Action No.: 0901-13483

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TRIDENT EXPLORATION CORP. ULC, FORT ENERGY CORP. ULC, FENERGY CORP. ULC, 981384 ALBERTA LTD., 981405 ALBERTA LTD., 981422 ALBERTA LTD., TRIDENT RESOURCES CORP., TRIDENT CBM CORP., AURORA ENERGY LLC., NEXGEN ENERGY CANADA, INC. AND TRIDENT USA CORP.

FACTUM OF FARALLON CAPITAL MANAGEMENT L.L.C., SPECIAL SITUATIONS INVESTING GROUP, INC. AND MOUNT KELLETT CAPITAL MANAGEMENT LP

(Motion Returnable October 6, 2009)

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TO: See attached Service List

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PART I - OVERVIEW

1. This motion is brought by Farallon Capital Management, L.L.C. on behalf of funds and managed accounts to which it serves as advisor ("**Farallon**"), Special Situations Investing Group, Inc. ("**Goldman Sachs**") and Mount Kellett Capital Management LP ("**Mount Kellett**" and collectively, the "**Required Lenders**") as a majority of the syndicate of lenders (the "**Trident Canada Secured Lenders**") that provide US$500,000,000 in secured term credit facilities to the Petitioner Trident Exploration Corp. ("**Trident Canada**"). The motion seeks to vary certain specific and limited provisions of an *ex parte* initial order of this Court dated September 8, 2009 (the "**Initial Order**") which granted the Petitioners certain relief under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended (the "**CCAA**") without the Required Lenders having been provided with an opportunity to object. Farallon and Goldman Sachs are original lenders who extended credit to Trident Canada in 2005.

2. The Required Lenders seek to vary the Initial Order so as to:

(a) remove or limit provisions of the Initial Order that authorize the Petitioners to transfer value directly or indirectly from Trident Canada, to Trident US (defined below) to the detriment of Trident Canada and its stakeholders; and

(b) allow the Trident Canada Secured Lenders to have appropriate input into the restructuring process that is being funded out of their collateral.

3. The Petitioners fall into two distinct groups.

4. Trident Canada and the Canadian Subsidiaries (defined below) carry on a Canadian coal bed methane business, employ all of the Petitioners' employees, generate all of the revenues and own all of the Petitioners' material assets. The Trident Canada Secured Lenders are direct lenders to Trident Canada and hold a first charge on all of the assets of Trident Canada and the Canadian Subsidiaries. Indeed, now that the $10 million operating facility provided by Toronto Dominion bank ("**TD**") has expired, the Trident Canada Secured Lenders are the only secured creditors of Trident Canada and the Canadian Subsidiaries.

5. Trident Resources Corp. ("**Trident US**") is a Delaware holding company with no material assets. It has US subsidiaries (the "**US Subsidiaries**") which own non-revenue generating properties located in the US of nominal, if any, value. Trident US and the US Subsidiaries have no employees, no active business and generate no revenue. Trident US is the ultimate parent of Trident Canada.

6. Trident US is essentially a financing vehicle. It has two existing layers of debt totalling US$270 million and CDN$120 million, preferred shares and common shareholders (the "**Trident US Securities**"). Many of the holders of Trident US Securities (the "**Trident US Security Holders**") hold multiple types of Trident US's debt and equity securities. Pursuant to a shareholder agreement, the board of directors of Trident US (and as a result, the matching Trident Canada board) is largely composed of nominees of the various classes of Trident US Security Holders.

7. The Required Lenders recognize the balance sheet problems faced by the Trident

Group and therefore support the CCAA filing by Trident Canada and the Canadian Subsidiaries (defined below). The Petitioners have too much debt and leverage needs to be reduced. This proceeding is not an operational restructuring or a downsizing of the business owned or operated by Trident Canada, this is a capital restructuring.

8. For several years it has been recognized by the Petitioners and the Trident US Security Holders that the Petitioners had a potential balance sheet problem. In 2007, a number of the existing US Security Holders loaned Trident $120,000,000 in the hopes of protecting their existing investments in Trident US Securities. This loan was advanced as part of an out-of-court restructuring consented to by the Required Lenders.

9. The 2007 out-of-court restructuring bought the Trident Group two years, but has ultimately failed. It is likely that as a result of market conditions and industry circumstances all of the Trident US Securities are now practically worthless. Some of the existing Trident US Security Holders have been talking for months about the possibility of once again reinvesting in Trident to try to protect their existing positions, but no transaction has been completed.

10. Equally, no third party investor has come forward. It therefore appears that Trident US can no longer serve its primary purpose as a financing vehicle. If so, it has no apparent business reason to continue to exist and no value will be generated by restructuring it.

11. Notwithstanding the Required Lenders' overwhelming stake in, their long involvement with and their past support for Trident Canada's restructuring efforts, the Initial Order was made without prior notice to them. While the Required Lenders do not quibble with the obvious need for Trident Canada to effect a restructuring of its debt, it appears that these proceedings were also designed to establish a way to finance the US restructuring efforts, or more exactly, a continuation of the (so far) failed efforts of some of the Trident US Security Holders to salvage their investments.

12. Cash-flows provided by the Petitioners originally estimated that the aggregate costs of the reorganization process they have designed will run at over $1,000,000 per week for the first 13 weeks of the restructuring (plus the incentive-based fees described below). This is a

shocking sum of money, particularly in view of the limited nature of the task at hand - to reduce the leverage in Trident Canada's capital structure. Even the Petitioners revised cash-flows contemplate reorganization costs of over $8.5 million by the beginning of December 2009.

