the hearing.

Paragraph 1 abridges the notice (if necessary) and provides that sufficient notice has been given.

In certain situations (for example, urgency), the application could be made *ex parte*, on evidence supporting the need to proceed without notice. In that case, the preamble should be amended to delete reference to service and to establish why it is appropriate to proceed *ex parte*. **Paragraph 1** should then be amended to completely dispense with service.

The CCAA Initial Order contemplates that the application will be made before a Justice in Chambers. Counsel are referred to the procedure set out in the "Notice to the Profession" dated December 7, 2010, as amended, for booking applications under the Commercial/Duty Justice Initiative.

POSSESSION OF PROPERTY AND OPERATIONS [PARAS. 4-9]

Paragraph 4 authorizes the Applicant to remain in possession of its assets, to continue its business and the employment of its employees and advisors, and to retain further advisors as necessary in the ordinary course of business, to carry out the terms of the Order.

Paragraph 4 (d) should only be utilized where necessary, in view of the fact that central cash management systems often operate in a manner that consolidates the cash of applicant companies. Specific attention should be paid to cross-border and inter-company transfers of cash.

Provision for a central cash management system may be necessary where the Applicant carries on business along with other related companies. As identified in the Ontario Explanatory Notes, implementation of a central cash management system may alter substantive rights and is to be used with caution. Given the relative infrequency of the need for such a provision, one has not been included in the CCAA Initial Order. In appropriate circumstances, such a provision could be included and brought to the Court's attention as a departure from the template.

To the extent that a party wishes to challenge the ability to set-off, that can be brought to the Court's attention at the initial application, or later through the comeback clause (for example, opportunistic acquisition of a cross claim).

NO INTERFERENCE WITH RIGHTS, CONTINUATION OF SERVICES, NO OBLIGATION TO ADVANCE MONEY OR EXTEND CREDIT [PARAS. 16-18]

During restructuring, an ongoing supply of goods and services to the debtor company is necessary in order to preserve the status quo while the debtor company attempts to strike an arrangement with its creditors. Therefore, **paragraph 16** of the CCAA Initial Order prohibits persons from altering, terminating or failing to renew agreements with the Applicant. This puts the onus on the party not wishing to be forced to continue supplying or to renew to make an application and persuade the Court otherwise within the context of the proceeding. Similarly, to the extent someone wishes to force a renewal in the absence of a contractual renewal right, this too will have to be brought to the Court's attention.

Section 11.01 of the CCAA provides, however, that a CCAA order may not prohibit a person from requiring immediate payment for goods, services, use of leased or licensed property or other valuable consideration provided after the order is made. **Paragraph 17** of the CCAA Initial Order confirms that the Order does not prohibit requiring immediate payment.

In some instances, a priority charge may be appropriate to provide a certain level of protection to creditors forced to continue dealing with the debtor company: see for example, ***Re Air Canada*** (2003), 43 C.B.R. (4th) 1 (Ont. C.A.) at para. 17, and see also ***Re Smoky River Coal Ltd.*** (2000), 19 C.B.R. (4th) 251 (Alta. Q.B.), aff'd in part (2001), 28 C.B.R. (4th) 127 (Alta. C.A.). This charge was sometimes referred to as a "Post-Petition Trade Creditor's Charge". Section 11.4 of the CCAA now contemplates a "critical suppliers' charge". The CCAA Initial Order does not include such a provision, but to the extent that one may be necessary in a particular case, it can be brought to the Court's attention and included as a black-lined addition. The Alberta Court of Appeal emphasized in ***Re Smoky River Coal Ltd.***, supra at para. 17 that priority charging provisions must clearly indicate the scope and extent of the charge.

