ALBERTA TEMPLATE CCAA INITIAL ORDER EXPLANATORY NOTES

Alberta Template Orders Committee
Calgary/Edmonton, Alberta

INTRODUCTION

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

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

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

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

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

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

CLAUSE BY CLAUSE REVIEW OF THE CCAA INITIAL ORDER

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

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

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

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

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

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

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

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

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

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

Paragraph 5 allows (to the extent permitted by law), but does not require the Applicant to pay certain expenses, whether incurred prior to or after the Order. As with the Ontario Order, the CCAA Initial Order is intentionally limited in terms of payment of pre-filing liabilities, in order to treat to the extent possible all pre-filing payments equally pending the filing and approval of a plan. Typically, payments for pre-filing liabilities will be suspended until the plan is approved and thereafter made only in accordance with an approved plan. **Paragraph 5** permits payment of some pre-filing liabilities simply to avoid the operating issues which would otherwise arise from ceasing payments for regular and frequent payments, such as wages. Counsel should be prepared to advise the court of payroll arrangements and include evidence of these in the supporting affidavit.

Paragraph 6 entitles (but does not require) the Applicant to pay all reasonable expenses incurred in carrying on business in the ordinary course after the Order.

Paragraph 7 requires the Applicant to remit or pay statutory deemed trust amounts in favour of the Crown, sales taxes, and any amounts payable to the Crown or other taxation authority in respect of municipal or other taxes ranking ahead of secured creditors. This paragraph applies only to amounts arising or to be remitted after the Order, unless otherwise ordered by the Court.

Paragraph 8 permits (but does not require) the Applicant to pay rent under real property leases until such time as the lease is disclaimed or resiliated, excluding rent in arrears.

Paragraph 9 directs the Applicant to make no payments to any of its creditors as of the date of the Order, except as specifically permitted in the Order. The Applicant is similarly prevented from granting security interests in respect of any of its property and from granting credit or incurring liabilities, except in the ordinary course of business.

In certain situations, more extensive payment of pre-filing claims, or charges for the payment of pre-filing and post-filing claims of critical suppliers, are needed to facilitate a successful CCAA restructuring in the best interests of the stakeholders as a whole. In that event, counsel can insert and black-line a provision to this effect for the Court's consideration.

RESTRUCTURING [PARAS. 10-12]

Paragraph 10 grants the Applicant extensive rights to restructure its business. These provisions underline the need for notice to affected parties of the initial order. Section 36 of the CCAA now provides that sales out of the ordinary course of the debtor's business require court authorization. The Alberta Committee felt that in the interests of judicial economy, prospective authorization for sales up to a certain dollar ceiling could be authorized in the initial order, provided the notice requirements of Section 36 were met on the initial application.

Paragraphs 11 and 12 of the CCAA Initial Order provide a mechanism reflecting the interests of both the Applicant and its landlord regarding the showing of the property, the identification and resolution of issues surrounding fixtures and, of course, the preservation of the landlord's remedies.

Consistent with the Ontario approach, there is no provision for the payment of percentage rent, as the Alberta Committee agreed that this level of detail was unnecessary in a standard form order. This and other details arising in particular situations could be inserted and black-lined to the CCAA Initial Order in appropriate circumstances.

There is no provision permitting the Applicant to dispose of property located on the leased premises without interference of any kind from landlords, and "notwithstanding the terms of any leases". In limited circumstances, such a provision may be appropriate to include in an initial order without notice to the landlord (for example, a pre-Christmas retail insolvency, or where perishable goods are involved).

NO PROCEEDINGS AGAINST THE APPLICANT OR THE PROPERTY [PARA. 13]

Paragraph 13 of the CCAA Initial Order contemplates an initial stay period of a maximum of 30 days, subject to extension by further order.

NO EXERCISE OF RIGHTS OR REMEDIES [PARAS. 14-16]

Paragraph 14 describes a broad stay of rights and remedies against or in respect of the Applicant or the Monitor, or affecting the Business or the Property.

