COURT FILE NUMBER	2401-02680
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANTS	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	**AFFIDAVIT #10 OF DOUG BAILEY**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	McCarthy Tétrault LLP 4000, 421 – 7th Avenue SW Calgary, AB T2P 4K9 Attention: Sean Collins KC / Pantelis Kyriakakis / Nathan Stewart Tel: 403-260-3531 / 3536 / 3534 Fax: 403-260-3501 Email: scollins@mccarthy.ca / pkyriakakis@mccarthy.ca / nstewart@mccarthy.ca

Clerk's Stamp

AFFIDAVIT #10 OF DOUG BAILEY
Sworn on October 1, 2024

I, Doug Bailey, of the City of Calgary, of the Province of Alberta, **SWEAR AND SAY THAT**:

1. I am the CEO of Razor Energy Corp. ("**Razor Energy**"), Razor Holdings GP Corp. ("**Razor Holdings**"), and Blade Energy Services Corp. ("**Blade**", Razor Energy, Blade, and Razor Holdings, are collectively referred to as, the "**Applicants**"). Razor Energy is the sole limited partner, and Razor Holdings is the sole general partner, of Razor Royalties Limited Partnership ("**Razor Royalties LP**", and collectively with the Applicants, the "**Razor Entities**"). I am also a member of the board of directors of each of the Applicants. I have reviewed the books and records prepared and maintained by the Razor Entities, in the ordinary course of business. I have personal knowledge of the facts and matters sworn to in this Affidavit, except where information was received from someone else or some other source of information, as identified herein. Where the information contained herein was received from another source, I believe such information to be true.

2. On February 20, 2024, I swore an affidavit (the "**Initial Affidavit**"), filed in the within proceedings (the "**CCAA Proceedings**"). Among other things, the Initial Affidavit

describes: (i) the background with respect to the Razor Entities' assets, liabilities, and operations; and, (ii) details concerning the relief sought in connection with the Initial Order and the ARIO (each as defined below), including the Applicants' sale and investment solicitation process (the "**SISP**").

3. On February 28, 2024, the Honourable Justice N.J. Whitling granted an initial order (the "**Initial Order**"), in respect of the Applicants, under the *Companies' Creditors Arrangement Act* (the "**CCAA**"). Among other things, the Initial Order: (i) established a stay of proceedings against the Applicants for ten (10) days (the "**Stay Period**") and extended the stay of proceedings to Razor Royalties LP, for the duration of the Stay Period; (ii) appointed FTI Consulting Canada Inc. ("**FTI**") as monitor (when referred to in such capacity, the "**Monitor**") of the Razor Entities; and, (iii) approved the SISP.

4. On March 6, 2024, the Honourable Justice M.E. Burns granted an order (the "**ARIO**"), amending and restating the Initial Order. The ARIO extended the Stay Period until and including March 29, 2024.

5. Most recently, on July 17, 2024, the Honourable Justice Mah granted four (4) orders which, among other things:

   (a) extended the Stay Period until and including October 13, 2024 (the "**July Extension Order**");

   (b) approved the HWN Transaction between Razor Energy, as vendor, and HWN Energy Ltd., as purchaser, which contemplated the sale of certain minor, non-operated assets that have been carved out of the Corporate Transaction (as defined below);

   (c) approved the FutEra Transaction between Razor Energy, as vendor, FutEra Power Corp. ("**FutEra**"), as issuer, and Seibu Investments Ltd., as purchaser, which contemplated the sale, transfer, and assignment of 210,000 common shares in the equity of FutEra held by Razor Energy; and,

   (d) sealed certain confidential documents, in connection with the HWN Transaction and the FutEra Transaction, on the Court file.

Summary of Relief Sought

6. This Affidavit is sworn in support of an application (the "**Application**"), by the Applicants, seeking an Order extending the Stay Period, up to and including November 8, 2024, or such other date as this Honourable Court may order.

The Applicants' Activities since the July Extension Order

7. The Applicants have continued to advance their restructuring since the granting of the July Extension Order. Specifically, among other things, the Applicants have:

   (a) completed the FutEra Transaction;

   (b) completed the HWN Transaction;

   (c) worked with the Monitor and the proposed purchaser (the "**Corporate Offeror**") to advance the draft Subscription Agreement, in respect of a transaction (the "**Corporate Transaction**") arising from the SISP, which contemplates that the Corporate Offer would acquire all of Razor Energy's issued and outstanding shares, by way of a reverse vesting order;

   (d) engaged with the Orphan Well Association ("**OWA**") and Alberta Energy Regulator ("**AER**") regarding a structuring matter in respect of the proposed Corporate Transaction;

   (e) engaged with Canadian Natural Resources Limited ("**CNRL**"), regarding revisions to the Subscription Agreement, to address such structuring matter;

   (f) worked with the Corporate Offeror to address the concerns raised by OWA and AER, with respect to the structure of the transaction and affected assets and interests of the Razor Entities;

   (g) continued discussions and negotiations with other material stakeholders regarding the Corporate Transaction;

   (h) continued to provide information to the Monitor, as requested, and to work with the Monitor and Peters & Co., to identify potential solutions to various issues arising under or in connection with the Applicants' CCAA Proceedings and the Corporate Transactions; and,

(i) responded to questions and issues, from creditors and other stakeholders, concerning these CCAA Proceedings and the Corporate Transaction.