Section 11.01 of the CCAA prohibits requiring the further advance of money or credit. This is reflected in **Paragraph 18.**

PROCEEDINGS AGAINST DIRECTORS AND OFFICERS, DIRECTORS' AND OFFICERS' INDEMNIFICATION AND CHARGE [PARAS. 19-22]

It is essential that a company seeking to reorganize under the CCAA have competent directors and officers to guide the restructuring and accordingly, the Alberta Committee thought it important to extend the stay to cover directors and officers, and to include an

Bankruptcy and Insolvency Law of Canada, 4th Edition § 19:4

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part II. Companies' Creditors Arrangement Act

Chapter 19. General; Short Title (S. 1)

II. Short Title (S. 1)

§ 19:4. Purpose of the *CCAA*

While the *CCAA* does not have an express objective clause, its long title, *An Act to facilitate compromises and arrangements between companies and their creditors* indicates that its objective is to assist insolvent companies in developing and seeking approval of compromises and arrangements with their creditors. The *CCAA* has a broad remedial purpose, giving a debtor company an opportunity to find a way out of financial difficulties short of bankruptcy, foreclosure or the seizure of assets through receivership proceedings. It allows the debtor to devise a plan that will enable it to meet the demands of its creditors through refinancing with new lending, equity financing or the sale of the business as a going concern. This alternative may give the creditors of all classes a larger return and protect the jobs of the company's employees: Diemaster Tool Inc. v. Skvortsoff (Trustee of) (1991), 1991 CarswellOnt 168, 3 C.B.R. (3d) 133 (Ont. Gen. Div.). However, the *CCAA* should not be the last gasp of a dying company; if it is to be implemented, it should be implemented at a stage prior to the death throes: Re Inducon Development Corp. (1991), 8 C.B.R. (3d) 306, 1991 CarswellOnt 219 (Ont. Gen. Div.).

The decided cases have identified the following purposes of the legislation:

- to permit an insolvent company to avoid or be discharged from bankruptcy by making a composition or arrangement with its creditors: Browne v. Southern Canada Power Co. (1941), 23 C.B.R. 131, 71 Que. K.B. 136 (Que. C.A.); Multidev Immobilia Inc. v. S.A. Just Invest. (1988), 1988 CarswellQue 38, 70 C.B.R. (N.S.) 91, [1988] R.J.Q. 1928 (Que. S.C.);

- to preserve the insolvent company as a viable operation and to reorganize its affairs to the benefit not only of the debtor but of the creditors: **Quintette** Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C. S.C.); Milner Greenhouses Ltd. v. Saskatchewan (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.); Re D.W. McIntosh Ltd. (1939), 1939 CarswellOnt 87, 21 C.B.R. 206 (Ont. S.C.); Re Avery Construction Co. (1942), 1942 CarswellOnt 86, 24 C.B.R. 17, [1942] 4 D.L.R. 558 (Ont. S.C.); Re Arthur Flint Co. (1944), 1944 CarswellOnt 59, 25 C.B.R. 156, [1944] O.W.N. 325, [1944] 3 D.L.R. 13 (Ont. S.C.); Citibank Canada v. Chase Manhattan Bank of Canada (1991), 5 C.B.R. (3d) 165, 1991 CarswellOnt 182, 2 P.P.S.A.C. (2d) 21 (Ont. Gen. Div.);

- to maintain the *status quo* for a period to provide a structured environment in which an insolvent company can continue to carry on business and retain control over its assets while the company attempts to gain the approval of its creditors for a proposed arrangement that will enable the company to remain in operation for the future benefit of the company and its creditors: Meridian Development Inc. v. Toronto Dominion Bank (1984), 1984 CarswellAlta 259, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, [1984] 5 W.W.R. 215, 53 A.R. 39 (Q.B.); **Quintette** Coal Ltd. v. Nippon Steel Corp. (1990), 80 C.B.R. (N.S.) 98, 1990 CarswellBC 425 (B.C. S.C.); Re Canadian Airlines Corp. (2000), 19 C.B.R. (4th) 1, 2000 CarswellAlta 622 (Alta. Q.B.); Milner Greenhouses Ltd. v. Saskatchewan (2004), 2004 CarswellSask 280, [2004] 9 W.W.R. 310, 50 C.B.R. (4th) 214, 2004 SKQB 160 (Sask. Q.B.); Re Blue Range Resource Corp. (2000), 192 D.L.R. (4th) 281, 2000 ABCA 239, 20 C.B.R. (4th) 187, 2000 CarswellAlta 1004 (Alta. C.A.);

- to protect the interests of creditors and to permit an orderly administration of the debtor company's affairs: Meridian Development Inc. v. Toronto Dominion Bank (1984), 1984 CarswellAlta 259, 52 C.B.R. (N.S.) 109, 32 Alta. L.R. (2d) 150, [1984] 5 W.W.R. 215, 53 A.R. 39 (Q.B.);

