COURT FILE NO.		Clerk's Stamp
COURT	COURT OF QUEEN'S BENCH OF ALBERTA	
JUDICIAL CENTRE	CALGARY	
APPLICANT	**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 CONNACHER OIL AND GAS LIMITED**	
DOCUMENT	**BENCH BRIEF OF THE APPLICANT**	
HEARING	**TUESDAY, MAY 17, 2016**	
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**Cassels Brock & Blackwell LLP** 1000 Bankers Hall West 888 3rd Street SW Calgary, Alberta T2P 5C5 Attn: Shayne Kukulowicz/Ryan Jacobs/Jeffrey Oliver Tel: 403-351-2920 Fax: 403-648-1151 skukulowicz@casselsbrock.com rjacobs@casselsbrock.com joliver@casselsbrock.com	

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I INTRODUCTION

1. This Bench Brief is submitted on behalf of Connacher Oil and Gas Limited ("**Connacher**", the "**Company**" or the "**Applicant**") in support of an application for a stay of proceedings and such other relief as is more particularly set out in the draft Initial Order attached at Schedule "A" to the Applicant's Originating Application, pursuant to the *Companies' Creditors Arrangement Act,* R.S.C. 1985, c. C-36 (the "***CCAA***").

2. The application for an Initial Order will be supported by, among other things, an Affidavit to be sworn by Merle Johnson, the Chief Executive Officer and a director of the Applicant (the "**Johnson Affidavit**"). Capitalized terms not defined herein have the meanings given to them in the Johnson Affidavit.

3. The purpose of this Bench Brief is to outline for the Court certain legislation and jurisprudence that is relevant to the relief being sought in the Company's application on May 16, 2016.

4. The Company's application and supporting materials have been served on (i) counsel for the First Lien Agent, (ii) the Collateral Trustee, and (iii) counsel to certain holders of the Convertible Notes.

II SUMMARY OF FACTS

5. The facts are as set out in the Johnson Affidavit and are briefly summarized here.

A. The Applicant

6. Connacher is a publicly traded, in situ oil sands developer, producer, and marketer of bitumen. In 2015, the Company was continued from the ABCA to the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44, ("**CBCA**") on March 30, 2015 and, as part of a recapitalization under the CBCA, was amalgamated with a numbered company.

Johnson Affidavit, at paras 5, 16

7. The Company's principal office and registered office are both located in Calgary, Alberta.

Johnson Affidavit, at para 4

8. The Company holds a 100 per cent interest in approximately 435 million barrels of proved and probable bitumen reserves and operates two steam-assisted gravity drainage facilities located on the Company's Great Divide oil sands leases near Fort McMurray, Alberta.

Johnson Affidavit, at para 5

9. In Connacher's existing SAGD projects, steam is generated on-site using locally available non-potable subsurface water heated by natural gas-fired boilers. After the produced bitumen and water is recovered to the surface, it is piped to a central plant where water and contaminants are removed from the produced emulsion and the produced bitumen is blended with a diluent, creating "dilbit" for delivery to market by truck, rail or pipeline.

Johnson Affidavit, at para 20

10. The Company has 29 employees and 4 independent contractors at its headquarters in Calgary. It also has 80 employees and 11 independent contractors at site. All of its employees are non-unionized.

Johnson Affidavit, at para 32

B. Cause of Financial Difficulties

11. Like many bitumen and heavy oil producers, Connacher's cash flow and liquidity are highly sensitive to fluctuations in the market prices for oil and natural gas. The decrease in the benchmark price of West Texas Intermediate crude oil ("**WTI**") resulted in a significant decrease in the sales price of the Company's dilbit over the course of 2015. The Company's revenue, net of royalties, decreased 49% to $224.3 million in 2015 from $437.5 million in 2014, substantially due to the decline in crude oil prices.

Johnson Affidavit, at para 6

12. As a result of the market prices for oil and gas and Connacher's significant debt obligations, the Company undertook a Recapitalization in May 2015 in order to reduce its debt burden by approximately $1 billion.

Johnson Affidavit, at para 7

13. Notwithstanding the industry expectations, following the Recapitalization, crude oil pricing continued to decline through the third and fourth quarters of 2015 and into 2016. Connacher currently has limited financial resources, primarily due to low crude oil prices through 2015 and early 2016 and the current outlook for crude oil pricing.