13. The Required Lenders request that the Court protect the Canadian entities from funding these exorbitant costs.

14. In 2007, in contemplation of these very circumstances, the Required Lenders agreed with Trident Canada that a maximum of $5 million of Trident Canada's cash could be used to finance future efforts to reorganize Trident US. While it is likely that permitting cash to go to the US will be simply throwing away money that could be better used to restructure Trident Canada, the Required Lenders are not retreating from the 2007 agreement. They do, however, ask the Court to limit the aggregate flow of value from Trident Canada to Trident US and its US-based advisors to the agreed to amount.

15. In addition, the Initial Order gives Trident Canada broad unlimited powers to sell assets and downsize its business. In the circumstances, the Required Lenders ask that these powers either be removed as being inapplicable and unnecessary, or that the exercise of those powers be subject to very precise conditions precedent to protect the Required Lenders and other stakeholders. It is submitted that appropriate conditions precedent would be that Trident Canada be required to obtain either (a) prior approval of the Monitor and the Required Lenders or (b) prior approval of the Court.

16. Specific provisions of the Initial Order that are unacceptable to the Required Lenders are, among other things, those which:

(a) permit unlimited intercompany loans from Trident Canada to Trident US and provide in return court-ordered charges (the "**Inter-Company Charge**") over the assets of Trident US, which have little or no value;

(b) authorize preferential payments by permitting Trident Canada to repay unsecured pre-filing indebtedness owed to Trident US which is expressly subordinated and postponed to the right of payment of the obligations owed to the Trident Canada Secured Lenders;

(c) authorize Trident Canada to make unlimited critical vendor payments to any creditors of Trident US without disclosure that Trident US did not have any such creditors;

(d) authorize Trident Canada to pay an unlimited amount of professional fees billed by the US advisors to Trident US and the funding of the costs of the US Chapter 11 proceedings with no discernable benefit to Trident Canada or its stakeholders;

(e) impose indemnification obligations on Trident Canada in favour of the Trident US directors and officers;

(f) provide for a second ranking charge on Canadian assets in a maximum amount of $5 million as security for, *inter alia*, the indemnification of obligations in favour of the directors and officers of Trident US (the "**D&O Charge**"); and

(g) provide for a first ranking administrative charge on the Canadian assets in a maximum amount of $5 million as security for the payment of, *inter alia*, professional fees and disbursements charged by Trident US' counsel and financial advisor (the "**US Administration Charge**").

PART II - THE FACTS

A. THE PETITIONERS

17. As set out more fully in the affidavit of Todd A. Dillabough filed in support of the petition for the Initial Order (the "**Dillabough Affidavit**"):

(a) The Petitioner, Trident Canada, is a Nova Scotia unlimited liability corporation. Fort Energy Corp. ULC, Fenergy Corp. ULC, 981384 Alberta Ltd. and 981405 Alberta Ltd. (together, the "**Canadian Subsidiaries**") are wholly owned subsidiaries of Trident Canada. The Canadian Subsidiaries are all Canadian corporations.

(b) The Petitioner, Trident US, is a Delaware corporation. Certain of the other Petitioners, Trident CBM Corp., Aurora Energy LLC., NexGen Energy Canada, Inc. and Trident USA Corp. (together, the "**US Subsidiaries**") are wholly owned subsidiaries of Trident US. The US Subsidiaries are American corporations.

Affidavit of Todd A. Dillabough sworn September 8, 2009 (the "**Dillabough Affidavit**"), paras. 7, 9 and 10.

18. The Petitioners are hereinafter referred to collectively as the "**Trident Group**".

19. The Trident Group's management is centred in Trident Canada. Its head office is

located in Calgary. All of the Trident Group's employees are employed by Trident Canada.

Dillabough Affidavit, paras. 6 and 9.

20. Trident Canada and the Canadian Subsidiaries are also the operational centre of the Trident Group. Trident Canada is the main operating corporation in the Trident Group and all of the operations and value generating assets are owned by Trident Canada and the Canadian Subsidiaries. As noted in the Dillabough Affidavit, Trident Canada and the Canadian Subsidiaries generate all of the Trident Group's operating revenue.

Dillabough Affidavit, paras. 9 and 42.

21. The vast majority of the Trident Group's assets and operations are located in Canada. Projects operated by Trident Canada and/or the Canadian Subsidiaries comprise all of the Trident Group's current production and they include:

(a) assets operated by Trident Canada in the Manville formation in central Alberta (the "**Manville Assets**") which generated approximately 58% of the Trident Group's production for the second quarter of 2009; and

(b) assets operated by Trident Canada in the Horseshoe Canyon, Alberta (the "**Horseshoe Assets**") which generated approximately 42% of the Trident Group's production for the second quarter of 2009.

Dillabough Affidavit, paras. 15 and 19.

Trident 2008 Annual Report, Exhibit "B" to the Dillabough Affidavit, p. 1.

22. Trident US is merely a holding company that serves no material function in the operations of the Trident Group or in the generation of revenue from operations. Trident US and the US Subsidiaries have no employees and their assets are limited to owning drilling rights and exploratory lands in the Northwestern United States, known as the Columbia River Basin (the "**CRB Project**"). This project is not part of the core operations of the Trident Group and has been described as "unproved".

Trident 2008 Annual Report, Exhibit "B" to the Dillabough Affidavit, p. 2 and 26.

Dillabough Affidavit, paras. 7, 9, 12, 26 and 42.

Trident 2008 Annual Report, Exhibit "B" to the Dillabough Affidavit, p. 12 and 26.