Corporate Transaction Status Update

8. In the Affidavit I swore on September 6, 2024 (the "**Bailey #9 Affidavit**"), I provided an update regarding the status of the Corporate Transaction, which included that:

(a) a well-advanced draft Subscription Agreement was subject to ongoing discussion between Razor Energy and the Corporate Offeror;

(b) there was a structuring matter under active discussion with the OWA and CNRL; and,

(c) the Corporate Offeror had advised Razor Energy that definitive documentation must be executed and delivered, subject only to Court approval, by September 20, 2024.

9. Since September 6, 2024:

(a) the structuring issue referred to in the Bailey Affidavit #9 has been resolved;

(b) the Corporate Offeror and Razor Energy mutually agreed to extend the deadline for the execution and delivery of the Subscription Agreement as, among other reasons, the parties required additional time to address changes resulting from the resolution of the structuring issue, and to finalize various schedules and values referred to in the draft Subscription Agreement; and,

(c) the draft Subscription Agreement has been further advanced to incorporate input from the Monitor and the Corporate Offeror. While the Subscription Agreement remains subject to ongoing discussions between Razor Energy and the Corporate Offeror, the parties are working in earnest to complete the definitive documentation in an expedient manner.

10. Although the Subscription Agreement has not been finalized as of the date hereof, I believe that the parties are in the final stages of negotiations and it is reasonably likely that the Subscription Agreement will be finalized in the near term.

11. The Razor Entities intend to provide all stakeholders with fulsome notice of the application seeking approval of the Corporate Transaction and any related or ancillary relief (collectively, the "**Sale Approval Application**"), to permit parties to consider their positions and to enable Razor Energy and the Corporate Offeror to engage with and address any concerns that may be raised.

12. The Applicants have secured the full day, on November 8, 2024, for the Sale Approval Application.

Update Regarding Applications Made in the CCAA Proceedings

13. On April 10, 2024, the Honourable Madam Justice M.E. Burns heard an application (the "**APMC Application**") by the Alberta Petroleum Marketing Commission ("**APMC**"), seeking to compel Razor Energy to deliver certain unremitted Crown royalties, for the month of January 2024, to APMC, in kind.

14. On September 6, 2024, the Court released its decision in *Razor Energy Corp. v. Companies' Creditors Arrangement Act*, 2024 ABKB 534 (the "**APMC Decision**"), dismissing the APMC Application. A true copy of the APMC Decision is attached and marked as **Exhibit "A",** to this, my Affidavit.

15. APMC has filed an application for leave to appeal the APMC Decision (the "**Leave to Appeal Application**"). Razor Energy is considering its position regarding APMC's appeal and any potential cross-appeal, while working with APMC and other interested parties, through their respective counsel, to address scheduling of APMC's Leave to Appeal Application.

16. On September 11, 2024, the Honourable Justice D.R. Mah heard an application (the "**Conifer Application**") by Conifer Energy Inc. ("**Conifer**") seeking to compel the payment of certain disputed post-filing obligations and the granting of a priming charge, in favour of Conifer, over Razor Energy's property.

17. On September 19, 2024, the Court released its decision in *Razor Energy Corp (Re),* 2024 ABKB 553 (the "**Conifer Decision**"), dismissing the Conifer Application. A true copy of the APMC Decision is attached and marked as **Exhibit "B",** to this, my Affidavit.

Seventh Cash Flow Forecast

18. With the assistance of the Monitor and the Applicants' professional advisors, the Applicants have prepared a cash flow forecast (the "**Seventh Cash Flow Forecast**") for the period ending November 10, 2024 (the "**Forecast Period**"). A copy of the final Seventh Cash Flow Forecast will be included in the forthcoming Seventh Monitor's Report.

19. The Seventh Cash Flow Forecast projects that the Applicants are forecasted to have sufficient liquidity to satisfy their post-filing obligations (other than certain post-filing joint venture obligations, which are not and have not previously been contemplated to be paid, until the completion of the Corporate Transaction), during the Forecast Period. For clarity, as with the previous recent cash flow forecasts prepared by the Applicants in these CCAA Proceedings, the Seventh Cash Flow Forecast does not contemplate the payment of post-filing amounts in respect of certain joint venture obligations, including the operation of the Judy Creek Gas Plant, until the completion of the Corporate Transaction.

Extension of Stay Period

20. The current Stay Period will expire on October 13, 2024; unless extended by further order of this Honourable Court.

21. The Applicants seek an extension of the Stay Period, up to and including November 8, 2024, in order to, among other things, provide the Applicants with the necessary time to:

    (a) complete the negotiations concerning the Corporate Transaction, and execute and deliver the definitive documentation regarding same;

    (b) seek Court approval of the Corporate Transaction, which contemplates a going concern transaction and the corresponding resumption and payment, of all of the Applicants' post-closing obligations to creditors and counterparties, together with the continuation and assumption of all abandonment and reclamation obligations. The corresponding Sale Approval Application is currently scheduled for November 8, 2024; and

    (c) take any and all related steps in furtherance of the CCAA Proceedings.

22. I verily believe that:

(a) the Applicants have acted, and are continuing to act, in good faith and with due diligence; and,

(b) it is in the best interest of the Applicants and their stakeholders, that the Applicants be afforded an extension of the Stay Period.

Conclusion

23. I make this Affidavit in support of the Application seeking an extension of the Stay Period, until and including November 8, 2024, or such other date as this Honourable Court may order.

SWORN BEFORE ME in the City of Calgary, in the Province of Alberta, this 1st day of October, 2024.

