

COURT OF APPEAL OF ALBERTA

Form AP-3
[Rule 14.53]

COURT OF APPEAL FILE NUMBER: 1601-0023AC

TRIAL COURT FILE NUMBER: 1501-12220

REGISTRY OFFICE: CALGARY

PLAINTIFF: ALBERTA TREASURY BRANCHES

STATUS ON APPEAL: RESPONDENT

STATUS ON APPLICATION: RESPONDENT

DEFENDANT: CONSERVE OIL 1ST CORPORATION

STATUS ON APPEAL: APPELLANT

STATUS ON APPLICATION: APPLICANT

DEFENDANTS: COGI LIMITED PARTNERSHIP, CANADIAN OIL & GAS INTERNATIONAL INC., CONSERVE OIL GROUP INC.

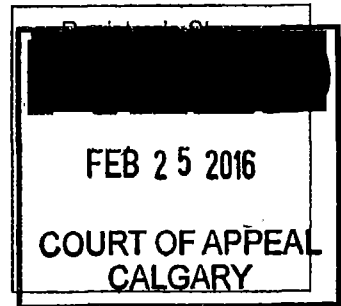
STATUS ON APPEAL: NOT PARTIES TO THE APPEAL

STATUS ON APPLICATION: NOT PARTIES TO THE APPLICATION

DOCUMENT: **MEMORANDUM OF ARGUMENT OF CONSERVE OIL 1ST CORPORATION FOR EXTENSION OF APPEAL PERIOD**

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I. Relief Sought

1. Conserve Oil 1st Corporation ("**Amalco**") seeks an Order extending the period to appeal the January 6, 2016 Order (the "**Second Receivership Order**") of Madam Justice K.M. Horner pronounced in Q.B. Action No. 1501-12220.

II. Summary of Facts¹

2. Amalco is the amalgamation successor of Conserve 1st Oil Corporation ("**COC1**"), Conserve Oil 2nd Corporation ("**COC2**"), Conserve Oil 6th Corporation ("**COC6**"), and Conserve Oil 7th Corporation ("**COC7**", collectively with COC1 and COC6, the "**Old GPs**").²

3. Amalco has never had any direct contractual relationship with Alberta Treasury Branch ("**ATB**"). The Old GPs, however, were each general partners of limited partnerships (the "**Old LPs**") that obtained credit facilities from ATB from December 2011 to September 2013 (the "**Old LPs' Credit Facilities**"), and provided guarantees to ATB (the "**Old Guarantees**") respecting the Old LPs' Credit Facilities. The Old Guarantees secured \$28.8 Million in aggregate.³

4. In July 2013, by way of an arrangement agreement (the "**Arrangement**"): (i) 100% of the assets and liabilities of the Old LPs were transferred to a new limited partnership, COGI Limited Partnership ("**COGI LP**"); (ii) Canadian Oil & Gas International Inc. (the "**COGI GP**") became the general partner of COGI LP; and (iii) the Old LPs were dissolved.⁴

5. Effective August 30, 2013: (i) the Old LPs' Credit Facilities were repaid and cancelled; (ii) COGI LP confirmed to ATB that it assumed all obligations and liabilities of the Old LPs, including respecting the Old Guarantees (if any such obligation under the Old Guarantees existed); (iii) COGI LP entered into a new \$94.5 Million credit facility with ATB (the "**New Credit Facility**"); and (iv) COGI LP and COGI GP provided new security to ATB respecting the New Credit Facility. The Old GPs understood that the repayment and cancellation of the Old LPs' Credit Facilities rendered all the obligations of the Old GPs under the Old Guarantees

¹ Detailed Chronology Attached as **Sched. "A"**; Schematic of Relationships attached as **Sched. "B"**.

² Affidavit of A. Gramatzki, sworn February 16, 2016 (the "**Gramatzki Aff.**") at para. 2.

³ Gramatzki Aff. at paras. 3-5.

⁴ Gramatzki Aff. at paras. 5-6.

discharged and cancelled. On December 20, 2013, Amalco was created.⁵

6. At no time were the Old LPs, the Old GPs, or Amalco: (i) parties to the New Credit Facility agreement; (ii) requested by ATB to provide security for the New Credit Facility; or (iii) requested to confirm or acknowledge the Old Guarantees were security for the New Credit Facility.