23. In the Dillabough Affidavit, the Trident Group relies on the preliminary drilling results obtained by Delta Petroleum Corp., a US oil and gas company with interests in the area, to suggest that the assets in the Columbia River Basin "could potentially add significant value to Trident".

Dillabough Affidavit, paras. 26 and 27.

24. On September 21, 2009, Delta Petroleum Corp., reported the results of more recent testing on its exploration well in the Columbia River Basin. The zones tested by Delta Petroleum flowed either fresh water or a combination of water and "minimal" gas volumes, deeming these zones "uneconomic" to develop. Plans for additional drilling in 2009 and 2010 in the area of the test well have been curtailed pending further review of the testing information. These results do not support a conclusion that there is significant, or any, value in the CRB Property.

Affidavit of Richard Voon, sworn October 1, 2009 (the "**Voon Affidavit"**), para. 36.

Press Release - Delta Petroleum Corporation Announces Initial Completion Results From The Gray Well, Exhibit "I" to the Voon Affidavit, Motion Record of the Required Parties, Tab 2(P).

Voon Affidavit, para. 46.

25. Trident US's existence has no impact on any "community". It is a Delaware holding company.

Dillabough Affidavit, para. 7.

Trident 2008 Annual Report, Exhibit "B" to the Dillabough Affidavit, p. 2 and 26.

26. The composition of the Board of Directors of Trident Canada and Trident US are identical. According to the 2008 Annual Report attached to the Dillabough Affidavit, there were eight directors on these boards at that time. Given that the Trident US shareholders and lenders have the right to appoint nine directors, it would appear that all of the directors of Trident Canada have been appointed by parties who are stakeholders of Trident US and are thus seeking to extract value from Trident Canada for the benefit of Trident US.

Trident 2008 Annual Report, Exhibit "B" to the Dillabough Affidavit, p. 63.

Affidavit of Reema Kapoor sworn October 1, 2009 ("**Kapoor Affidavit**"), para. 8.

B. TRIDENT GROUP'S FINANCING ARRANGEMENTS

(a) Trident Group's Existing Financing

27. Now that the TD credit facility has expired,[1] the Trident Group has three significant credit facilities. Trident Canada has one credit facility and Trident US has two.

28. The Trident Canada facility is as follows:

(a) **Trident Canada Secured Credit Agreement:** Trident Canada is a borrower of US$500,000,000 under a facility granted by the Trident Canada Secured Lenders. The Trident Secured Credit Agreement is guaranteed by certain Canadian Subsidiaries[2] (the "**Canadian Guarantors**") and secured by a first charge over all of the present and future assets and undertaking of Trident Canada and the Canadian Guarantors (the "**Canadian Assets**"). As of August 31, 2009, the accrued interest on the Canadian Secured Credit Agreement was approximately US$8,400,000.

Dillabough Affidavit, para. 35.

Kapoor Affidavit, para. 4, Exhibit "A".

29. The Trident US facilities are as follows:

(a) **Trident US 2006 Credit Agreement:** Trident US is a borrower of US$270,000,000 under this facility granted by a syndicate of US lenders (the "**US Lenders**"). The facility is secured by certain present and future assets of Trident US (the "**Limited US Assets**"). It is guaranteed by the US Subsidiaries, who have granted a first charge over all of their present and future assets and undertaking. This facility is also guaranteed by Trident Canada and the Canadian Guarantors up to the limited amount of US$150,000,000 on an unsecured basis. The US Lenders have no security over the Canadian Assets.

(b) **Trident US 2007 Subordinated Credit Agreement:** Trident US is a borrower under this unsecured facility for CDN$120,000,000. The facility is guaranteed by the US Subsidiaries, subordinated in right of payment to the guarantees under the Trident US 2006 Credit Agreement, as well as by the

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[1] Trident Canada had a CDN$10,000,000 revolving secured credit facility (the "**Trident Canada TD Credit Agreement**") from TD. There was approximately CDN$5,090,560.74 outstanding on this facility as of September 16, 2009. At paragraph 14 of the affidavit of Todd Dillabough sworn October 1, 2009, he states that as of October 2, 2009 this facility expired and was paid in full.

[2] All of the Canadian Subsidiaries except 981443 Alberta Limited have provided unlimited guarantees.

> Trident Canada and the Canadian Subsidiaries, subordinated in right of payment to obligations under the Trident Canada Secured Credit Agreement. This facility is unsecured. These lenders (the "**US Subdebt Lenders**") have no security over the Canadian Assets.
>
> Dillabough Affidavit, para. 35.

30. It had been the intention of the Required Lenders to exercise their right to either assume the indebtedness of TD, as they are entitled to under the TD Buy Out Provision, (defined below) or pay off the TD facility using a portion of the DIP financing that the Required Lenders have proposed to the Company. However, as the TD facility has expired, this will not be necessary.

> Voon Affidavit, para. 31.

31. The Dillabough Affidavit attached financial statements showing that the total assets of the Trident Group had a book value of approximately $0.6 billion and total liabilities were approximately $1.8 billion as of June 30, 2009. The Trident Canada Secured Lenders are owed over US $508 million and, with the expiration of the TD facility, are the only secured lenders to Trident Canada.

> Trident Second Quarter Report for the six months ended June 30, 2009, Exhibit "C" to the Dillabough Affidavit, p. 19.
>
> Dillabough Affidavit, para. 35.

32. In the materials filed by the Petitioners on October 2, 2009, they refer to a sealed engineering report as if that report is materially indicative of the realizable market value of Trident Canada, which it is not. While it may become necessary at a later stage in this case to ask this Court to make a finding about valuation on proper notice and evidence, what is a relevant indicator of market value at this stage is that over an extended period of time Trident US has failed to raise new financing. For now it is fair to say that there is material doubt as to whether the value of Trident Canada's assets are sufficient to repay the Trident Canada Secured Lenders' debt.