A Commissioner for Oaths in and for the Province of Alberta

Samantha Arbor
Barrister & Solicitor

DOUG BAILEY

This is Exhibit "A" to the Affidavit

of Doug Bailey

sworn before me this 1 day of

October, 2024

A Commissioner for Oaths in and for Alberta

Samantha Arbor
Barrister & Solicitor

Court of King's Bench of Alberta

Citation: Razor Energy Corp., v Companies' Creditors Arrangement Act, 2024 ABKB 534

Date:
Docket: 2401 02680
Registry: Calgary

In the Matter of the Companies Creditors Arrangement Act, RSC 1985, c C-36

Between:

Razor Energy Corp., Razor Holdings GP Corp, Blade Energy Services Corp.

Applicants

- and -

Companies' Creditors Arrangement Act

Respondents

Reasons for Decision
of the
Honourable Justice M.E. Burns

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[1] Razor is in the business of the development and production of oil and gas.

[2] Alberta (the "Crown") owns and holds legal title to most mines and minerals and natural resources in the province and enters into agreements under the *Mines and Minerals Act,* RSA c M-17 (the "*Act*") that grants rights in respect of minerals, which includes petroleum and oils as provided in Section 1(1)(p)(i) and section 16 of the *Act*.

[3] The *Act* provides that a royalty determined under the *Act* is reserved to the Crown on a mineral recovered pursuant to an agreement. The royalty is prescribed from time to time by the Lieutenant Governor in Council (section 34).

[4] The Alberta Petroleum Marketing Commission ("APMC") was created and appointed to act as the Crown's agent to receive and market crude oil royalty volumes and includes tasks related to crude oil royalty forecasting, deliveries, and settlement of Crown oil royalties under the *Petroleum Marketing Act* and its' regulations.

[5] Razor has entered into approximately 321 "Petroleum and Natural Gas Leases" with the Crown. Each of the agreements are substantially identical other than the location and "leased substance." As a result, Razor is obligated to deliver to the Crown a royalty share of the leased substance produced by delivering such share to APMC.

[6] The royalty owing to the Crown in respect of the leased substance produced by Razor in January 2024 was not delivered to the APMC by Razor.

[7] On January 30, 2024, Razor commenced insolvency proceedings by filing notices of intention to make proposals to their creditors pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), consequently there was a stay of proceedings respecting Razor and its property.

[8] On February 28, 2024, Razor converted its proposal proceedings to proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 ("*CCAA*"), with an ("initial order") being granted the same day. Amongst other things, a Monitor was appointed and the stay of proceedings under the proposal continued with respect to preventing parties from commencing or continuing proceedings or exercising any rights or remedies against Razor.

[9] On February 28th, APMC notified the Monitor and Razor Energy of the Crown's ownership and title to royalty oil, including the January royalty deficiency volumes (estimated to be 934.8 m^3 of crude oil). AMPC advised Razor Energy it was in a bailment and trust relationship with respect to the Crown's royalty share of crude oil production, and there was no right to seize and convert the Crown's property for the use of Razor Energy and its creditors and the royalty oil could not form part of the property of Razor Energy.

[10] On March 1, 2024, the APMC directed Razor Energy ("the Direction"), pursuant to section 12(1) of the *Petroleum Marketing Regulation,* to deliver, in kind, to APMC, as part of the February 2024 royalty deliveries, crude oil of an equal quantity and like quality to the January 2024 royalty deficiency volumes that were not delivered.

[11] The Monitor's position, as stated in its First Report, was that as the Direction from APMC was directly related to the January royalty amounts, it appeared to the Monitor that the Direction was in breach of the prohibition on the exercise of rights and remedies contained in paragraph 15 of the Initial Order.

[12] APMC, on behalf of the Crown, argues that it has a proprietary right in the oil that it reserves as royalties. This right applies to the monthly oil royalty and the oil it directs to be paid under section 12(1) of the *Act*. APMC argues that the Crown does not become a creditor when a royalty is not paid – it has a proprietary right that it may seek over subsequent oil production. AMPC is not seeking the enforcement of a payment, <u>it is seeking to have the Crown's royalty share delivered to it.</u>

[13] Razor, and its primary creditor, Arena Investors LP, argue that while the Crown may have a proprietary right to the oil in the month the royalties are due, if the oil is not provided, the Crown becomes a creditor with respect to the outstanding royalty deficiency volumes and the usual priorities will apply to the Crown in the context of the bankruptcy. The fact that APMC is directing Razor's pre-filing obligations be paid in kind rather than cash is still enforcing a missed payment – an outstanding liability to a creditor.

What is the scope of the stay?

[14] The Initial Order, as amended and extended, contains provisions mandating a stay. It provides, in part, that:

> **NO PROCEEDINGS AGAINST THE APPLICANTS OR THE PROPERTY**
>
> 14. Until and including March 8, 2024, or such later date as this Court may order (the "Stay Period"), no proceeding or enforcement process in any court (each, a "Proceeding") shall be commenced or continued against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, except with leave of this Court, and any and all Proceedings currently under way against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or affecting the Business or the Property are hereby stayed and suspended pending further order of this Court.
>
> **NO EXERCISE OF RIGHTS OR REMEDIES**
>
> 15. During the Stay Period, all rights and remedies of any individual, firm, corporation, governmental body or agency, or any other entities (all of the foregoing, collectively being "Persons" and each being a "Person"), whether judicial or extra-judicial, statutory or non-statutory against or in respect of the Razor Entities (including, for greater certainty, Razor Royalties LP) or the Monitor, or affecting the Business or the Property, are hereby stayed and suspended and shall not be commenced, proceeded with or continued except with leave of this Court […]

[15] Razor asserts that all financial and payment obligations relating to the pre-filing period are stayed under the *CCAA* and failure to pay a pre-filing royalty deficiency volume does not give rise to an enforceable remedy during the applicable stay period. The *CCAA* is clear that it is binding upon the Crown. It is also clear that the *CCAA* applies with respect to the debtor's assets and does not permit a debtor to take and use that which they do not own.