Paragraph 15 permits taking action against the Applicant in order to preserve rights respecting statutory limitation periods, without the need for a Court application. This alleviates the onus placed on a claimant to seek Court approval to file whatever documents are necessary to meet the deadline in question. No further steps are permitted beyond the action necessitated to comply with the limitation, except in accordance with other provisions of the order.

Counsel should be aware that the CCAA preserves the rights of set-off. The Courts have recognized the application of the law of set-off in the CCAA context, and have specifically permitted set-off to "cross the line" of the CCAA filing date: see for example, ***Re Blue Range Resource Corp.*** (2000), 84 Alta. L.R. (3d) 665 (C.A.); ***Re Canadian Airlines Corp.*** (2001), 14 B.L.R. (3d) 258 (Alta. Q.B.); ***Re Air Canada*** (2003), 45 C.B.R. (4th) 13 (Ont. S.C.J.).

There are examples of extension of a stay to prevent exercise of set-off, without leave: ***Re Air Canada, supra***. However, to the extent that such a stay operates to require payment by a creditor of a debt otherwise subject to valid set-off against a debt owing from the debtor company, it amounts to cancellation of the rights Parliament has preserved in the CCAA.

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

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

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

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

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

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

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

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

indemnity and a charge in the CCAA Initial Order. These respectively appear at **paragraph 19, paragraph 20 and paragraph 21.**

The CCAA in section 11.51 now expressly permits the inclusion of an indemnity and a charge in favour of directors and officers. Prior to the most recent amendment of the statute, there were a number of cases that supported the Court's ability to make such orders: see for example, ***General Publishing Co., Re*** (2003), 39 C.B.R. (4th) 216 Ont. S.C.J.); ***JetsGo Corporation, Re***, 2005 CarswellQue. 2700 (S.C.).

Section 11.51(3) of the CCAA provides that the Court may not grant this type of Order if, in its opinion, adequate indemnification insurance could be obtained at reasonable cost.

APPOINTMENT OF MONITOR [PARAS. 23-30]

Paragraph 23 appoints the Monitor as an officer of the court to monitor the Property and the Applicant's conduct of the Business in accordance with the CCAA and the terms of the order. The Applicant is required to advise the Monitor of all material steps taken by the Applicant pursuant to the order, and to co-operate with the Monitor.

The Monitor is granted broad restructuring powers in **paragraph 24.**

Paragraph 25 provides that the Monitor shall not take possession of the property and shall take no part in the management of the business. So long as the Monitor does not take possession nor manage, the prohibition in ***GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.,*** [2006] 2 S.C.R. 123 does not come into play. **Paragraph 25** also goes on to specify that

nothing in the Order shall require the Monitor to take possession or control of any of the property that might be environmentally contaminated or that might cause or contribute to a discharge of a substance contrary to law. The Order does not, however, exempt the Monitor from reporting or disclosure as required by environmental legislation.

Paragraph 26 does not require the Monitor to collect information, but rather contemplates the Monitor will simply pass along information provided by the Applicant in response to reasonable requests for information from creditors. The Monitor does not have responsibility or liability with respect to the information so disseminated. Subject to Court order, confidential information is not to be disseminated.

Paragraph 28 contemplates that the Monitor's fees (including its counsel fees) will be paid by the Applicant on a regular basis as part of the costs of the proceedings. Paragraph 29 requires that the Monitor and its legal counsel pass their accounts from time to time.

Paragraph 30 grants a charge to the Monitor, counsel for the Monitor and the Applicant's counsel as security for their professional fees and disbursements. (“Administration Charge”). These charges are permitted by Section 11.52 of the CCAA.

INTERIM FINANCING [PARAS. 31-36]

Given the frequent necessity for what is now called "interim" financing (formerly, Debtor In Possession – "DIP" financing) in CCAA proceedings, it is provided for in **paragraphs 31 to 36** of the CCAA Initial Order. It can only be granted on notice to affected secured creditors, pursuant to Section 11.2 of the statute. These provisions allow interim financing to a predetermined maximum amount, and also envision the filing of a Commitment Letter, so that the Court and the affected parties can address the details of the proposed financing at the initial application.