- to protect an insolvent company from proceedings by creditors that would prevent it from carrying out the terms of a compromise or arrangement: Feifer v. Frame Manufacturing. Corp. (1947), 1947 CarswellQue 15, 28 C.B.R. 124, [1947] Que. K.B. 348 (Que. C.A.);

- to permit equal treatment of creditors of the same class: Re NsC Diesel Power Inc. (1990), 79 C.B.R. (N.S.) 1, 1990 CarswellNS 33, 97 N.S.R. (2d) 295, 258 A.P.R. 295 (T.D.);

- to permit a broad balancing of stakeholder interests in the insolvent corporation: Nova Metal Products Inc. v. Comiskey (Trustee of) (1990), 1 C.B.R. (3d) 101, 41 O.A.C. 282, 1990 CarswellOnt 139, 1 O.R. (3d) 289 (Ont. C.A.); Re Air Canada [Greater Toronto Airport Authority re gates at new terminal (Toronto)] (2004), 47 C.B.R. (4th) 189, 2004 CarswellOnt 870 (Ont. S.C.J. [Commercial List]);

- in appropriate circumstances to effect a sale, winding-up or liquidation of a debtor company and its assets: Re Anvil Range Mining Corp. (2002), 34 C.B.R. (4th) 157, 2002 CarswellOnt 2254 (Ont. C.A.).

The Supreme Court of Canada has held that the *CCAA* offers more flexibility and greater judicial discretion than the rules-based mechanism under the *BIA*, making the former more responsive to complex reorganizations. The exercise of judicial discretion has allowed the *CCAA* to adapt and evolve to meet contemporary business and social needs. As reorganizations become increasingly complex, *CCAA* courts have been called on to innovate. In determining their jurisdiction to sanction measures in a *CCAA* proceeding, courts should first interpret the provisions of the *CCAA* before turning to their inherent or equitable jurisdiction. Noteworthy in this regard is the expansive interpretation the language of the *CCAA* is capable of supporting. The general language of the *CCAA* should not be read as being restricted by the availability of more specific orders. The requirements of appropriateness, good faith and due diligence are baseline considerations that a court should always bear in mind when exercising *CCAA* authority. The question is whether the order will usefully further efforts to avoid the social and economic losses resulting from liquidation of an insolvent company, which extends to both the purpose of the order and the means it employs. The Supreme Court of Canada held that Parliament understood when adopting the *CCAA* that liquidation of an insolvent company was harmful for most of those it affected, notably creditors and employees; and that a workout that allowed the company to survive was optimal. It held that courts must recognize that on occasion the broader public interest will be engaged by aspects of the reorganization and may be a factor against which the decision of whether to allow a particular action will be weighed. The Supreme Court of Canada has held that reorganization serves the public interest by facilitating the survival of companies supplying goods or services crucial to the health of the economy or saving large numbers of jobs: Century Services Inc. v. Canada (A.G.), 2010 CarswellBC 3419, 72 C.B.R. (5th) 170, 2010 SCC 60, [2010] S.C.J. No. 60, (*sub nom.* Re Ted LeRoy Trucking Ltd.) 326 D.L.R. (4th) 577 (S.C.C.). For a full discussion of this case, see § 22:54 "Claims under the *Excise Tax Act*".

The Alberta Court of Queen's Bench dismissed the *CCAA* application of the debtor. Justice Romaine found that the debtor met the technical requirements for protection under the *CCAA*; however, it was also clear that if the application for an initial order under the *CCAA* did not succeed, a receivership would follow. In considering an initial order, Justice Romaine held that there should be a germ of a reasonable and realistic plan, particularly if there is opposition from the major stakeholders most at risk in the proposed restructuring. Justice Romaine acknowledged that the fundamental purpose of the *CCAA* is to permit a company to carry on business and where possible avoid the social and economic costs of liquidating its assets. Here, the debtor was a company with very few employees; relatively minor unsecured debt; it did not carry on a business that had broader community; and there were no social implications that could require greater flexibility from creditors. The major stakeholders in this case were the secured creditors who opposed the application and the equity holders. Justice Romaine concluded that the restructuring options proposed by the debtor were not realistic or commercially reasonable. This case was not one where the secured creditors had acted precipitously, or where the debtor had not had a more than adequate opportunity to canvass the market for refinancing

and restructuring options. The debtor was most likely a liquidating *CCAA*, and given the lack of confidence and the adversarial relationship between the debtor and the secured creditors at risk, a *CCAA* order was not appropriate in the circumstances: Alberta Treasury Branches v. Tallgrass Energy Corp., 2013 CarswellAlta 1496, 2013 ABQB 432 (Alta. Q.B.).