33. Given that there is no value in Trident US and there may be little or no value left in Trident Canada after the payment to the Trident Canada Secured Lenders, it is not surprising that the Trident US Security Holders, whose claims are subordinate to those of the Trident

Canada Secured Lenders, want to move forward with an expensive restructuring process in an attempt to generate more value for themselves. This is clearly not in the best interests of Trident Canada's stakeholders.

(b) Trident Group's 2007 Out-of-Court Restructuring

34. In January 2007, Trident Canada initiated discussions with the Trident Canada Secured Lenders with respect to restructuring the Trident Canada Secured Credit Agreement. During that process, the Required Lenders understood that Trident Canada would be at a material risk of an insolvency filing if it did not raise additional capital.

Voon Affidavit, paras. 11 and 12.

Voon Affidavit, paras. 13-14.

35. Recognizing that the Trident Group might become subject to restructuring proceedings in the near future notwithstanding its efforts to secure additional financing, the Trident Canada Secured Lenders requested, and Trident Canada agreed, to a number of insolvency related amendments to the Trident Canada Secured Credit Agreement. These amendments were the subject of lengthy negotiations and were intended to protect the Trident Canada Secured Lenders and govern the parties in any future insolvency filing.

Voon Affidavit, paras. 12-15 and 19.

36. Specifically, as part of Amendment No. 2 to Credit Agreement dated April 12, 2007 (the "**April 2007 Amendment**"), Trident Canada agreed, among other things:

(a) where a default exists, to limit distributions to Trident US for any fees and expenses (including legal, investment banking and advisory fees) incurred in connection with or relating to any insolvency proceeding or other restructuring efforts to US$5,000,000;

(b) to provide the Trident Canada Secured Lenders (through the Agent) with written notice of any request for proposals to provide debtor-in-possession financing to Trident Canada or Trident US, notice of receipt of any proposals and the full particulars of the proposals, and prior notice before any such proposal is accepted or an application for court approval is filed or served;

(c) that the principal place of business and center of main interest of each of Trident Canada and the Canadian Subsidiaries are located in Alberta Canada;

and

(d) that the commencement of a voluntary insolvency proceeding, such as this CCAA proceeding, would constitute a default under the Trident Canada Secured Credit Agreement.

Voon Affidavit, Motion Record of the Required Lenders, Tab 2, para. 14.

Kapoor Affidavit, Exhibit "A".

37. In August 2007, Trident US was able to obtain a subordinated, unsecured term loan in the amount of CDN$120,000,000 under the Trident US 2007 Subordinated Credit Agreement.

Kapoor Affidavit, para. 6.

38. Concurrently with the closing of the Trident US 2007 Subordinated Credit Agreement, each of the Trident Canada TD Credit Agreement, the Trident Canada Secured Credit Agreement, the Trident US 2006 Credit Agreement and the intercreditor agreements between the lender groups were amended (the "**August 2007 Amendment**") to reflect the incurrence of the new liabilities, along with other insolvency related changes. Specifically:

(a) an intercreditor agreement between TD and the Trident Canada Secured Lenders was amended to provide the Trident Canada Secured Lenders with the right to purchase from the TD all of the loans and security under the Trident Canada TD Credit Agreement (the "**TD Buy Out Provision**");

(b) a new intercreditor agreement was entered into between the Trident Canada Secured Lenders and the Trident US Subdebt Lenders (the "**Canada Secured/US Subdebt Intercreditor Agreement**"), pursuant to which the US Subdebt Lenders agreed to a deep subordination and postponement of their interests in Trident Canada to those of the Trident Canada Secured Lenders; and

(c) a new intercreditor agreement was entered into between the US Lenders and the US Subdebt Lenders, on terms substantially similar to those set out in the Canada Secured/US Subdebt Intercreditor Agreement, pursuant to which the US Subdebt Lenders agreed to a deep subordination and postponement of their interest in Trident US to those of the US Lenders.

Kapoor Affidavit, para. 7.

39. Prior to the closing of the Trident US 2007 Subordinated Credit Agreement, each of Trident US, Trident Canada and the four lending groups had an opportunity to view, comment and object to each others' documentation, including the terms of the April 2007 Amendment,

the August 2007 Amendment and the various intercreditor agreements.

Voon Affidavit, para. 17.

40. Although the 2007 out-of-court restructuring provided the Trident Group with much needed liquidity, the parties understood that the new financing was only a stop-gap measure and that a court supervised restructuring remained a material risk.

Voon Affidavit, para. 18

41. Inasmuch as the insolvency related terms added to the Trident Canada Secured Agreement by the April 2007 Amendment were expressly negotiated in contemplation that insolvency proceedings in the near future would be required, the Trident Canada Secured Lenders expected that those terms would be honoured in any subsequent insolvency proceedings.

Voon Affidavit, para. 19.

42. Notwithstanding their agreement to the insolvency related terms, the Petitioners appear to have failed to provide full disclosure of the April 2007 Amendment to the Court on their petition for the Initial Order. In relation to the Trident Canada Secured Credit Agreement, the Dillabough Affidavit stated:

> Under the [Trident Canada Secured Credit Agreement], Trident is presently restricted by its largest lender though a covenant therein which, if triggered, would cause a limitation on intercompany cash flow up from Trident Canada to Trident US to a maximum of $5.0 million annually…With anticipated restructuring costs, it is predicted that this cap may cause significant prejudice to Trident's capability to restructure if it is unable to continue paying its professional advisors and other obligations in the most tax and commercially advantageous manner.