7. In October 2015, ATB obtained a receivership order (the "**First Receivership Order**") respecting COGI LP, COGI GP, and Conserve Oil Group Inc. On January 6, 2016, ATB obtained the Second Receivership Order adding Amalco to the existing receivership proceedings. Further on January 6, 2016, Amalco, through its prior counsel, Bennett Jones LLP ("**BJ**"), unsuccessfully applied for a stay of the Second Receivership Order pending appeal (the "**Appeal**"). ATB opposed Amalco's stay Application.⁶

8. On January 8, 2016, BJ advised Amalco that it had 30 days from January 6, 2016 to appeal the Second Receivership Order (the "**BJ Advice**"). Amalco immediately began pursuing alternate counsel to represent it in the Appeal. On January 29, 2016, Amalco retained MacPherson Leslie & Tyerman LLP ("**MLT**"). Further on January 29, 2016, MLT advised Amalco that the time to file the Appeal was 10 days⁷ and not 30 days (the "**MLT Advice**"). On February 3, 2016, shortly after receiving the MLT Advice, Amalco filed the Appeal.⁸

III. Argument

9. In deciding to extend the time to file the Appeal, the following matters may be considered: (1) Amalco's *bona fide* intention to appeal while its right to appeal existed and the circumstances that justify its delay; (2) the explanation for the delay and that ATB has suffered no prejudice; (3) that Amalco has taken no benefit of the Second Receivership Order; and (4)

⁵ Gramatzki Aff. at paras. 2, 5, and 7.

⁶ Gramatzki Aff. at paras. 12, 16, and 19.

⁷ *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "**BIA**"), s 183(2) [Appellant's Book of Authorities ("**BOA**"), Tab 1]; *Bankruptcy and Insolvency General Rules*, Can. Reg. 368, Rule 31(1) [BOA, Tab 2].

⁸ Gramatzki Aff. at paras. 22, 25-28, and 30.

the Appeal has a reasonable chance of success (collectively, the "**Cairns Test**").⁹ The Cairns Test is not necessarily determinative and this Honourable Court retains "free and unfettered discretion to do what justice requires between the parties having regard to the circumstances of each particular case".¹⁰

1. Amalco at all times had a Bona Fide Intention to Appeal and any Delay is Justified

10. At all material times, Amalco had a *bona fide* intention to appeal and communicated that intention to the Court and to ATB's counsel.¹¹ Had Amalco not received the BJ Advice, or had Amalco received the MLT Advice earlier, Amalco would have filed its Notice of Appeal within the applicable 10-day appeal period.¹²

11. Amalco was delayed in filing its appeal on the basis of the incorrect BJ Advice. The effects of incorrect advice from counsel should not be visited upon appellants.¹³ This Honourable Court recently held that "[t]here are numerous cases in which an error by counsel or a misunderstanding of the procedural requirements did not preclude a late appeal".¹⁴

12. Once Amalco became aware of the error in the BJ Advice, it advanced its appeal of the Second Receivership Order as quickly as possible, including by filing its Notice of Appeal on February 3, 2016.¹⁵ The delay in Amalco commencing the Appeal was short.

2. No Prejudice to ATB

13. ATB will suffer no prejudice through the granting of an extension of the time to appeal. Since the granting of the Second Receivership Order, ATB has been aware of Amalco's intention to appeal. Amalco's appeal is specific to Amalco and the Second Receivership Order

⁹ *Kubota Canada Ltd. v Case Credit Ltd.*, 2004 ABCA 41 at paras. 9-12 ["*Kubota*"] [BOA, Tab 3]; *HSBC Bank Canada v Silverado Oilfield Ventures Ltd.*, 2015 ABCA 399 at paras. 10-11 ["*HSBC*"] [BOA, Tab 4].

¹⁰ *Kubota* at para. 11 [BOA, Tab 3]; *HSBC* at para. 12 [BOA, Tab 4].

¹¹ Gramatzki Aff. at paras. 17-20.

¹² Gramatzki Aff. at para. 24.

¹³ *Canada v MKM Manufacturing Ltd.*, 2003 BCCA 652 at para. 7 ["*MKM*"] [BOA, Tab 5], cited with approval in *Garritty (Re)*, 2006 ABQB 545 at para. 123 [BOA, Tab 6]; *Re Braich*, 2007 BCCA 641 at para. 15 [BOA, Tab 7].