Is this a deemed trust?

[16] Razor argues that while the *Mines and Minerals Act* uses language of "ownership," APMC's claim is akin to or in fact a statutory deemed trust. Section 37(1) of the *CCAA* provides:

> 37 (1) Subject to subsection (2), despite any provision in federal or provincial legislation that has the effect of deeming property to be held in trust for Her Majesty, property of a debtor company shall not be regarded as being held in trust for Her Majesty unless it would be so regarded in the absence of that statutory provision.

[17] Razor argues that the Crown's royalty share of the mineral produced in a given month is commingled with all the produced minerals which are property of Razor Energy. Razor asserts that section 3(b) of the *Marketing Regulation* implicitly recognizes this and states that "when crude oil recovered pursuant to an agreement is delivered to a field delivery point during a delivery month, the Crown's royalty share of that crude oil is deemed to be delivered first". Presumably, Razor's position is that the Crown's oil, deemed to be delivered first, would then engage the protection of s 37(1) of the *CCAA*.

[18] The Crown's position is that this is different because here there is no question that the Crown holds the propriety interest in all of the crude subject to Razor's interest. Razor's interest is governed by a contract and the provisions of the *Act*. Section 37 applies to "property of a debtor company" being held in trust for Her Majesty. The Crown's royalty share is not and never was the "property of the debtor" which was deemed by statute to be held for the Crown. It was always the property of the Crown. At most, Razor is "a trustee or agent" in respect of the Crown royalty share. This is not a deemed trust created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share.

[19] The Alberta Court of Appeal considered the *Act* and the Crown's interest in the mineral production in the decision of ***Excel Energy Inc v Alberta***, 1997 ABCA 24 at paragraphs 6 and 7, where the court noted:

> ... under Alberta law, the Crown royalty is an *in rem* right. To establish the required statutory obligation, Excel relied upon provisions in the *Mines and Minerals Act,* RSA 1980, c M-15, s 34 provides that "A royalty … is reserved to the Crown in right of Alberta on any mineral recovered pursuant to an agreement." S. 35(3) provided that the royalty interest was deliverable in kind. S. 36 provides that title remains in Alberta even though the royalty is commingled during the extraction and refining process, and indeed remains until the Alberta interest is "disposed of by or on behalf of the Crown". If then, the producer ever sells the royalty it can only do so as agent for Alberta.
>
> It first must be said that this attempt by Canada to treat an obligation as income is, of course, the creation of a fiction. Nobody but Alberta ever in fact had that royalty or received a penny by way of proceeds from it. Alberta held an *in rem* interest in the hydrocarbons as they came out of the ground, and, when they were sold, the proceeds, under the scheme of the Alberta *Act*, went straight to Alberta. The producer could never be anything more than a trustee or agent.

[20] Consequently, this is not a case such as ***British Columbia v. Henfrey Samson Belair Ltd.***, [1989] 2 S.C.R. 24, where a person collects a tax (cash or similar), and the legislation deems a trust over the tax collector's property for the amount of the tax collected.

[21] Further, in ***Canada v. Canada North Group Inc***., 2021 SCC 30, the question was whether a deemed trust created by statute had a priority over priming (administrative) charges in the context of the *CCAA*. The SCC found that the deemed trust did not create a beneficial interest that could be considered a proprietary interest and did not give the Crown a property interest as a common law trust would, reasoning that the trust lacked the quality that allowed a court to refer to a beneficiary as a beneficial owner.

[22] Here, the Court of Appeal recognized the *in rem* ownership interest in the hydrocarbons. Razor's relationship to the Crown's royalty share as a trustee or agent is not a deemed trust created by statute but rather a recognition of the fundamental *in rem* rights the Crown has in the royalty share. No deemed trust is necessary or has been created. There is already a proprietary interest. Razor does not hold the oil in a "trust" as one would find in a deemed trust. Razor is holding onto the Crown's oil. The Initial Order applies to creditors and to Razor's property, not the Crown's property.

But does the Crown become a creditor when a royalty is not delivered?

[23] Given the decision in *Excel*, it is clear that the Crown's rights to the royalty share are *in rem*. Razor never owned and was never entitled to own the Crown's royalty share of production. Neither the *BIA* nor the *CCAA* give Razor any ownership interest in the Crown's royalty share.

[24] The Crown argues that Alberta is not acting as a creditor, but the steward of natural resources owned by and for the benefit of all Albertans, which it develops in the public interest, but in the context of oil that was not provided when required, is the Crown then a creditor with respect to the non-delivered amount? And if so, is it the type of "claim" covered by the Initial Order or the statutes?

[25] Arena argues that APMC is fundamentally seeking relief in relation to a pre-filing claim which has been stayed by virtue of the Initial Order. The APMC is utilizing the enforcement mechanisms available to it under provincial legislation to seek recovery of the January 2024 royalty shares.

[26] The reality is that the royalty is a tangible, physical quantity of oil but Razor no longer possesses the January 2024 royalty shares volume because it was likely transferred to third party oil marketers back in the beginning of the year (albeit in violation of section 11 of the *Act*) and the tangible assets are unrecoverable. As a result, the APMC cannot enforce its *in rem* rights with respect to that particular oil.

Can AMPC demand the royalty under s 12?