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2004 (Carswell, 2005) 59–118; Andrew Kent, Shahen Mirakian, Adam Maerov and Tushara Weerasooriya, "Eligible Financial Contracts vs. Insolvency: Round II"; John McLean and Mike Cheevers, "Raising the Titanic: the Fall and Rise of Northern Steamships Ltd." in J. Sarra, ed. *Annual Review of Insolvency Law, 2007* (Carswell, 2008).

An issue arose as to whether a creditor, "BP", or the first lien lenders to the debtor have priority to certain funds held by the monitor and debtor pending resolution of disputed claims. The Alberta Court of Queen's Bench held that the *CCAA* stay provision prevents termination of an agreement because of a contractual counterparty's insolvency, does not apply to an eligible financial contract (EFC). Section 34(8)(a) of the *CCAA* allows solvent counterparties to EFC certain permitted actions during the stay period if they are allowed to take such actions under the specific EFC agreement, including netting or setting off or compensation of obligations between the company and the other parties to the EFC. However, s. 34(10) does not permit enforcement actions to recover net termination values once they are determined. Rather, if net termination values are owed by the company to another party to the EFC, s. 34(10) deems the non-insolvent counterparty "to be a creditor of the company with a claim against the company in respect of those net termination values". The purpose of protection for EFC under the *CCAA* is to provide stability to financial markets by allowing a non-defaulting counterparty the right to terminate and crystallize claims arising under an EFC. Romaine J. further held that BP is not entitled to a constructive trust as a remedy for unjust enrichment nor for wrongful conduct. The Court accepted that BP's failure to object to the stay does not preclude its claim of bad faith, but in this case, there was no bad faith. Justice Romaine held that the first lien lenders are entitled to a declaration that they have a first priority interest in all the debtor's property, including a payment held in trust and funds held back from the sale of assets. Any amounts owing to BP are an unsecured claim: *Re Bellatrix Exploration Ltd.*, 2020 CarswellAlta 2545, 86 C.B.R. (6th) 191, 2020 ABQB 809 (Alta. Q.B.).

§ 22:33 Letters of Credit

Under s. 11.04, no stay order made under s. 11.02 has affect on any action, suit or proceeding against a person, other than the company in respect of whom the order is made, who is obligated under a letter of credit in relation to the company.

Where a creditor held an irrevocable letter of credit of the bank securing electricity debts and asked the bank to honour the letter on the debtor's insolvency, the court held that (former) s. 11.2 of the *CCAA* specified that the court may not make an order with respect to requests in relation to letters of credit and (former) s. 11.3 (now s. 34(4)) specified that no order may prohibit a person from requiring immediate payment for services or requiring further advance of any money or credit. Hence, the creditor was justified in requiring a letter of credit to be paid and to allocate related amounts to accounts owing before the stay order. The court does not have the power to affect legal relationships between the parties to the letter of credit where a third party is involved. On the facts, since the amounts paid by the creditor from the bank were never in the debtor's patrimony, the creditor could freely allocate this amount to the accounts it determined and nothing in the statute prevented the creditor from demanding that the debtor give personal guarantees, since it could not require payment as it became due, and bore an increasing risk: *Re Meubles Dinec inc.* (2006), 2006 CarswellQue 4986, 35 C.B.R. (5th) 41 (Que. C.A.).

§ 22:34 Suppliers of Goods and Services or Rental of Property to the Debtor

See s. 11.4 Critical Supplier and § 22:55 for provisions in force effective September 18, 2009.