Johnson Affidavit, at para 8

14. The Company has long term debt with a face value in excess of $245 million. The Company's total liabilities, including both long term debt and trade accounts, are in excess of $277 million.

Johnson Affidavit, at para 10

15. The Company has limited access to new financing due to the restrictive provisions of the Company's long-term debt arrangements that were added in the Recapitalization. Over the past year the Company has significantly reduced costs but has limited capacity to further reduce costs.

Johnson Affidavit, at para 9

16. Connacher believes that it will maximize value to its stakeholders by continuing production at levels justified by the Company's cost structure and the current oil and natural gas price environment. Such continued operation will require additional capital in the immediate term.

Johnson Affidavit, at para 12

17. The Company does not expect to have sufficient financial resources to fund its financial commitments unless it is able to identify and implement a strategic alternative.

18. In connection with the Recapitalization, the Company entered into an Amended Term Loan Agreement with an aggregate principal amount of US$153.2 million, comprised of the original term loan facility principal amount of US$128.4 million and an increased total commitment of US$24.8 million (the "**Amended Term Loan Agreement**").

Johnson Affidavit, at para 64

19. The Company also issued US$35 million face value of notes (the "**Convertible Notes**") to certain participating holders of Notes. Pursuant to the notes, interest payments are due quarterly in arrears.

Johnson Affidavit, at para 68

20. The Company has exercised its rights to defer interest payments under its Convertible Notes and did not make a principal and interest payment with respect to the Amended Term Loan Agreement which was due on March 31, 2016. On that same day, the Company entered into a forbearance agreement (the "**Forbearance**") with Credit Suisse AG, Cayman Islands Branch as administrative agent ("**Credit Suisse**") and certain of the First Lien Lenders. Prior to the expiration of the Forbearance on April 30, 2016, the Company entered into a second forbearance agreement (the "**Second Forbearance**") with Wilmington Trust, National Association, successor in interest to Credit Suisse (the "**First Lien Agent**") and certain of the First Lien Lenders, which expires on May 16, 2016.

Johnson Affidavit, at para 11

21. The Company does not have sufficient cash to service its funded debt, while continuing to operate the business. As demonstrated in the Company's cash flows, absent *CCAA* protection and the proposed interim financing (discussed below), the Company will run out of cash in early June. As such, the Company is insolvent for the purposes of this application.

C. A Stay of Proceedings Is Necessary to Preserve Value for Stakeholders

22. Connacher has engaged in discussions with its stakeholders over the past few months and has determined that a stay of proceedings, coupled with undertaking a SISP and parallel discussions with its creditors on a potential plan of arrangement through these proceedings is in the best interests of all stakeholders.

Johnson Affidavit, at para 13

23. To facilitate the SISP and ongoing restructuring discussions, the Company has engaged in good faith negotiations with the First Lien Lenders and reached an agreement on terms of post-filing financing. The proposed Interim Financing is crucial to facilitate these

proceedings and Company requires approval of the Interim Financing on an urgent basis. Consistent with the Cash Flow Projections the Company will need to draw on the Interim Financing shortly following its *CCAA* filing.

Johnson Affidavit, at para 14

24. The Company has not cured the default under the Amended Term Loan Agreement resulting from the failure to make the March 31, 2016 principal and interest payment and, absent relief from this Court, the First Lien Agent will be entitled to direct the Collateral Trustee to take enforcement steps.

25. The immediate objective of the proceeding is to identify a stakeholder driven solution to the Company's liquidity challenges while maintaining production in a manner that preserves long term value.

26. At the same time, the Company believes it prudent and necessary to concurrently develop plans for the safe, orderly shut-down of operations in the event there is not a timely resolution of the ongoing care of its assets through a *CCAA* plan, a sale and investment solicitation process, or otherwise. Such steps would be intended to preserve the property, maximize employee safety and minimize negative effects on the property.

Johnson Affidavit, at para 102

III ISSUES

27. The issues on this application are:

(a) Whether the Company is a "company" to which the *CCAA* applies; and

(b) Whether this Court should grant the Initial Order in the form proposed.

IV LAW AND ARGUMENT

28. The Applicant submits that the Company is one to which the *CCAA* applies and that this Court should exercise its discretion to grant the Initial Order in the form proposed.

A. Application of the *CCAA*

29. The *CCAA* applies in respect of a "debtor company" or "affiliated debtor companies" where the total of claims against the debtor or its affiliates exceeds five million dollars.