[27] Section 12(1) of the Petroleum Marketing Regulation provides:

> 12(1) If there is an underdelivery balance at a battery for a delivery month, the Commission, by a notice given to the operator of the battery for that delivery month, may direct that the default under the agreement or agreements resulting from the deficient delivery be remedied by the delivery in kind to the Commission of crude oil in equal quantity and of like quality to the underdelivery balance
>
> (a) in the month in which the direction is given,
> (b) in a particular subsequent month, or
> (c) in instalments in 2 or more particular subsequent months,
>
> whichever is specified in the direction (emphasis added).

[28] Section 12 is a statutory enforcement clause/remedy. Section 15 of the Initial Order is specific in providing that all rights and remedies of a government body, whether judicial or extra-judicial, statutory, or non-statutory, against or in respect of the Razor Entities, or affecting the Business or Property, are stayed.

[29] Whether APMC could exercise its rights under section 13 (seeking a monetary amount) is irrelevant to this determination.

[30] Further, there is no paramountcy issue here. There is no conflict between the Act and *Petroleum Marketing Regulation* and the *CCAA* or *BIA*. The Initial Order was made within the power, authority, and jurisdiction of the Court. The Crown is bound by it.

[31] At its crux, even though the oil was wrongfully taken in January, and the Crown has title to any and all subsequent oil, subject to the terms of the leases, and even though the oil was held in a

true trust, not a deemed trust, the act allows, and the Initial Order provides, that all attempts at remedying the taken oil were stayed. Using the power in Section 12 is a remedial step that is stayed.

[32] APMC's application is dismissed.

Heard on the 10th day of April, 2024.
Dated at the City of Edmonton, Alberta this 6th day of September, 2024.

M.E. Burns
J.C.K.B.A.

Appearances:

William Shores,
Shores Jardine LLP
for the Applicant

Pantellis Kyriakakis,
McCarthy Tetrault LLP,
for the Respondent Razor Energy Razor Holdings GP Corp.,
and Blade Energy Services Corp.

Jessica Cameron,
Borden Ladner Gervais LLP
for the Respondent Arena Investors LP

Kelly Bourassa,
Blake, Cassels & Graydon LLP
counsel to the court-appointed Monitor,
for FTI Consulting Canada Inc.

Mick Wall,
Attorney General of Alberta

This is Exhibit "B" to the Affidavit

of Doug Bailey

sworn before me this 1 day of

October, 2024

A Commissioner for Oaths in and for Alberta

Samantha Arbor
Barrister & Solicitor

Court of King's Bench of Alberta

Citation: Razor Energy Corp (Re), 2024 ABKB 553

Date:
Docket: 2401 02680
Registry: 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

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Reasons for Decision
of the
Honourable Justice Douglas R. Mah

A. Background

[1] Within the ambit of ***CCAA***[1] proceedings, a creditor (Conifer Energy Inc) of the debtor corporation (Razor Energy Corp) seeks an Order under s 11 for payment of post-filing obligations and a priming charge to secure that payment.

[2] Here is a brief factual synopsis:

- Razor and Conifer are oil and gas producers. Conifer operates the Judy Creek Gas Conservation Plant where Conifer, under an ownership and operating agreement (OOA) with Razor, received and processed a major portion of Razor's gas production.
- Razor and Conifer, along with others, are owners of the gas plant. The OOA requires Razor to pay its share of the plant's operating costs and to pay for ongoing processing services in respect of its gas processed there. There are 8

[1] ***Companies' Creditors Arrangement Act*****,** RSC, 1985, c C-36 as am.

other owners who have ownership interests in the functional units comprising the facility.

- In December 2023, after Razor defaulted in its obligations under the OOA, Conifer physically locked Razor out of the gathering system at 16 separate points within the South Swan Hills Gas Gathering System, thus preventing processing of about two-thirds of Razor's gas.
- Conifer was unable to completely lock out Razor because the configuration of the infrastructure did not allow Conifer to do so without adversely affecting third-party interests. Conifer set-off and continues to set-off the revenue from the one-third of Razor's gas that continues to be processed against Razor's obligations.
- Razor filed a Notice of Intention to Make a Proposal (NOI) under the ***BIA***[2] in January 2024, thus invoking the statutory stay provided in s 69(1)(a) of the ***BIA***.
- Justice Lema in a February 21, 2024 decision reported as ***Blade Energy Services Corp (Re)***, 2024 ABKB 100 determined that Conifer's lockout action was contrary to the statutory stay so far as any pre-NOI amounts were concerned, but not any post-NOI amount owing. He determined that Conifer continues to enjoy any contractual remedies it may have with regard to unpaid post-NOI obligations.
- Following Justice Lema's decision, Conifer and Razor were unable to reach terms by which Razor could revert to full access to the plant. Razor had determined that it could continue to carry on business even without access to the Judy Creek plant. Thus, the lockout of the two-thirds of Razor's output continues and the set-off by Conifer of the revenue from the remaining one-third also continues.
- On February 28, 2024 Razor converted its NOI proceedings into a ***CCAA*** proceeding, engaging a new stay under s 11.02. There have been extensions applied for and granted. The current stay period expires on October 13, 2024. The amounts sought to be paid (or secured) relate to the period on and after February 28, 2024 or the "post-filing" period.
- Razor advises that its plan in the ***CCAA*** proceedings takes the form of a pending "Corporate Transaction" with a third-party purchaser which, according to Razor's affiant (Mr. Bailey, affidavit of September 6, 2024 at para 6), will come together on or about September 20, 2024 and will result in Conifer being paid the post-filing arrears in full. For reasons of commercial confidentiality, the details of the Corporate Transaction have not been disclosed.
- It is Conifer's surmise (affidavit of Ms. Wilkins affirmed September 3, 2024 at para 16) that Razor's interest in the Judy Creek gas plant and South Swan Hills Unit form part of the assets under sale in the Corporate Transaction.
- Razor continues to not pay Conifer under the OOA. Razor says it is insolvent and unable to do so. Conifer says that Razor is getting a "free ride" with respect to the one-third of gas output that continues to be processed at the Judy Creek plant and with regard to its ownership obligations. Furthermore, Conifer advises that

[2] ***Bankruptcy and Insolvency Act***, RSC 1985, c B-3 as am.