Under its general authority, the court can create a security interest for creditors who supply goods and services to the debtor after the filing of a *CCAA* petition and can provide for the priority and ranking of such a security interest with respect to other security holders. If the plan under the *CCAA* fails, the court can determine who are

entitled to share in the proceeds of the security interest: *Re Smoky River Coal Ltd.* (2000), 19 C.B.R. (4th) 281, [2000] 10 W.W.R. 147, 83 Alta. L.R. (3d) 127 (Q.B.). Although the Alberta Court of Appeal in the main approved the Queen's Bench decision in the *Smoky River* case, the Court of Appeal was of the opinion that if a charge is created for persons supplying goods and services after the filing of a *CCAA* petition, the terms and scope of the charge should be clearly defined. The charge should make it clear that the costs of maintaining and repairing lease equipment, in addition to the lease payments, are covered by the charge: *Re Smoky River Coal Ltd.* (2001), 28 C.B.R. (4th) 127, 2001 CarswellAlta 1035 (Alta. C.A.).

A post-filing charge created by a court must be done clearly and with specificity. A charge directing the vendors of a debtor company to complete the sale transaction in accordance with the terms of an agreement of purchase and sale will not suffice to create a charge in favour of the purchaser of a debtor company in priority to secured creditors where, after adjustments, it transpired that the purchaser had made an over-payment with respect to the purchase price: *Re Mosaic Group Inc.* (2004), 2004 CarswellOnt 2254, 3 C.B.R. (5th) 40 (Ont. S.C.J.).

In *Re Air Canada [TA lessors' motion for rental payments]* (2004), 47 C.B.R. (4th) 182, 2004 CarswellOnt 643 (Ont. S.C.J. [Commercial List]), in keeping with commercial reasonableness, a reconciliation obligation was split between the pre-filing and post-filing obligations of the debtor. To do otherwise would have allowed a lessor to obtain an on-going priority that would be unwarranted vis-à-vis other lessors with claims under their on-going leases. The general stay did not prohibit the lessor from requiring payment for the use of the leased airplane that continued to be provided after the filing.

Even though a lease agreement provides that the lease is a true lease and that the lessor intends to claim available tax benefits, the court can find that the arrangements between the parties are akin to equipment purchase financing arrangements, rather than to the sort of pay-for-use lease arrangements: *Re International Wallcoverings Ltd.* (1999), 28 C.B.R. (4th) 48, 1999 CarswellOnt 4933 (Ont. Gen. Div. [Commercial List]); *Re Philip Services Corp.* (1999), 15 C.B.R. (4th) 107 (Ont. S.C.J. [Commercial List]); *Re Smith Brothers Contracting Ltd.* (1998), 13 P.P.S.A.C. (2d) 316, 53 B.C.L.R. (3d) 264 (S.C.).

The Alberta Court of Queen's Bench held that a post-protection service provider usually has a right to maintain its contract price; as a general rule, courts do not vary contracts in an initial order. Here, the contracts were "true" licenses, which meant that they were not security documents and the creditor could not be forced to provide the portions of those contracts that related to the provision of services post-protection without the right to claim immediate payment. If a service provider will not agree to modify its contractual payment terms in order to provide post-protection services, then the debtor must either terminate the contract or pay the contractual amount. It would be inappropriate for a court to attempt to draw up a contract for the parties at an early stage of the *CCAA* process. What the parties have negotiated in a contract should generally be presumed to be a fair and reasonable price for the services provided. Justice Veit noted that there were two exceptions identified in the jurisprudence to the general rule that contract terms govern. First, there are utility contracts, where it may be appropriate for a court to set the terms of payment for post-protection services since a utility provider should not be required to provide post-protection services that require the advance of further credit; and second, is the selection by a court from amongst the provisions of one contract of certain services for which the debtor must pay the contract price, while other provisions are identified as ones for which the debtor is not immediately required to pay. Justice Veit held that the two exceptions reinforce the generality of the rule that contracts cannot be varied by courts; they can be interpreted or rectified but not varied. Any termination must be fair, appropriate, reasonable, and must have been issued after good faith negotiations; here, the test had been met and it was entitled to terminate its contract: *Re Allarco Entertainment Inc.* (2009), 2009 CarswellAlta 1458, 58 C.B.R. (5th) 140 (Alta. Q.B.).

The British Columbia Supreme Court dismissed an application for rent deferral. Justice Fitzpatrick held that the initial and amended orders were made on the