

COURT FILE NUMBER Q.B. No. 733 of 2021

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE SASKATOON

APPLICANT ABBEY RESOURCES CORP.

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*,
RSC 1985, c C-36, AS AMENDED (the "CCAA")

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT FOR THE CREDITORS
OF ABBEY RESOURCES CORP.

BRIEF OF LAW

(Re: Application for Fourth Extension Order and Amendment of Initial Order)

**BRIEF OF LAW FILED BY THE APPLICANT IN RESPECT OF ITS APPLICATION SEEKING A
FOURTH EXTENSION ORDER AND AMEENDMENT OF INITIAL ORDER UNDER THE *COMPANIES'*
*CREDITORS ARRANGEMENT ACT***

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I. INTRODUCTION

1. The Applicant, ABBEY RESOURCES CORP. (the “**Company**”), was granted creditor protection pursuant to the *Companies’ Creditors Arrangement Act*¹ pursuant to Order of this Honourable Court dated August 13, 2021 (the “**Initial Order**”), which has since been extended by three additional Orders of the Court.
2. The Company now seeks a further Order of this Honourable Court to amend paragraph 9 of the Initial Order in part. In particular, the Company seeks an amendment (the “**Amendment**”) modifying the Initial Order to impose on the Company an obligation to pay surface lease rentals at a *per diem* rate. The Amendment is sought so as to clarify that the Company is not under an obligation pursuant to an Order of this Honourable Court to pay annual surface lease rentals in advance.
3. This Brief of Law is intended to provide the Court with the relevant statutory authority and case law in support of the Company’s Application for the Amendment.

II. STATEMENT OF ISSUES

- A. This Honourable Court has the power to grant the Amendment under the CCAA and is not prohibited from doing so by any of the CCAA’s internal restrictions**

III. ARGUMENT

A. The Court should grant the Amendment

4. This section of the Argument first explains why the Court is able to grant the Amendment under CCAA section 11 before going on to demonstrate that the Amendment does not offend CCAA section 11.01.
 - i. The Court has power to grant the Amendment**
5. This Court is empowered to order the Amendment by its broad discretionary authority under the CCAA. Section 11 of that Act authorizes courts to exercise a wide range of authority, subject to minimal restrictions, to make orders necessary to further the aims of an applicant’s restructuring. The section reads:

11 Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-*

¹ RSC 1985, c C-36, [CCAA].

up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, **subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.**

[Emphasis added]

6. In *US Steel Canada Re*², the Ontario Court of Appeal (the “**ONCA**”) reiterated that CCAA section 11 is “the engine that drives this broad and flexible statutory scheme.”³ The ONCA went on to clarify that the broad powers afforded to CCAA courts by section 11 are circumscribed only by that section’s express limitations:

76 The jurisdiction under s. 11 has two express limitations. First, the court must find that the order is “appropriate in the circumstances”. Second, even if the court considers the order appropriate in the circumstances, it must consider whether there are “restrictions set out in” the CCAA that preclude it.⁴

7. The Supreme Court of Canada (“**SCC**”) provided CCAA courts with guidance on the broad scope of their authority in CCAA proceedings in *Century Services Inc. v Canada (Attorney General)*.⁵ There, the SCC adopted the view that the CCAA is deliberately “skeletal in nature” and that it thus does “not contain a comprehensive code that lays out all that is permitted or barred.”⁶ The SCC further stressed that the “expansive interpretation the language of the [CCAA] is capable of supporting” is “[p]articularly noteworthy.”⁷ Speaking to the general nature of discretionary authority under the CCAA, the majority in *Century Services* stated as follows:

[70] The general language of the CCAA should not be read as being restricted by the availability of more specific orders. However, the requirements of appropriateness, good faith, and due diligence are baseline considerations that a court should always bear in mind when exercising CCAA authority. **Appropriateness under the CCAA is assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The question is whether the order will usefully further efforts to achieve the remedial purpose of the CCAA — avoiding the social and economic losses resulting from liquidation of an insolvent company.** I would add that appropriateness extends not only to the purpose of the order, but also to the means it employs. Courts should be mindful that chances for successful reorganizations are enhanced where **participants achieve common ground and all stakeholders are treated as advantageously and fairly as the circumstances permit.**

[71] It is well established that efforts to reorganize under the CCAA can

² 2016 ONCA 662, [2016] OJ No 4688.

³ *Ibid*, at para 74.

⁴ *Ibid*, at para 76.