Dillabough Affidavit, para. 46.

43. This characterization is, at best, incomplete and, at worst, misleading. The description is deficient in that:

(a) it fails to disclose that Trident Canada agreed, and Trident US and the Trident US lenders understood, that the covenant was specifically agreed to apply in cases of a court-supervised restructuring process; and

(b) it fails to disclose that the $5.0 million available to be transferred upstream to Trident US under the covenant is intended to cover the costs of a restructuring, the very costs that are stated in the Dillabough Affidavit to require unlimited upstream transfers of cash from Canada (Trident Canada) to the United States (Trident US).

C. 2009 RESTRUCTURING EFFORTS

44. In April of 2009 Trident's US financial advisor approached the Trident Canada Secured Lenders regarding possible restructuring options and, since that time, the Trident Canada Secured Lenders have engaged in discussions regarding certain restructuring options.

Voon Affidavit, para. 20.

45. Despite spending months searching for capital or a refinancing to implement a restructuring, the Trident Group does not currently have any committed proposal for restructuring in hand.

Voon Affidavit, para. 21.

D. THE INITIAL ORDER

46. The Initial Order was obtained without notice to the Trident Canada Secured Lenders, even though those lenders have participated in restructuring discussions for several years, as described above, and are known to all concerned. This is of particular concern where the Initial Order contains numerous provisions which go beyond what is appropriate in an Initial Order obtained on an *ex parte* basis, and which are highly prejudicial to the interests of the Trident Canada Secured Lenders.

47. The Initial Order permits unlimited transfers of value from Trident Canada to Trident US (the "**Upstream Transfers**") in the following manner:

(a) by permitting unlimited intercompany loans from Trident Canada to Trident US and providing in return court-ordered charges over the assets of Trident US, which have little or no value;

(b) by authorizing preferential payments by permitting Trident Canada to repay unsecured pre-filing indebtedness owed to Trident US which is expressly subordinated and postponed to the right of payment of the obligations owed to the Trident Canada Secured Lenders;

(c) by authorizing Trident Canada to make unlimited critical vendor payments to any creditors of Trident US without disclosure that Trident US did not have any such creditors;

(d) by authorizing Trident Canada to pay an unlimited amount of professional fees billed by the US advisors to Trident US and the funding of the costs of the US Chapter 11 proceedings with no discernable benefit to Trident Canada or its stakeholders;

(e) through the imposition of indemnification obligations on Trident Canada in favour of the Trident US directors and officers;

(f) through the provision of a second ranking charge on Canadian assets in a maximum amount of $5 million as security for, *inter alia*, the indemnification of obligations in favour of the directors and officers of Trident US; and

(g) by providing for a first ranking administrative charge on the Canadian assets in a maximum amount of $5 million as security for the payment of, *inter alia*, professional fees and disbursements charged by Trident US' counsel and financial advisor.

Initial Order, paras. 5(c), 13, 15, 25, 26, 33, 35 and 38.

48. The Initial Order also permits the Petitioners to downsize or shut down their business operations and dispose of assets (of a value of up to $1 million in any one transaction or $5 million in the aggregate) and engage in other extraordinary restructuring activities without the need for the approval of the Trident Canada Secured Lenders (or, for that matter, the Monitor or the Court).

Initial Order, para. 10.

E. US RESTRUCTURING COSTS

49. The cash-flows provided to the Required Lenders after the Initial Order was made projected approximately $15 million in professional fees being spent in the first 13 weeks of the restructuring. In addition to these fees, Rothschild Inc. ("**Rothschild**"), if its retainer as financial advisor for the Trident Group is ultimately approved, would be entitled to millions of dollars in incentive based fees depending on the nature of the restructuring. These incentive based fees first became known to the Required Lenders when the Rothschild engagement letter was filed in the US Bankruptcy proceedings.

Voon Affidavit, para. 33.

50. A summary of professional fees provided by the Petitioners allocates very significant US legal fees and fees incurred by Rothschild to Trident Canada with no justification for that allocation and, more importantly, no explanation as to how such significant US legal fees add value for Trident Canada.

Voon Affidavit, para. 27.

51. Similarly, the cash-flows delivered by the Monitor on October 2, 2007 show professional fees for Trident Canada and the Canadian Subsidiaries totalling $11,660,000 and professional fees for Trident US and the US Subsidiaries of $2,171,000. No explanation for this allocation is provided. This allocation is also surprising in view of the statement set forth in the Dillabough Affidavit to the effect that the limitation of inter-company transfers from Trident Canada to Trident US to a maximum of $5.0 million annually "may cause significant prejudice to Trident's capability to restructure if it is unable to continue paying its professional advisors and other obligations in the most tax and commercially advantageous manner."

Dillabough Affidavit, para. 46.

Monitor's Report, Appendix A.

PART III - ISSUES AND THE LAW

52. The issues to be determined on this motion are:

(a) Should the Petitioners be permitted to transfer value from Trident Canada and the Canadian Subsidiaries, over whose assets the Trident Canada Secured Lenders have a security interest, to Trident US, for the purpose of funding a restructuring of the Trident US and the US Subsidiaries for the benefit of the US Security Holders.

(b) Should the Petitioners be allowed to prevent the Trident Canada Secured Lenders from having meaningful input into the restructuring process.