¹⁴ *Attila Dogan Construction and Installation Co. v AMEC Americas Ltd.*, 2015 ABCA 257 at paras. 7-8 [BOA, Tab 8].

¹⁵ Gramatzki Aff. at para. 31.

and does not impact ATB's receivership proceedings as they relate to the various other entities under the First Receivership Order, which proceedings are ongoing.¹⁶

3. Amalco has received No Benefit from the Second Receivership Order

14. Clearly, Amalco has received no benefit from the Second Receivership Order.

4. Amalco's Appeal has a Reasonable Chance of Success¹⁷

15. The final consideration of the Cairns Test requires "a limited consideration of the merits of the Appeal".¹⁸ The Appeal must be "reasonably arguable"¹⁹ and "not hopeless".²⁰

16. The Appeal involves the interpretation of the Old Guarantees.²¹ This Honourable Court has held that where a proposed ground of appeal requires a detailed analysis of the wording of a guarantee to resolve competing interpretations, there is potential merit to the appeal.²²

17. In this case, there is dispute as to whether the wording extending the Old Guarantees to "the person...from time to time carrying on the business now carried on by the Customer" can bind Amalco, notwithstanding: (i) there is no ongoing connection between the "Customer" (the Old LPs) and the "business"; (ii) the obligations of the "Customer" to the lender (ATB) having been paid out and cancelled; (iii) the "Customer" having been dissolved; (iv) the lender entering into significantly increased credit facility (the New Credit Facilities) with a new entity carrying on some form of the "business", the lender obtaining new replacement security for that new credit facility from the entities which are parties to that new credit facility; and (v) all of the foregoing occurring with the knowledge and consent of ATB as lender.

18. The Chambers Judge held that the Old Guarantees were sufficiently linked to the "business", that the Old GPs' business carried on, such that the Old Guarantees could be relied upon in relation to the indebtedness that arose under the New Credit Facility. Amalco submits

¹⁶ See, for example, *Alberta (Treasury Branches) v COGI LP*, 2016 ABQB 43 [BOA, Tab 9].

¹⁷ The basis for Amalco's appeal is further addressed in its Leave Memorandum, filed concurrently.

¹⁸ *Muhtady v Sarhan*, 2013 ABCA 197 at para. 6 ["*Muhtady*"] [BOA, Tab 10].

¹⁹ *Muhtady* at para. 6 [BOA, Tab 10.].

²⁰ *Kerr v Robert Mathew Investments Inc.*, 2008 ABCA 193 at para. 5 [BOA, Tab 11].

²¹ In particular, paragraph 8 of the Old Guarantees [the "**Contested Paragraph**"], which is attached hereto as **Schedule "C"**.

²² *Koska v Alberta (Treasury Branches)*, 2002 ABCA 138 at paras. 30-31 [BOA, Tab 12].

that the Chambers Judge erred in her interpretation of the Contested Paragraph due to a misapprehension of facts and the principles of contractual interpretation.

19. Guarantees are to be strictly interpreted.²³ The interpretation of the Old Guarantees will require a resolution of the ambiguities in the Contested Paragraph, including as to whether the Old Guarantees can apply following a dissolution of the "Customer". These ambiguities can be resolved by considering parol evidence, including the parties' conduct; ensuring that the interpretation of the text does not result in a commercially unreasonable or absurd result;²⁴ and though application of the principle of *contra proferentem*.²⁵

20. The principles of contractual interpretation support Amalco's submission that the Old Guarantees are not of the broad and ongoing scope found by the Chambers Judge such that they continue to be binding, nor did the parties intend the Old Guarantees to have that scope. Rather, absent a clear and specific acknowledgement and confirmation that the Old Guarantees continued to be binding, the Old Guarantees were cancelled when the Old LP's Credit Facilities were repaid in their entirety and cancelled, and the Old LPs dissolved.

21. Amalco's position respecting the Old Guarantees accords with the principle that a guarantor is released from liability following a material alteration in the terms of the guarantee.²⁶

22. Finally, the circumstances of this case (especially in light of the incorrect BJ advice received by Amalco) support the grant of an extension in the interests of justice.

IV. Conclusion

23. Amalco respectfully submits that it is a just and appropriate use of this Honourable Court's discretion to grant Amalco's Application for an extension of time for filing the Appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 24th DAY OF FEBRUARY 2016.