⁵ 2010 SCC 60, [2010] 3 SCR 379.

⁶ *Ibid*, at para 57.

⁷ *Ibid*, at para 66.

be terminated and the stay of proceedings against the debtor lifted if the reorganization is “doomed to failure” ...). However, **when an order is sought that does realistically advance the CCAA’s purposes, the ability to make it is within the discretion of a CCAA court.**⁸

8. The Amendment sought by the Company is modest in scope. It sets out as a minimum obligation for the Company the requirement to pay compensation at the rate contemplated by the agreements between the Company and the surface rights holders as property is occupied, as opposed to in advance of that property’s use. The wording used in the current iteration of the Initial Order, which is derived from the standard-form Template Initial Order adopted by this Honourable Court, could arguably be interpreted as placing an enhanced obligation to pay rents in advance, over and above any obligation that would be imposed upon the Company pursuant to the CCAA. As is discussed below, the CCAA’s own internal limitations do not prohibit the Amendment or place an obligation on an applicant debtor generally to make full and immediate payment of all amounts owing under a strict construction of its lease agreements.
9. The Amendment is appropriate in the circumstances, as it is necessary for the Company to facilitate its restructuring plan and it does not contravene any restrictions set out in the CCAA. As is discussed in the Ninth Affidavit of James Gettis dated January 21, 2022, the Company will be unable to implement its restructuring plan if it is required to pay all surface rights holders full annual rental amounts in advance at the original, un-amended rates set out in its surface leases.
10. It bears mention that two recent decisions of CCAA courts outside of Saskatchewan concern disputes within CCAA proceedings over non-payment of rent - specifically, the British Columbia Supreme Court’s (the “**BCSC**”) 2020 decision in *Quest University Canada (Re)*⁹ and the Quebec Superior Court’s (the “**QCS**”) decision in *Groupe Dynamite inc. v Deloitte Restructuring Inc.*¹⁰
11. In both *Quest University* and *Group Dynamite*, the applicant debtors in CCAA proceedings already underway sought discretionary orders of BCSC and QCS, respectively, entitling them to defer or avoid rental payments entirely to certain of their landlords. In both instances, the Court denied the relief sought.
12. The within matter is readily distinguishable from both *Quest University* and *Group Dynamite* for at least two reasons. First, under the Amendment, the Company will remain obligated by Court Order to pay rental amounts on a *per diem* basis, whereas the debtors in *Quest*

⁸ *Ibid*, citations omitted.

⁹ 2020 BCSC 921 [*Quest University*].

¹⁰ 2021 QCCS 3 [*Groupe Dynamite*].

University and Group Dynamite sought to avoid payment entirely. Second, neither of the CCAA Courts in those matters held the rent deferrals sought by the applicant debtors were of critical necessity to such debtors' ability to restructure. As stated, in the instant case, payment of advance of full annual surface lease rentals at their un-amended rates would be jeopardize the Company's ability to restructure.

ii. The Amendment does not offend CCAA section 11.01

13. Section 11.01 of the CCAA contains an internal limit on the scope of the broad range of orders that may be granted under CCAA section 11 and stays of proceedings granted pursuant to CCAA section 11.02. The provision reads:

11.01 No order made under section 11 or 11.02 has the effect of

- (a) prohibiting a person from requiring immediate payment for goods, services, **use of leased or licensed property** or other valuable consideration provided after the order is made; or
- (b) requiring the further advance of money or credit.

14. The following paragraphs explain why the Amendment, or for that matter, the Company's practice of paying prorated rental amounts on certain surface leases, does not offend section 11.01 of the CCAA or the scheme of that Act more generally.

Section 11.01(a) does not apply to Real Property Leases

15. In *Quest University Canada*, in 2020, the British Columbia Supreme Court ("BCSC") considered the application of a debtor restructuring in CCAA proceedings seeking an order permitting it to defer payments on real property leases. Upon canvassing the jurisprudence, the BCSC remarked that CCAA courts do not appear to have applied CCAA section 11.01 to real property leases:

60 Courts across Canada have consistently applied the reasoning in *Smith Brothers Contracting* in the interpretation of s. 11.01 with respect to personal property leases (see discussion in *Cow Harbour Construction*). No Canadian court has extended the Smith Brothers Contracting reasoning to real property leases.

...