A. ONUS ON PETITIONERS TO JUSTIFY THE INITIAL ORDER

53. Notwithstanding the terms of the Initial Order, the onus remains on the Petitioners to justify all of the provisions of the Initial Order. Numerous decision stress this onus in the context of CCAA Orders obtained without notice. Mr. Justice Farley put the proposition in the following terms:

> As this Order today is being requested without notice to persons who may be affected, I would stress that these persons are completely at liberty and encouraged to use the comeback clause found at paragraph 59 of the Initial Order. In that respect, notwithstanding any Order previously being given, the onus rests with the Applicants (and the Applicants alone) to justify *ab initio* the relief requested and previously granted.
>
> *Re MuscleTec Research and Development Inc*. (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Comm. List]) at para. 5
>
> See also *Re: General Chemical Canada Ltd.* (2005), 7 C.B.R. 102 (Ont. S.C.J. [Comm. List])

54. A CCAA Order obtained on an *ex parte* basis will be set aside:

(a) when the Order ought not to have been sought on an *ex parte* basis;

(b) if there has been less than full disclosure by the petitioner; or

(c) if the court has been misled about material facts.

> *Encore Developments Ltd. (Re)* (2009), 52 C.B.R. (5th) 30 (B.C. S.C.) at para. 35.
>
> *Marine Drive Properties Ltd. (Re)* (2009), 52 C.B.R. (5th) 47 (B.C. S.C.) at para. 47.
>
> *Hester Creek Estate Winery Ltd. (Re)* (2004), 50 C.B.R. (4th) 73 (B.C. S.C.) at para. 30.

55. It is particularly important to give notice in circumstances when a charge is sought that in essence obligates a secured creditor to bear the entire cost of the restructuring.

> *Encore Developments Ltd. (Re)* (2009), 52 C.B.R. (5th) 30 (B.C. S.C.) at para. 31.
>
> *Les Boutiques San Francisco Incorporees et al. (Re)*, 2003 CanLII 36955 (QC C.S.) at para. 32.

56. Having chosen to proceed on an *ex parte* basis, the Petitioners assumed the strict

evidentiary requirements for doing so and their failure to properly and fully disclose the nature of the April 2007 amendment agreed to as part of the 2007 Restructuring is, in and of itself, a basis for setting aside or varying the Initial Order.

57. On an *ex parte* petition and in all materials where protection is sought under an Initial CCAA Order without notice, the materials must set forth full and fair disclosure. The obligation of a petitioner on an *ex parte* petition under the CCAA can be likened to a petitioner for a Mareva Injunction. The petitioner must make full and fair disclosure of all material facts known to him and make proper inquires for any additional relevant facts before making a petition. The obligation includes the requirement to disclose facts relevant to the position of parties to which notice has not been provided to the extent that they are known.

> *Big Sky Living (Re)* (2002), 37 C.B.R. (4th) 42 (Alta. C.A.) at para. 12.
>
> *Hester Creek Estate Winery Ltd. (Re)* (2004), 50 C.B.R. (4th) 73 (B.C. S.C.) at paras. 5 and 30.
>
> *Marine Drive Properties Ltd. (Re)* (2009), 52 C.B.R. (5th) 47 at para. 27.

B. THE PETITIONERS SHOULD NOT BE PERMITTED TO TRANSFER ASSETS SUBJECT TO THE TRIDENT CANADA SECURED LENDERS' SECURITY TO FUND A TRIDENT US RESTRUCTURING OR BENEFIT TRIDENT US SECRITY HOLDERS.

(i) Restructuring of Trident US is Unnecessary

58. The Upstream Transfers allow the transfer of assets upon which the Trident Canada Secured Lenders hold security to Trident US where they can be used to fund Trident US' restructuring proceedings and/or benefit unsecured Trident US creditors and shareholders. Use of Trident Canada's assets for these purposes cannot be justified and is manifestly unfair.

59. The Petitioners have failed to establish why a Trident US restructuring is necessary, let alone why such a restructuring should be funded from assets of Trident Canada over which the Trident Canada Secured Lenders hold security. A restructuring of the Trident US is not a necessary part of a successful restructuring of the Trident Canada since:

(a) Trident Canada carries out all of the material operations of the Trident Group;

(b) Trident US is simply a holding company with no substantial assets which does not generate cashflow from operations;

(c) none of the assets of Trident US or the US Subsidiaries are necessary to restructure Trident Canada;

(d) Trident US and the US Subsidiaries are not parties to the joint venture agreements through which the core operations of the Trident Group are carried out;

(e) Trident US and the US Subsidiaries have no employees;

(f) Trident US appears to have no customers or suppliers other than its professional advisors and no trade creditors other than its professional advisors and the members of its board of directors; and

(g) Trident US' failure would have no impact on any "community". It is simply a Delaware holding company.

60. The businesses of Trident US and Trident Canada are not integrated. Trident US' function within the Trident Group was to raise funds for the Trident Group's capital programs and that role is historical in nature. Trident Canada can assume this function on a going forward basis.

Dillabough Affidavit, para. 8.

61. The material before the Court fails to establish how restructuring proceedings with respect to Trident US will provide any tangible benefit to the Trident Group. As a result, there is no rational basis for utilizing assets from Trident Canada to fund such proceedings.

62. Utilizing funds from Trident Canada to fund restructuring proceedings for Trident US is particularly offensive in circumstances where a funding limitation on future restructuring proceedings was specifically addressed by the Petitioners and their lenders in the April 2007 Amendment. The agreement reached at that time was that funding from Trident Canada would be strictly limited to a maximum of US$5 million. The parties should be held to their bargain, especially in circumstances where the Petitioners have failed to demonstrate any tangible benefit from restructuring Trident US.