Razor's obligations to another owner, CNRL, are now being allocated by CNRL to Conifer, thus jeopardizing Conifer's financial status.

- The amount owed to Conifer by Razor for the post-filing period as of September 2, 2024 for services is $1.89 million, including Razor's share of the plant's operating costs. The debt is escalating at a rate of $250,000 per month after set-off. The amount reallocated by CNRL to Conifer in respect of Razor is more than $4.15 million which includes approximately $360,000 for post-filing amounts charged by CNRL.

B. Principles underlying the *CCAA*

[3] The Supreme Court of Canada in ***Century Services Inc v Canada (Attorney General),*** 2010 SCC 60, by its majority at paras 57-60, set out the foundational precepts of decision-making under the ***CCAA***:

- The ***CCAA*** is "skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred." Thus, ***CCAA*** decisions are often based on discretionary grants of jurisdiction. Judicial discretion in this regard must be exercised in furtherance of the ***CCAA***'s purposes.
- The purpose of the ***CCAA*** is remedial "in the purest sense" in providing a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a Court-supervised attempt to reorganize the financial affairs of the debtor company is undertaken.
- The Court engaged in judicial decision-making under the ***CCAA*** must "first of all provide the conditions under which the debtor can attempt to reorganize." This can be achieved by staying enforcement action to allow the debtor's business to continue, preserving the *status quo* while the debtor readies itself to present the restructuring or reorganization plan to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed.
- The Court must be cognizant of and weigh all stakeholder interests and the public interest that may come into play in any decision of whether to allow a particular action.

[4] I consider this application against the backdrop of the above principles.

C. Conifer's Position

[5] Conifer seeks this Order from the Court:

- requiring Razor to pay Conifer all amounts owing under the OOA for the post-filing period;
- requiring Razor to pay Conifer all post-filing amounts owed by Razor to CNRL that CNRL intends to seek from Conifer;

- that such payments be made in priority to any other creditors of Razor and be paid by September 20, 2024 (coinciding with the date that the Corporate Transaction is supposed to be signed); and
- that Conifer be granted a charge against Razor's property to secure the post-filing amounts, ranking only behind the administration charge and directors' charge, or a declaration of constructive trust against Razor's property, for the post-filing amounts. (This appears to be alternative relief to a Court Order for an immediate in-full cash payment.)

[6] As justification for the relief sought, Conifer says:

- The amounts are owed by Razor to Conifer under the OOA.
- Both s 11.01 of the ***CCAA***, as an exception to the stay provision, and para 19 of the Amended and Restated Initial Order (ARIO) permit Conifer to require immediate payment from Razor for post-filing amounts.
- Conifer notes that Razor is paying certain partners and service providers their post-filing invoices but not Conifer, resulting in Conifer facing risk while those other creditors receive ongoing payment, contrary to the spirit of insolvency legislation as expressed in ***Québec Inc v Callidus Capital Corp***, 2020 SCC 10 at para 75.
- The Court has broad jurisdiction under section 11 of the ***CCAA*** to make the Order sought. When assessed against the policy objectives of the ***CCAA***, Conifer notes the purpose of the ***CCAA*** is not to disadvantage creditors but rather to provide a constructive solution for all stakeholders and where all stakeholders are treated as advantageously and fairly as circumstances permit: ***Sun Indalex Finance, LLC v United Steelworkers***, 2013 SCC 6 at para 205.
- 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: ***Arrangement relatif à Gestion Éric Savard inc,*** 2019 QCCA 1434 at paras. 17-24; Houlden, Morawetz and 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.
- Further, or in the alternative, the Court may declare a constructive trust in respect of the supplier's entitlement to be paid for post-filing goods and services provided under an executory contract: ***General Motors Corporation v Peco, Inc.,*** 2006 CanLII 4758 at paras. 17-31.

[7] In its brief at paragraph 41, Conifer invoked s 11.4 the ***CCCA***, which provides the Court the ability to declare a charge in favor of a "critical supplier" but did not press that position during the hearing. The evidence before me was that Razor was carrying on business without support from Conifer and Conifer was not cutting off services completely only because of the configuration of the infrastructure and its obligations to other parties. In this sense, Conifer was not a critical supplier of Razor.

[8] CNRL appeared by counsel at the hearing. No argument was made on its behalf regarding whether the Orders sought should be granted or not. Counsel confined his remarks to saying that if the Court was inclined to grant the Orders in favour of Conifer, then payment of the amounts earmarked for reallocated obligations by CNRL should be paid directly to CNRL. Counsel for CNRL also suggested that if Conifer was successful, then one might expect CNRL and other operators involved with Razor to make the same application.