74 I do not intend the above discussion as endorsing, as a matter of the interpretation of s. 11.01(a), that real property leases are within its purview. As stated above, no Canadian court has interpreted s. 11.01 in that fashion. Only one recent Ontario decision seems to have addressed s. 11.01(a) in the context of real property leases: *Comark Holdings Inc., Re* However, the Ontario court did not issue any reasons so there is no indication that the court grappled with this issue.

...

76 Section 11.01(a) has been applied in the context of personal property leases only. Here, I need not decide whether real property leases also come within the purview of s. 11.01(a) and I would leave that for later determination. I conclude that, if s. 11.01(a) applies to real property leases, I do not interpret the Subleases as “financing leases” for the above reasons. I make this determination having regard to the need to interpret s. 11.01 narrowly, as discussed above.¹¹

16. Subsequent to the BCSC’s decision in *Quest University*, the QSC’s decision in *Groupe Dynamite* was rendered under the apparent presumption that CCAA section 11.01(a) does contemplate real property leases.¹² Despite the fact that *Quest University* is cited in that decision, the question of whether Parliament intended this provision to refer to both personal property leases and real property leases was neither put into issue by the parties nor canvassed by the QSC in *Groupe Dynamite*.
17. Neither *Quest University* nor *Groupe Dynamite* are binding authorities on this Honourable Court. However, given that the Court in *Quest University* directly engaged with the question of whether CCAA section 11.01(a) includes real property and that the Court *Groupe Dynamite* did not, it is submitted that *Quest University* stands as a persuasive authority for the proposition that the exclusion or inclusion of real property leases in section 11.01(a) of the CCAA remains unresolved in Canadian jurisprudence. In light of the unresolved tension in the law, it is respectfully submitted that this Honourable Court must come to a determination as to whether the word “leases” in section 11.01(a) of the CCAA is applicable to real property leases, as opposed to only leases of chattel property.
18. In *Quest University*, the British Columbia Supreme Court stated that CCAA section 11.01, being an exception to a provision central to the remedial purpose of the CCAA, must be interpreted narrowly:

54 The right of a supplier to proceed under s. 11.01 is an exception to the application of the general stay under s. 11.02. The purpose of the general stay is to further the remedial purposes of the CCAA. In that context, courts have consistently interpreted s. 11.01 narrowly: *Nortel Networks Corp., Re*, 2009 ONCA 833 (Ont. C.A.) at para. 17; *Smith Brothers Contracting Ltd., Re*, [1998] B.C.J. No. 728 (B.C. S.C.) at para. 41; and *Royal Royal Bank v. Cow Harbour Construction Ltd.*, 2012 ABQB 59 (Alta. Q.B.) at para. 20.¹³

CCAA Section 11.01(a) not breached in any event

¹¹ *Quest University*, *supra* note 9, at paras 60, 74, 76.

¹² *Group Dynamite*, *supra* note 10, at paras 12-13.

¹³ *Quest University*, *supra* note 9, at para 54, emphasis added.

19. Even if CCAA section 11.01(a) should be interpreted to include real property leases, amending the Initial Order to clarify that the Company is not obligated by court order to pay the maximum amounts owing under its surface leasing agreements does not offend CCAA section 11.01(a).
20. CCAA courts in Saskatchewan and elsewhere have considered the extent to which applicant debtors granted protection under the CCAA are placed under an obligation to pay post-filing creditors. Consistently, CCAA courts have found that suppliers have a right to refuse supply, insist on cash on delivery, to negotiate to require the imposition of a critical suppliers' charge by way of a court order, or to risk supplying goods and services on credit. Courts have not, however, found a standalone requirement within the CCAA necessitating that initial orders place an obligation debtors to pay all post-filing obligations immediately upon them coming due.
21. In *Quest University*, the BCSC found that the CCAA does not contain any provision placing an affirmative obligation on an applicant to make payment to persons (inclusive of landlords) who provide goods and services in the post filing period:

43 I agree with Quest that **there is no specific CCAA provision that requires a company to make payment to persons who supply good and services in the post-filing period (including a landlord for post-filing rent).**¹⁴

22. The BCSC in *Quest University* went on to speak to the nature of the consequences of non-payment of rent to a real property lessor, presuming for the sake of its analysis that section 11.01(a) applies to landlords (which was not decided):

51 If s. 11.01 of the CCAA applies here, upon any default by Quest, **the stay in the ARIO would not prohibit Southern Star from demanding immediate payment of the rent for the Residences.** It is common ground that, if Southern Star (and perhaps even BMO) wished to take further action to address the default (under the Subleases and BMO's mortgage), **they may be required to seek to lift the stay to allow them to proceed further.** I will make no further comment in that respect as the issue is not before me.¹⁵

23. In the result, the BCSC ultimately held that it would be unfair for the Court to exercise its broad discretionary authority under section 11 of the CCAA to entitle the applicant from deferring rent to the prejudice of the rights of the landlord to demand payment of rent. As stated, the Amendment proposed by the Company differs radically from the relief sought by the applicant in *Quest University*, in that the Amendment expressly contemplates regular payment for use of leased property, whereas the relief sought in *Quest University* involved the complete

¹⁴ *Ibid*, at para 43, emphasis added.