63. Despite the fact that the Petitioners and their advisors have been asked repeatedly for an explanation of what value there is for Trident Canada in the US restructuring proceedings,

they have failed to provide such an explanation. In particular, they have failed to explain how the payment of significant fees and compensation to US lawyers and financial advisors produces meaningful value for Trident Canada, despite the fact that they want Trident Canada to pay for those services.

64. If Trident US' Security Holders believe there is value to be gained by restructuring proceedings with respect to Trident US, they should bear the costs of such proceedings by funding these costs directly without any recourse to Trident Canada, the Canadian Subsidiaries or any of their respective assets.

(ii) Intercompany Transfers for Payment of US Creditors

65. It is equally inappropriate and unfair to permit intercompany transfers which could have the effect of benefiting creditors and shareholders of Trident US at the expense of secured and unsecured creditors of Trident Canada.

66. Trident US and the US Subsidiaries have limited assets. In the Trident US Chapter 11 proceedings, Trident US estimated the value of its assets, and those of the US Subsidiaries, at between US$1 million and US$10 million. Despite the fact that Trident US has almost US$400 million in secured debt, it also indicated that it "estimates that funds will be available for distribution to unsecured creditors" of the US companies. The only possible source for such distributions is the assets of Trident Canada over which the Trident Canada Secured Lenders have security.

> Voluntary Petition of Trident US in the United States Bankruptcy Court, District of Delaware ("Trident US Chapter 11 Filings"), Exhibit "B" to the Voon Affidavit.

67. Given the content of Trident US' Chapter 11 Filings, the Trident Canada Secured Lenders are concerned that Trident US will transfer significant amounts from Trident Canada via Upstream Transfers in order to fully or partially satisfy Trident US' obligations to its lenders and other creditors. The effect of such transfers would be that Trident US' Lenders and other creditors, who have no security interest in the assets of Trident Canada, could be paid from the assets of Trident Canada ahead of the Trident Canada Secured Lenders, and Canadian unsecured creditors, without any assurances that the creditors of Trident Canada

would first be paid in full.

(iii) No Legal Basis for Continuing the Order Permitting Intercompany Transfers

68. In considering whether it is appropriate to authorize the transfer of assets of Canadian debtors to their American affiliates in a cross-border restructuring, the Court must balance the benefits accruing to stakeholders from the transfer against any potential prejudice to creditors.

> *Indalex Ltd. (Re)* (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Comm. List]) at para. 8
>
> *InterTAN Canada Ltd. (Re)* (2008), 49 C.B.R. (5th) 248 (Ont. S.C.J. [Comm. List]) at para. 69

69. Authorizing a guarantee or other transfer of assets of Canadian debtors to meet the obligations of affiliated US debtors may sometimes be appropriate where the businesses of the Canadian and American debtors are fully integrated such that a reorganization of the Canadian debtors without a coordinated restructuring of their American counterparts would be difficult or wholly impracticable. In circumstances such as those in the present case, where no necessity for a US restructuring has been established and where the proposed transfer of assets is prejudicial to the interest of the creditors of the Canadian debtors, such a transfer should not be authorized.

> *Indalex Ltd. (Re)* (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Comm. List]) at para. 8.
>
> *Smurfit-Stone Container Inc. (Re)* (2009), 50 C.B.R. (5th) 71 (Ont. S.C.J. [Comm. List]) at paras. 8, 12, 15 and 18.
>
> *InterTAN Canada Ltd. (Re)* (2008), 49 C.B.R. (5th) 248 (Ont. S.C.J. [Comm. List]) at para. 69.
>
> *Pliant Corporation of Canada Ltd. et al. (Re),* (March 24, 2009), 09-CL-8007 (Ont. S.C.J. [Comm. List]) at 1.
>
> *Fraser Papers Inc. et al. (Re),* 2009 CanLII 32698 (Ont. S.C.J.) at paras. 37 and 44.

70. The provisions of the Initial Order which permit Upstream Transfers and create priority charges for the costs of restructuring Trident US are provisions which prime the security of the Trident Canada Secured Lenders and are not appropriate as part of an Initial Order.

Royal Oak Mines Inc. (Re) (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. [Comm. List]) at paras. 24 and 25.

71. Creating a priority charge is an extraordinary measure that should be used sparingly, only in clear cases and when (a) the prejudice to the secured creditors whose security is being eroded is clearly outweighed by the benefits to all creditors, shareholders and employees; and (b) it is critical for the business to continue operating and to successfully restructure its affairs. A court should be cautious in exercising its jurisdiction to order a priming charge over the objections of a secured creditor.

1252206 Alberta Ltd. v. Bank of Montreal, 2009 ABQB 355 (CanLII) at para. 17.

MEI Computer Trident Canadahnology Group Inc. v. Ernst & Young Inc., 2005 CanLII 15656 (QC C.S.) at para. 25.

Temple City Housing Inc. (Re) (2007), 42 C.B.R. (5th) 274 (Alta. Q.B.) at para. 14; application for leave to appeal dismissed (2008), 43 C.B.R. (5th) 35 (Alta. C.A.).

United Used Auto & Truck Parts Ltd. (Re) (1999), 12 C.B.R. (4th) 144 (B.C. S.C.) at paras. 28 to 30, aff'd (2000), 16 C.B.R. (4th) 141 (B.C. C.A.), aff'd [2000] S.C.C.A. No. 142 (S.C.C.).

72. Limitations should be placed on any priming charge to minimize its impact on the secured creditors. There must be judicial control over amounts of priority charges, their precise nature, use and period of availability.

1252206 Alberta Ltd. v. Bank of Montreal, 2009 ABQB 355 (CanLII) at para. 17.

MEI Computer Trident Canadahnology Group Inc. v. Ernst & Young Inc., 2005 CanLII 15656 (QC C.S.) at paras. 25 and 26.