²³ *Manulife Bank of Canada v Conlin*, [1996] 3 SCR 415 ["*Manulife*"] at paras. 10 and 15 [BOA, Tab 13].

²⁴ *Toronto (City) v W.H. Hotel Ltd.*, [1966] SCR 434 [BOA, Tab 14]; *Consolidated Bathurst Export Ltd. v Mutual Boiler and Machinery Insurance Co.*, [1980] 1 SCR 888 at para. 26 [BOA, Tab 15].

²⁵ *Manulife* at para. 8 [BOA, Tab 13].

²⁶ *Canada Permanent Trust Co. v King Art Dev. Ltd.*, [1984] 4 WWR 587 (Alta C.A.) at paras. 46 and 49 [BOA, Tab 16]; *Manulife* at para. 3 [BOA, Tab 13].

LIST OF SCHEDULES

- A. Chronology
- B. Schematic of Partnerships and Corporate Relationships
- C. Paragraph 8 of the Old Guarantees.

TAB DESCRIPTION

AUTHORITIES

Legislation

1. *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3
2. *Bankruptcy and Insolvency General Rules*, Can. Reg. 368

Caselaw

3. *Kubota Canada Ltd. v. Case Credit Ltd.*, 2004 ABCA 41, [2005] AJ No 230 (QL)
4. *HSBC Bank Canada v. Silverado Oilfield Ventures Ltd.*, 2015 ABCA 399, [2015] AJ No 1406 (QL)
5. *Canada v. MKM Manufacturing Ltd.*, 2003 BCCA 652, [2003] BCJ No 2672 (QL)
6. *Garritty (Re)*, 2006 ABQB 545, [2006] AJ No 890 (QL)
7. *Braich (Re)*, 2007 BCCA 641, [2007] BCJ No 2847 (QL)
8. *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 257, [2015] AJ No 895 (QL)
9. *Alberta (Treasury Branches) v. COGI Limited Partnership*, 2016 ABQB 43, 2015 AJ No 53
10. *Muhtady v Sarhan*, 2013 ABCA 197
11. *Kerr v Robert Mathew Investments Inc.*, 2008 ABCA 193
12. *Koska v. Alberta (Treasury Branches)*, 2002 ABCA 138, [2002] AJ No 760 (QL)
13. *Manulife Bank of Canada v. Conlin*, [1996] 3 SCR 415, [1996] SCJ No 101 (QL)
14. *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, [1980] 1 SCR 888, [1979] SCJ No 133
15. *Canada Permanent Trust Co. v. King Art Dev. Ltd.*, [1984] 4 WWR 587 (Alta CA), [1984] AJ No 2591 (QL)

TAB A

SCHEDULE "A" – Chronology

Defined Terms

Defined Terms	
Amalco	Amalgamation successor of COC1, COC6, COC7 and Conserve Oil 2 nd Corporation
COC1	Conserve Oil 1 st Corporation
COC6	Conserve Oil 6 th Corporation
COC7	Conserve Oil 7 th Corporation
COGI GP	Canadian Oil and Gas International Inc.
COGI LP	COGI Limited Partnership
Conserve LP	Conserve Oil POC First Limited Partnership
COPII LP	Conserve Oil POC Second Limited Partnership
LP1	Conserve Oil POC Growth Limited Partnership
LP6	Conserve Oil POC Growth II Limited Partnership
LP7	Conserve Oil Natural Gas I Limited Partnership
Old GPs	COC1, COC6 and COC7 collectively
Old LPs	LP1, LP6 and LP7 collectively