¹⁵ *Ibid*, at para 51, emphasis added.

suspension of payments, notwithstanding use of leased property.

24. In *ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd.*,¹⁶ the Saskatchewan Court of Appeal (“**SKCA**”) reviewed section 11.3 of the predecessor to the current iteration of the CCAA (which is identical to section 11.01 of the CCAA). The Court’s *dicta* there merits reproduction at length:

43 *Smith Brothers Contracting Ltd., Re* also supports a narrow reading of s. 11.3... with respect to the intention of Parliament and the object and scheme of the CCAA, Bauman J. in *Smith Brothers* wrote:

45 It is interesting that Gibbs J.A. suggested that it would be unlikely that a court would exercise its s. 11 jurisdiction:

... where the result would be to enforce the continued supply of goods and services to the debtor company without payment for current deliveries ...

46 Parliament has now precluded that by adding s. 11.3(a) to the CCAA. It is instructive to note, however, that the subsection has been added against the backdrop of jurisprudence which has underlined the very broad scope of the court’s jurisdiction to stay proceedings under s. 11.

47 To repeat the relevant portion of the section:

11.3 No order made under s. 11 shall have the effect of

(a) prohibiting a person from requiring immediate payment for ... use of leased or licenced property ... provided after the order is made;

It is noted that the remedy which is preserved for creditors is a relatively narrow one; **it is the right to require immediate payment for the use of the leased property.**

Thus, Bauman J. interpreted s. 11.3 in accordance with Parliament’s intention and the object and scheme of the CCAA as creating **a narrow right — the right to withhold services without immediate payment.**

44 I agree with Bricore’s counsel. When a supplier is requested to provide goods or services on a post-filing basis to a company operating under a stay of proceedings imposed by the CCAA, **s. 11.3 allows the supplier the right:**

(a) to refuse to supply any such goods or services at all;

(b) to supply such goods or services on a “cash on demand” basis only;

(c) to negotiate with the insolvent corporation for the amendment of the CCAA Order to create a post-filing supplier’s charge on the assets of the insolvent corporation to secure the payment by the insolvent corporation of amounts owing by it to such post-filing suppliers; or

(d) to take the risk of supplying goods or services on credit.

Where the Initial Order imposes a stay of proceedings and prohibits further proceedings, s. 11.3 does not permit the supplier of goods or

¹⁶ 2007 SKCA 72 [*ICR Commercial Real Estate*].

services to sue without obtaining leave of the court to do so.¹⁷

25. In summary, in *ICR Commercial Real Estate*, the SKCA emphasized that CCAA section 11.3 (as it then was) created only a narrow right on behalf of the supplier to demand payment. The SKCA clarified, unequivocally, that the exercise of that right on behalf of a supplier necessitated the lifting of the stay of proceedings imposed under a CCAA initial order.
26. That the Amendment does not offend the CCAA is underscored by the fact that the current template initial order adopted by the Alberta Court of Queen's Bench (the "**ABQB**") and the previous iteration of the template initial order adopted by this Honourable Court do not include *pro forma* clauses placing an affirmative obligation on the applicant to pay rents. The ABQB template order provides at paragraph 8 that "the Applicant may pay all amounts constituting rent or payable as rent under real property leases."¹⁸ The explanatory note to this provision to this provision states "[p]aragraph 8 permits (but does not require) the Applicant to pay rent under real property."¹⁹

IV. CONCLUSION AND RELIEF SOUGHT

27. For the reasons expressed herein, it is respectfully submitted that this Honourable Court has the clear authority to grant the Amendment and that granting the Amendment is necessary for the restructuring of the Company and, consequently, the general benefit of all of its stakeholders.

DATED at Edmonton, Alberta, this 27th day of January, 2022.

DLA PIPER (CANADA) LLP

Per: 

Jerritt R. Pawlyk and Kevin N. Hoy,
Counsel to Abbey Resources Corp.