Notwithstanding its common role in CCAA proceedings, interim financing is an exceptional remedy, and severely impacts the rights of existing secured parties given the super-priority afforded. Evidence establishing the need for interim financing must be supplied and all affected parties should be given notice. The typical practice in Alberta is therefore to seek the consent of, or at least notify secured creditors who are going to be affected by the interim financing. The Interim Lender's Charge must not secure any obligation which existed before the CCAA Order is made. Only in very exceptional cases, where the evidence supports the extension of the Interim Lender's Charge to pre-existing obligations, will the Court permit such extension. See for example ***Re Comark Inc.***, 2015 ONSC 2010.

Interim financing provisions should only be applied for *ex parte* in exceptional circumstances and in that event, should only be for an amount sufficient to "keep the lights on". Ongoing interim financing should be re-visited at the comeback application.

VALIDITY AND PRIORITY OF CHARGES, ALLOCATION [PARAS. 37-42]

Paragraph 37 provides for the following ranking: Administration Charge, Interim Lender's Charge, Directors' Charge. This ranking may be subject to negotiation, and must be tailored to the circumstances of the case before the Court. Similarly, the quantum of each charge may be negotiated, however, **paragraph 37** contemplates a cap on each.

The Alberta Committee was of the view that certain characteristics should be common to all of these charges. For example:

1. The charges do not require registration under any system of registration in Alberta (although parties may wish to consider doing so) **(paragraph 38)**;

2. The charges should generally attach to all of the debtor's property and prevail over all other interests **(paragraph 39)**. However, the applicant must be prepared to justify this "super priority", particularly where no notice is given of the initial application;

3. The Applicant/borrower should be precluded from granting any interest that would rank in priority to, or *pari passu* with, any of the charges **(paragraph 40)**; and

4. The charges should not by themselves be an event of default or be subject to subsequent proceedings to be set aside **(paragraph 41)**.

The Alberta Committee recognizes that the "super priority" of these charges may be limited by other variables, such as lack of notice to certain secured or statutory creditors over whom the priority is being asserted, and by specific statutory terms which do not permit the granting of a priority charge over certain statutory-based charges. This must be assessed by counsel on a case-by-case basis.

Pursuant to section 34(11) of the CCAA no order may be made which has the effect of subordinating financial collateral (as defined in section 2(1) of the CCAA).

Paragraph 43 provides that any interested party may apply to the Court for an order to allocate the Administration Charge, the Interim Lender's Charge and the Directors' Charge amongst the various assets comprising the Property. This paragraph is not intended to pre-determine the success or failure of such an application, but rather only to signal the ability to bring the application.

SERVICE AND NOTICE, GENERAL [PARAS. 44-51]

Paragraph 44 reflects the expanded duties and functions of the Monitor to deal with service of notices and the dissemination of information concerning the proceedings contained in section 23 of the CCAA. **Paragraph 45** permits service by e-mail and allows materials to be posted on the Monitor's website, which is to be established for informational (as distinct from service) purposes. The regulations under the CCAA (SOR 2009-219, Sections 7 & 9) mandate what the monitor is now required to post on its website. The CCAA Initial Order expands on that to include substantially all materials filed by or on behalf of the Monitor or served upon it, other than confidential materials.

Paragraph 48 and paragraph 49 permit the Monitor to seek assistance and recognition from domestic and foreign jurisdictions.

Paragraph 50 is the comeback clause and allows for applications to vary or amend the order on 7 days'notice to all affected parties.

Paragraph 51 provides that the Order is effective as 12:01 a.m. Mountain Standard Time on the date of the Order.

CONCLUSION

The Alberta Committee hopes that the CCAA Initial Order will be a useful tool to both the bench and bar by providing a familiar and well-understood starting point. As counsel and the Court consider an appropriate order for a given case, black-lining to the CCAA Initial

Order should enable them to expeditiously address changes needed to appropriately tailor the order to the circumstances.

The CCAA Initial Order is not intended to apply universally to every CCAA proceeding, nor is it intended to raise any sort of onus that will require counsel to meet some legal or evidentiary burden in order to depart from the template. Rather, it is intended as a practical help to the bench and bar, to ensure both are acquainted with typical tents of an initial CCAA order, so that departures from such terms can be quickly highlighted.

The Alberta Template Orders Committe