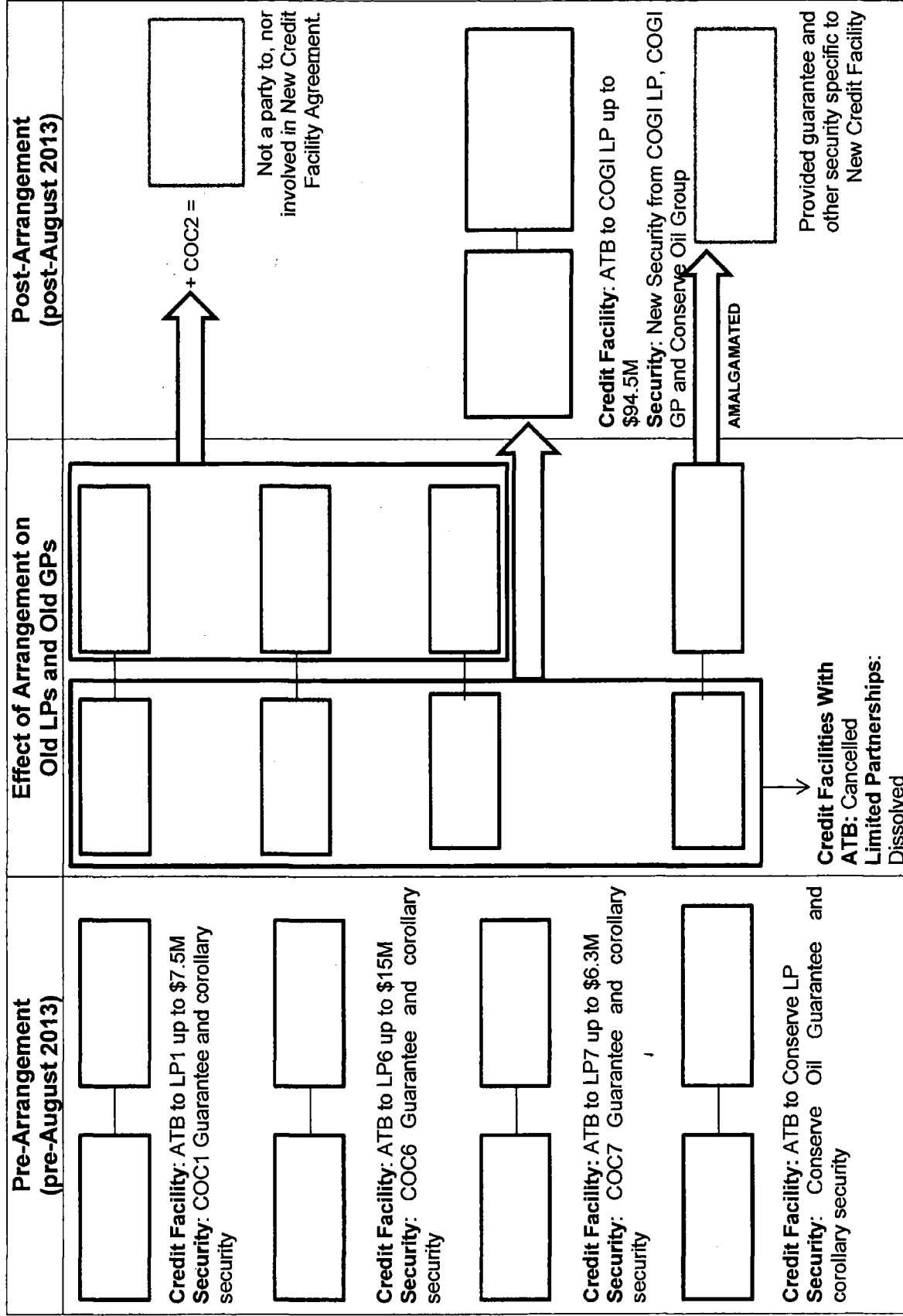
DATE	CHRONOLOGY (Capitalized terms not defined herein are set out in the list of defined terms)
Relationship between the Old LPs, Old GPs and ATB	
LP1, COC1, and ATB	
1. December 1, 2011	ATB provides credit facility to LP1 of up to \$9.5 million (the "LP1 Credit Facility") [Aff. of D. Crombie, sworn February 16, 2016 (the "Crombie Aff."), at para 10].
2. January 27, 2012	LP1's general partner, COC1, provides guarantee (the "COC1 Guarantee") [Crombie Aff., para 12, Ex B].
3. February 7, 2013	LP1 Credit Facility amended and reduced to \$7.5 million from \$9.5 million. COC1 executes acknowledgement consenting to amendment to acknowledge, agree and confirm that the COC1 Guarantee would remain binding and continue in full force and effect [Crombie Aff., paras 14-17, Ex C].
LP6, COC6, and ATB	
4. May 30, 2012	ATB provides revolving operating credit facility to LP6 of up to \$15 million (the "LP6 Credit Facility") [Crombie Aff., para 18, Ex D].
5. June 21, 2012	LP6's general partner, COC6, provides guarantee (the "COC6 Guarantee") [Crombie Aff., para 20, Ex E].
LP7, COC7, and ATB	
6. September 13, 2012	ATB provides credit facility to LP7 up to \$6.3 Million [Crombie Aff., para 22, Ex F].
7. September 21, 2012	LP7's general partner, COC7, provides guarantee (the "COC7 Guarantee") [Crombie Aff., para 24, Ex G].