CCAA, s. 3(1) **[TAB 1]**

30. The terms "company" and "debtor company" are defined in Section 2 of the *CCAA* as follows:

> "company" means any company, corporation or legal person incorporated by or under an Act of Parliament or of the legislature of a province, any incorporated company having assets or doing business in Canada, wherever incorporated, and any income trust, but does not include banks, authorized foreign banks within the meaning of section 2 of the *Bank Act*, railway or telegraph companies, insurance companies and companies to which the *Trust and Loan Companies Act* applies;
>
> "debtor company" means any company that
>
> (a) is bankrupt or insolvent,
>
> (b) has committed an act of bankruptcy within the meaning of the *Bankruptcy and Insolvency Act* or is deemed insolvent within the meaning of the *Winding-up and Restructuring Act,* whether or not proceedings in respect of the company have been taken under either of those Acts,
>
> (c) has made an authorized assignment or against which a bankruptcy order has been made under the *Bankruptcy and Insolvency Act,* or
>
> (d) is in the course of being wound up under the *Winding-up and Restructuring Act* because the company is insolvent;

CCAA, s. 2 **[TAB 1]**

31. Insolvency is not defined in the *CCAA*. The courts have interpreted this term by reference to the three tests of insolvency set out in Section 2(1) of the *Bankruptcy and Insolvency Act,* RSC, 1985, c B-3. An entity is an insolvent "debtor company" under the *CCAA* if any one of the following conditions exist:

(a) the entity is for any reason unable to meet its obligations as they generally become due;

(b) the entity has ceased paying its current obligations in the ordinary course of business as they generally become due; or

(c) the aggregate of the entity's property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all its obligations, due and accruing due.

Re Stelco Inc., [2004] OJ No 1257, at paras 21-22, 28 (Sup Ct); leave to appeal to CA refused, [2004] OJ No 1903; leave to appeal to SCC refused, [2004] SCCA No 336 [*Re Stelco*] **[TAB 2]**

32. Consistent with the remedial purposes of the *CCAA*, the first condition of the test laid out above has been interpreted such that a financially troubled entity will be considered insolvent for the purposes of the *CCAA* if it is "reasonably expected to run out of liquidity within a reasonable proximity of time as compared with the time reasonably required to implement a restructuring."

Re Stelco, at para 26 **[TAB 2]**

33. The Applicant is a "company" as defined in the *CCAA*: (i) the Company is a corporation continued under the *CBCA* and (ii) it does not fall within any of the excluded categories listed in Section 2 of the *CCAA*.

34. The Applicant has debts in excess of five million dollars.

35. The Applicant is insolvent and in need of protection under the *CCAA* to implement a restructuring.

B. Stay of Proceedings

36. The overarching goal of an initial order is to maintain the status quo during the *CCAA* proceeding. The Court should exercise its power broadly under the *CCAA* and at common law in order to maintain the status quo. It is well-established that under section 11 of the *CCAA* the court has broad jurisdiction to grant a stay of proceedings:

> The legislation is intended to have wide scope and allows a judge to make orders which will effectively maintain the status quo for a period while the insolvent company attempts to gain the approval of its creditors for a proposed arrangement which will enable the company to remain in operation for what is, hopefully, the future benefit of both the company and its creditors.

Meridian Developments v Toronto Dominion Bank, 1984 CarswellAlta 259 (QB), at paras 21-23 **[TAB 3]**

CCAA, s. 11 **[TAB 1]**

37. The *CCAA* is remedial legislation, and is intended to facilitate compromises and arrangements. The Court should give the statute a broad and liberal interpretation so as to encourage and facilitate new and creative ways to successfully restructure whenever possible.

Chef Ready Foods Ltd. v Hongkong Bank of Canada, [1990] BCJ No 2384 (CA), at para 10 **[TAB 4]**

Re Lehndorff, [1993] OJ No. 14 (Gen Div), at para 5 [*Re Lehndorff*] **[TAB 5]**

38. A plan of compromise or arrangement is not required of the debtor company at the initial order application. Relief should be granted to a debtor company under the *CCAA* where the debtor plans to continue operating as a viable commercial entity but requires Court protection to do so, and where it is otherwise too early for the Court to determine whether the debtor company will succeed.

Re Lehndorff, at para 6 **[TAB 5]**

39. The stay of proceedings being sought, which is substantially in conformance with the Alberta Model Template *CCAA* Initial Order, is appropriate and necessary in the circumstances to allow the Applicant the necessary breathing room to effect a value maximizing sale and/or restructuring for the benefit of their creditors.