Les Boutiques San Francisco Incorporees et al. (Re), 2003 CanLII 36955 (QC C.S.) at para. 32

73. To the extent that the D&O Charge, the US Administration Charge and the Inter-Company Charge operate to prime the secured creditors of Trident Canada in order to fund a restructuring of Trident US, they are unfairly prejudicial and should not be permitted. The Inter-Company Charge provides little protection to Trident Canada since the assets of Trident US have little or no value and thus any advances made by Trident Canada to Trident US will essentially be made on an unsecured basis.

C. THE TRIDENT CANADA SECURED LENDERS SHOULD HAVE REASONABLE AND MATERIAL INPUT INTO THE RESTRUCTURING

74. Given their position as Trident Canada's only secured creditor, the Trident Canada Secured Lenders have, by far, the largest financial stake in the restructuring of the Trident Group. The provisions of the Initial Order contemplate that the costs of the restructuring be paid from assets over which the Trident Canada Secured Lenders have security but provide for no input from them in the restructuring process.

75. The provisions of paragraph 10 of the Initial Order provide broad restructuring powers to the Petitioners which, in some circumstances, can be exercised by the Petitioners without the approval of the Monitor or the Court. Such broad restructuring provisions should not be included in an initial order, especially when the Petitioners put forward no evidence whatsoever of any need to dispose of assets or cease any of their operations. Moreover, such wide powers exercisable by the Petitioners alone should not be granted by the Court without at least some kind of preliminary indication of the nature of the proposed restructuring.

> *Les Boutiques San Francisco Incorporees et al. (Re)*, 2003 CanLII 36955 (QC C.S.) at paras. 28 and 29.

76. If broad restructuring powers are to be granted to the Petitioners, they should be conditional upon the Petitioners obtaining the express written consent of the Trident Canada Secured Lenders or, in the alternative, with approval from the Court on notice to the Trident Canada Secured Lenders.

PART IV - ORDERS SOUGHT

77. The Required Lenders request that the Initial Order be varied in accordance with Schedule "A" to the Notice of Motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

October 4, 2009

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *Re MuscleTec Research and Development Inc.* (2006), 19 C.B.R. (5th) 54 (Ont. S.C.J. [Comm. List])

2. *Re: General Chemical Canada Ltd.* (2005), 7 C.B.R. 102 (Ont. S.C.J. [Comm. List])

3. *Encore Developments Ltd. (Re)* (2009), 52 C.B.R. (5th) 30 (B.C. S.C.)

4. *Marine Drive Properties Ltd. (Re)* (2009), 52 C.B.R. (5th) 47 (B.C. S.C.)

5. *Hester Creek Estate Winery Ltd. (Re)* (2004), 50 C.B.R. (4th) 73 (B.C. S.C.)

6. *Les Boutiques San Francisco Incorporees et al. (Re)*, 2003 CanLII 36955 (QC C.S.)

7. *Big Sky Living (Re)* (2002), 37 C.B.R. (4th) 42 (Alta. C.A.)

8. *Indalex Ltd. (Re)* (2009), 52 C.B.R. (5th) 61 (Ont. S.C.J. [Comm. List])

9. *InterTAN Canada Ltd. (Re)* (2008), 49 C.B.R. (5th) 248 (Ont. S.C.J. [Comm. List])

10. *Smurfit-Stone Container Inc. (Re)* (2009), 50 C.B.R. (5th) 71 (Ont. S.C.J. [Comm. List])

11. *Pliant Corporation of Canada Ltd. et al. (Re)*, (March 24, 2009), 09-CL-8007 (Ont. S.C.J. [Comm. List])

12. *Fraser Papers Inc. et al. (Re)*, 2009 CanLII 32698 (Ont. S.C.J.)

13. *Royal Oak Mines Inc. (Re)* (1999), 6 C.B.R. (4th) 314 (Ont. Ct. J. [Comm. List])

14. *1252206 Alberta Ltd. v. Bank of Montreal*, 2009 ABQB 355 (CanLII)

15. *Temple City Housing Inc. (Re)* (2007), 42 C.B.R. (5th) 274 (Alta. Q.B.); application for leave to appeal dismissed (2008), 43 C.B.R. (5th) 35 (Alta. C.A.)

16. *United Used Auto & Truck Parts Ltd. (Re)* (1999), 12 C.B.R. (4th) 144 (B.C. S.C.) aff'd (2000), 16 C.B.R. (4th) 141 (B.C. C.A.), aff'd [2000] S.C.C.A. No. 142 (S.C.C.)

17. *MEI Computer Trident Canadahnology Group Inc. v. Ernst & Young Inc.*, 2005 CanLII 15656 (QC C.S.)

Action No. 0901-13483

IN THE COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL DISTRICT OF CALGARY

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TRIDENT EXPLORATION CORP. ULC, FORT ENERGY CORP. ULC, FENERGY CORP. ULC, 981384 ALBERTA LTD., 981405 ALBERTA LTD., 981422 ALBERTA LTD., TRIDENT RESOURCES CORP., TRIDENT CBM CORP., AURORA ENERGY LLC., NEXGEN ENERGY CANADA, INC. AND TRIDENT USA CORP.

FACTUM OF FARALLON CAPITAL MANAGEMENT L.L.C., SPECIAL SITUATIONS INVESTMENT GROUP, INC. AND MOUNT KELLETT CAPITAL MANAGEMENT LP

(MOTION RETURNABLE OCTOBER 6, 2009)

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