D. Razor's position

[9] In response, Razor submits the following:

- The OOA between Conifer and Razor provides the remedies for breach and non-payment. The Court should not be rewriting the OOA by giving Conifer new remedies and rights, nor does the ***CCAA*** confer jurisdiction on the Court to do so: ***Allarco Entertainment Inc, Re,*** 2009 ABQB 503 at paras 52-54. (As noted, Conifer is presently exercising the existing right of set-off.)
- Enforcement of the post-filing amounts remain stayed. No application has been made to lift the stay. The remedy inherent in s 11.01 is not an Order for payment but rather stoppage of supply.
- The Court should remain alive to the principle that the *status quo* should be maintained until a conclusion is reached under the ***CCAA***. Accordingly, there is no basis for Conifer to obtain the Court's assistance to either improve its position by enhancing priority or effect collection of amounts owing: ***Agro Pacific Industries Ltd, Re***, 2000 BCSC 879 at para 17.
- Case law establishes that s 11.01 must be construed narrowly. In order for a creditor to fit within the exception to the stay of proceedings found in s 11.01, the creditor must be compelled by ***CCAA*** Order to continue supply of services during the post-filing period. The *quid pro quo* for this compulsion is the statutory obligation for the debtor to continue paying on a current basis during the post-filing period: ***Smith Brothers Contracting Ltd (Re) (Trustee of)***, 1998 CanLII 3844 (BCSC) at para 14; ***Royal Bank v Cow Harbour Construction Ltd***, 2012 ABQB 59.
- The granting of Conifer's application in either form, says Razor, would basically sound the death knell for the Corporate Transaction. Razor says that it is insolvent and lacks the ability to pay Conifer as requested in the application. Further, the granting of a priority charge to Conifer would make the Corporate Transaction untenable. There is no reason to elevate Conifer's position at the expense of all remaining creditors standing to benefit if the Corporate Transaction is concluded.

[10] Razor was supported in its opposition to the application by Arena Investors LP, one of Razor's secured creditors, and by Big Lakes County and the Municipal District of Greenview. The two municipalities, among others, are owed municipal taxes on a priority basis. All of these objecting parties echo that Conifer seeks to improperly elevate its priority status either by actual payment before anyone else or the granting of a priming charge, to the prejudice of other creditors.

[11] Arena's counsel submitted that Conifer's post-filing claim is unsecured or at best forms the basis of an Operator's Lien, still subordinate to Arena's security: ***Cansearch Resources Ltd v Regent Resources Ltd,*** 2017 ABQB 535 at para 42. Arena also contends that a single post-filing creditor should not be allowed to determine the fate of the entire ***CCAA*** proceeding: ***Essar Steel Algoma Inc, Re***, 2016 ONSC 6459 at para 26. Finally, with regard to constructive trust, Arena's counsel says that even if enrichment of Razor and deprivation on Conifer's part are made out, there is a juristic reason not to pay Conifer and that is the ***CCAA***.

E. Does Section 11.01 apply?

[12] I accept that s 11.01 must be construed narrowly *per* ***Smith Brothers*** and ***Cow Harbour***. Yamauchi J noted at para 16 of the latter case:

> While a debtor corporation is proceeding through the ***CCAA*** restructuring process, it must still carry on its business. It hardly seems fair to require a person to continue to supply the debtor corporation with goods or services, or to allow the debtor corporation to continue to use leased property, without that person being compensated for those goods, services or use. Section 11.01(a) of the ***CCAA*** allows for that compensation.

[13] I understand the sentiment of the unfairness of non-payment when the services are connected to the debtor corporation carrying on business while under the ***CCAA***. Here, the evidence before me is that Razor has not asked Conifer to provide services. In fact, Conifer has cut off Razor to the extent it can. All of the gas ostensibly produced by Razor that is processed at the plant is being processed for Conifer's benefit, not Razor's. The only reason the services continue on Razor's account is because of the physical configuration of the system infrastructure and Conifer's obligations to other parties, neither of which Razor control. Indeed, the evidence is that Razor is getting by without any help from Conifer.

[14] I am not ready to say that the *quid pro quo* of compulsion under a ***CCAA*** Order is required to engage s 11.01 as suggested by Razor but in the least the services being claimed must be at the debtor's request and of some utility to the debtor in conducting its business, even if the claimant is not a "critical supplier" under s 11.4. It is true that the plant continues to be operated and that Razor's interest in the plant may be part of the assets sold in the Corporate Transaction. But Conifer's continued operation of the plant arises not from Razor's request to do so but rather Conifer's obligations to others and its self-interest in the plant's operation.

[15] As the evidence shows, Razor has undergone a process of determining who it needs to pay in order to remain in business and work toward achieving the Corporate Transaction. Examples were given in Mr. Bailey's affidavit of electrical supply and the services of other operators who are processing Razor's gas *and* providing Razor with revenue for use as the ***CCAA*** proceedings advance. Razor has determined that it does not need Conifer's help to conduct business during the stay period or to advance the Corporate Transaction under the ***CCAA***.

[16] To be sure, Conifer is in an unwieldy predicament and that is through no fault of its own. It cannot completely shut off Razor's access and it cannot shut down the plant. Unfortunately for Conifer, it has already taken its best available remedy, which is the set-off. I agree that *if* s 11.01 is engaged then Conifer's remedies under s 11.01 itself are as contained in the OOA or stoppage of supply (if it were possible). Beyond that, Conifer must apply for an Order under s 11 (or s

11.4 if "critical supplier" status was made out). Such an application in either event engages the foundational precepts of decision-making under the ***CCAA*** discussed above.

F. Monitor's Report

[17] These points are notable from the Monitor's Report:

- (at para 24) Razor has sufficient liquidity to remain in business for the duration of the stay. If Conifer were successful in obtaining its Order directing payment of the post-filing arrears by September 20, 2024 Razor would not have the necessary cash flow to remain in business.
- (at para 25) The Monitor's fifth report and sixth (and current) cash flow statement, and others filed in these proceedings, do not contemplate payment of the post-filing amounts owed to Conifer.
- (at para 28) The Monitor views the Corporate Transaction as the best alternative for all stakeholders as it would avoid a bankruptcy and potentially no recovery for stakeholders.
- (at para 29) The Monitor understands that the estimated proceeds from the Corporate Transaction are expected to be sufficient to pay the post-filing arrears owed to Conifer, not including the deposit of $680,000 that is requested, which would only be required if Conifer were to reconnect Razor to the system.
- (at para 32) If Conifer were successful in this application, Razor will likely be unable to complete the Corporate Transaction which would result in significant losses for stakeholders, including significant abandonment and reclamation obligations.