¹⁷ *Ibid*, emphasis added, citations omitted.

¹⁸ Alberta Template CCAA Initial Order, at paragraph 8.

¹⁹ Alberta Template CCAA Initial Order Explanatory Notes, at paragraph 8.

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COURT FILE NUMBER **Q.B. No. 773 of 2021**

**COURT OF QUEEN'S BENCH FOR SASKATCHEWAN
IN BANKRUPTCY AND INSOLVENCY**

JUDICIAL CENTRE **SASKATOON**

APPLICANT **ABBEY RESOURCES CORP.**

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

**AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT
FOR THE CREDITORS OF ABBEY RESOURCES CORP.**

TABLE OF AUTHORITIES

(Re: Application for Fourth Extension Order and Amendment of Initial Order)

CASE LAW

TAB

Ted Leroy Trucking [Century Services] Ltd., Re, 2010 SCC 60 (CanLII), [2010] 3 SCR 379.

US Steel Canada Re, 2016 ONCA 662 (CanLII), [2016] OJ No 4688.

Quest University Canada (Re), 2020 BCSC 921 (CanLII)

Groupe Dynamite inc. v Deloitte Restructuring Inc., 2021 QCCS 3 (CanLII)

ICR Commercial Real Estate (Regina) Ltd. v Bricore Land Group Ltd., 2007 SKCA 72 (CanLII)

SECONDARY SOURCES AND ADOPTED TEMPLATE ORDERS

Alberta Template CCAA Initial Order 1

Alberta Template CCAA Initial Order Explanatory Notes 2

CAN: 39498759.1

TAB 1

Clerk's Stamp:



COURT FILE NUMBER
COURT
JUDICIAL CENTRE OF

COURT OF QUEEN'S BENCH OF ALBERTA



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 **[THE
DEBTOR(S)]**

APPLICANT:
RESPONDENT(S):
DOCUMENT
CONTACT INFORMATION OF PARTY
FILING THIS DOCUMENT:

ALBERTA TEMPLATE CCAA INITIAL ORDER

[LAW FIRM NAME]

[Address]

[Address]

Solicitor: ●

Telephone: ●

Facsimile: ●

Email: ●

File Number: ●

**DATE ON WHICH ORDER WAS
PRONOUNCED:
NAME OF JUDGE WHO MADE THIS
ORDER:
LOCATION OF HEARING:**

**[*NOTE: DO NOT USE THIS ORDER AS A PRECEDENT WITHOUT REVIEWING
THE ACCOMPANYING EXPLANATORY NOTES.]**

- (i) employment insurance,
- (ii) Canada Pension Plan,
- (iii) Quebec Pension Plan, and
- (iv) income taxes,

but only where such statutory deemed trust amounts arise after the date of this Order, or are not required to be remitted until after the date of this Order, unless otherwise ordered by the Court;

- (b) all goods and services or other applicable sales taxes (collectively, "**Sales Taxes**") required to be remitted by the Applicant in connection with the sale of goods and services by the Applicant, but only where such Sales Taxes are accrued or collected after the date of this Order, or where such Sales Taxes were accrued or collected prior to the date of this Order but not required to be remitted until on or after the date of this Order; and
- (c) any amount payable to the Crown in Right of Canada or of any Province thereof or any political subdivision thereof or any other taxation authority in respect of municipal realty, municipal business or other taxes, assessments or levies of any nature or kind which are entitled at law to be paid in priority to claims of secured creditors and that are attributable to or in respect of the carrying on of the Business by the Applicant.

8. Until such time as a real property lease is disclaimed or resiliated in accordance with the CCAA, the Applicant may pay all amounts constituting rent or payable as rent under real property leases (including, for greater certainty, common area maintenance charges, utilities and realty taxes and any other amounts payable as rent to the landlord under the lease) based on the terms of existing lease arrangements or as otherwise may be negotiated by the Applicant from time to time for the period commencing from and including the date of this Order ("**Rent**"), but shall not pay any rent in arrears.

9. Except as specifically permitted in this Order, the Applicant is hereby directed, until further order of this Court:

- (a) to make no payments of principal, interest thereon or otherwise on account of amounts owing by the Applicant to any of its creditors as of the date of this Order;
- (b) to grant no security interests, trust, liens, charges or encumbrances upon or in respect of any of its Property; and
- (c) not to grant credit or incur liabilities except in the ordinary course of the Business.

TAB 2

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.

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”).

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.