Conserve LP, Conserve Oil, and ATB	
8. September 14, 2010	ATB provides credit facility to Conserve LP as amended December 1, 2010 and August 30, 2013 (the "Conserve LP Credit Facility"). The Conserve LP Credit Facility is secured by a continuing guarantee provided by Conserve LP's general partner, Conserve Oil Corporation ("Conserve Oil") [Crombie Aff., para 29].
The July 2013 Arrangement and ATB	
9. July 21, 2013	The Old LPs, Old GPs, Conserve LP, Conserve Oil and 10 other entities enter into arrangement agreement, as amended August 23, 2013, which, among other things, creates a new single limited partnership, COGI LP [Crombie Aff., paras 30, 32, Ex H].
10. August 30, 2013	ATB provides new credit facility to COGI LP for maximum principal amount of \$94.5 million (the "New Credit Facility") pursuant to a credit agreement (the "New Credit Facility Agreement") [Crombie Aff., para 34, Ex J].
	COGI LP's general partner, COGI GP, provides a guarantee [Crombie Aff., para 34(e), Ex Q].
	COGI LP enters confirmation and assumption agreement to confirm its assumption of all obligations, liabilities, and indebtedness (present or future, absolute or contingent, matured or otherwise) of the Old LPs [Crombie Aff., paras 41-43, Ex R].
	ATB confirms that the credit facilities of Old LPs have been repaid in their entirety and any unused portions of those credit facilities cancelled [Crombie Aff., para 44, 47, Ex S, T, U].
11. December 20, 2013	Amalco is created [Crombie Aff., para 3, Ex A].
12. November 1, 2014	The New Credit Facility Agreement is amended to require a guarantee from Conserve Oil Group Inc., the successor by amalgamation of Conserve Oil. A new guarantee is obtained from Conserve Oil Group Inc. and confirmations are obtained from COGI LP and COGI GP that the amendments to the New Credit Facility Agreement do not affect their obligations under the security provided in relation to

	the New Credit Facility [Crombie Aff., paras 50-54, Ex W, X, Y].
The Receivership Proceedings	
13. June 11, 2015	ATB sends demand for payment to COGI LP, COGI GP and Conserve Oil Group Inc. [Crombie Aff., para 59, 60, Ex Z].
14. October 26, 2015	ATB is granted the First Receivership Order relating to COGI LP, COGI GP and Conserve Oil Group Inc. [Crombie Aff., para 61, Ex AA].
15. November 16, 2015	ATB sends demand for payment to Amalco [Crombie Aff., para 62, Ex BB].
16. November 23, 2015	ATB applies to extend First Receivership Order to Amalco [Crombie Aff., para 63].
17. November 27, 2015	ATB is granted order that limits steps Amalco can take in relation to its assets and liabilities [Crombie Aff., para 64, Ex CC].
18. January 6, 2016	ATB is granted the Second Receivership Order extending the receivership to Amalco [Crombie Aff., para 65, Ex DD (Order), Ex EE (Reasons for Judgment)].

TAB B

Schedule "B" – Schematic of Entity Relationships



TAB C

SCHEDULE "C" – PARAGRAPH 8 OF THE OLD GUARANTEES

Paragraph 8 of the Old Guarantees

No change in the name, objects, share capital, business, membership, directors' powers, organization or management of the [Old LPs] shall in any way effect the obligations of the [Old GPs] with respect to the transactions occurring before or after the any such change, it being understood that where the [Old LPs] is a partnership or corporation, the guarantee is to extend to the person or persons or corporation for the time being and from time to time carrying on the business of the [Old LPs], notwithstanding any change or changes in the name or membership of the [Old LPs] firm or in the name of a corporate Customer, and notwithstanding any reorganization of a corporate Customer, or [a corporate Customer's] amalgamation with another or others or the sale or disposal of [a corporate Customer's] business in whole or in part to another or others.