[18] I remind myself of the Monitor's role in these proceedings. The Monitor is a Court officer subject to OSB supervision. The Ontario Court of Appeal summarized the nature of the Monitor's role in ***Ernst & Young Inc v Essar Global Fund Limited***, 2017 ONCA 1014 at para 109, as:

> The monitor is to be the eyes and the ears of the Court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the ***CCAA*** and its restructuring purpose. In the course of a ***CCAA*** proceeding, a monitor frequently takes positions; indeed it is required by statute to do so.

[19] The Monitor's financial presentation and its statements about the effect of the Corporate Transaction if it comes to fruition (or not) were not controverted by Conifer or any other evidence. Accordingly, I accept what the Monitor in its September 10, 2024 report says about the financial condition of Razor, its liquidity, and the prospects for all of Razor's stakeholders if the Corporate Transaction is realized or is not.

G. Ruling

[20] Even if Conifer's post-filing claim falls within s 11.01, I am still required to exercise my discretion to make an appropriate Order under s 11 in accordance with the ***CCAA***'s overall policy objectives.

[21] In making my ruling, I have regard to the following factors:

- The mere fact that Razor is under the ***CCAA*** means it is insolvent.
- No provision in the latest cash flow statement, which extends to the end of the current stay, is made for payment to Conifer for any post-filing amounts.
- The granting of Conifer's application in either form would trigger similar applications by CNRL and other operators, which the Court would be hard-pressed (given the precedent set) to deny.
- The Corporate Transaction contemplates full payment of post-filing arrears to both Conifer and CNRL (less only the deposit for future services which would not be required).
- The documentation for the Corporate Transaction is scheduled to be completed and signed as of September 20, 2024, which is a scant day away. Mr. Bailey (Razor's CEO) expresses optimism that the Corporate Transaction will actually come to pass. There is no contrary information before me.
- Conifer is not left dangling indefinitely. There are milestone dates looming: September 20, 2024 for the signing of the Corporate Transaction and October 13, 2024 for the expiry of the current stay.

[22] Based on the evidence before me, I conclude as follows:

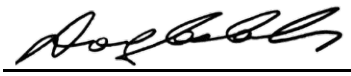
- Allowing Conifer's application (and the other similar applications that would inevitably follow) will likely have the effect of causing the Corporate Transaction to collapse.
- In the words of ***Century Services***, granting the Order sought would not "provide the conditions" under which Razor can execute on the Corporate Transaction but rather would hasten its bankruptcy or receivership.
- Granting the Order sought would give Conifer an unfair advantage now and in any subsequent bankruptcy or receivership by authorizing a preferential payment and/or artificially elevating its priority position. It would not provide a constructive solution to all stakeholders, only Conifer.
- Granting the Order would in effect permit the interests of a single post-filing creditor to determine the fate of the entire ***CCAA*** proceeding to the detriment of remaining stakeholders.

[23] In exercising my discretion under the ***CCAA***, I remain cognizant of the remedial purpose of the ***CCAA*** and the requirement to consider broad stakeholder interests. I appreciate the Corporate Transaction, if signed, is still subject to Court approval but, on the basis of the evidence before me, it does represent the best and fairest outcome for all stakeholders.

[24] In the result, I find that Conifer's post-filing claim does not fall within the narrow exception created by s 11.01. Whether it does or not, I would still exercise my discretion against granting the Order for the reasons given above. In consequence, I dismiss Conifer's application.

[25] If the parties/counsel so wish, they may address costs with me within 30 days of the date of this decision by submitting a written submission not longer than two single-spaced pages, excluding exhibits and authorities, and including a draft Bill of costs.

Heard on the 11th day of September, 2024.
Dated at the City of Calgary, Alberta this 19th day of September, 2024.



Douglas R. Mah
J.C.K.B.A.

Appearances:

Keely Cameron and Sarah Aaron, Bennett Jones LLP,
counsel for the Applicant Conifer Energy

Sean Collins, McCarthy Tetrault LLP,
counsel for Razor Energy Corp, Razor Royalties Limited Partnership, Razor Holdings GP Corp., and Blade Energy Services Corp.

Kelly J. Bourassa, Blakes, Cassels & Graydon LLP,
counsel for the Monitor, FTI Consulting Canada Inc.

Jessica Cameron, Fasken Martineau Dumoulin LLP,
counsel for 405 Dolomite ULC, as agent to certain lenders (Arena Investors LP)

Randal Van de Mosselaer, Osler,
counsel for Canadian Natural Resources Limited

Corey Luda, Brownlee LLP,
counsel for Vulcan County

Michael Swanberg, Reynolds Mirth Richards & Farmer LLP,
counsel for Big Lakes County and Municipal District of Greenvew

The following parties also attended but did not make submissions

Stacey McPeak, Shores Jardine LLP,
counsel for the Alberta Petroleum Marketing Commission

Philip LaFair,
Counsel to Sabre Energy Ltd.

Daniel Segal,
Justice Canada

Marianne Panenka, Department of Justice Canada,
Counsel for Indian Oil and Gas Canada

Kristopher Lensink,
Government of Alberta, Alberta Energy and Mineral Energy Legal Team