40. The First Lien Agent and majority of the First Lien Lenders – the Applicant's first priority and most significant secured creditors – support the Applicant in this CCAA proceeding. A significant group of the First Lien Lenders are providing interim financing to allow the Applicant sufficient time to run the SISP under the oversight of the proposed Monitor.

41. Having regard to the interests of all of the Applicant's stakeholders, a stay of proceedings is necessary and appropriate in order to undertake the SISP and to determine the appropriate path forward to maximize value for stakeholders.

C. Administration Charge

42. Section 11.52 of the *CCAA* expressly provides the Court with the jurisdiction to grant the Administration Charge, relating to the professional fees and disbursements of counsel to the Applicant, the Monitor, and counsel to the Monitor:

> 11.52(1) *Court may order security or charge to cover certain costs*
>
> On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a debtor company is subject to a security or charge -- in an amount that the court considers appropriate — in respect of the fees and expenses of
>
> (a) the monitor, including the fees and expenses of any financial, legal or other experts engaged by the monitor in the performance of the monitor's duties;
>
> (b) any financial, legal or other experts engaged by the company for the purpose of proceedings under this Act; and
>
> (c) any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for their effective participation in proceedings under this Act.
>
> 11.52(2) *Priority*
>
> The court may order that the security or charge rank in priority over the claim of any secured creditor of the company.
>
> *CCAA*, ss. 11.52(1) and (2) **[TAB 1]**

43. In *Canwest Publishing*, the Court noted that Section 11.52 of the *CCAA* does not contain any specific criteria for a court to consider in granting an administration charge and provided a list of non-exhaustive factors to consider in making such an assessment. The list of factors to consider in approving an administration charge include:

> (a) the size and complexity of the business being restructured;
>
> (b) the proposed role of the beneficiaries of the charge;
>
> (c) whether there is unwarranted duplication of roles;
>
> (d) whether the quantum of the proposed charge appears to be fair and reasonable;
>
> (e) the position of the secured creditors likely to be affected by the charge; and
>
> (f) the position of the Monitor.

Re Canwest Publishing Inc., 2010 ONSC 222, at para 54 [*Re Canwest*] **[TAB 6]**

44. The Applicant submits that the priority and quantum of the Administration Charge is justified and appropriate in the circumstances. In particular:

(a) the restructuring of the Applicant to be undertaken is sufficiently large and complex to warrant the charge in the amount sought;

(b) the professionals that are to be the beneficiaries of the Administration Charge have contributed and will continue to contribute to the restructuring of the Applicant;

(c) there is no unwarranted duplication of the roles so as to minimize the professional fees associated with these proceedings;

(d) the secured creditors affected by the charge has been provided with notice of these *CCAA* proceedings and the First Lien Agent, on behalf of the First Lien Lenders, is consenting to the Administration Charge; and

(e) the proposed Monitor supports the proposed Administration Charge, including the quantum thereof.

D. Interim Financing & Interim Lenders' Charge

45. Section 11.2 of the *CCAA* provides statutory jurisdiction to grant an interim financing charge:

> 11.2(1) *Interim financing* - On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, a court may make an order declaring that all or part of the company's property is subject to a security or charge — in an amount that the court considers appropriate — in favour of a person specified in the order who agrees to lend to the company an amount approved by the court as being required by the company, having regard to its cash-flow statement. The security or charge may not secure an obligation that exists before the order is made.
>
> 11.2(2) *Priority* – secured creditors – The court may order that the security or charge rank in priority over the claim of any secured creditor of the comp any.

CCAA, s. 11.2 **[TAB 1]**

46. Subparagraph 11.2(4) of the *CCAA* sets out the factors to be considered by the Court in determining whether to grant an interim financing charge:

> 11.2(4) *Factors to be considered* – In deciding whether to make an order, the court is to consider, among other things,
>
> (a) the period during which the company is expected to be subject to proceedings under this Act;
>
> (b) how the company's business and financial affairs are to be managed during the proceedings;
>
> (c) whether the company's management has the confidence of its major creditors;
>
> (d) whether the loan would enhance the prospects of a viable compromise or arrangement being made in respect of the company;
>
> (e) the nature and value of the company's property;
>
> (f) whether any creditor would be materially prejudiced as a result of the security or charge; and
>
> (g) the monitor's report referred to in paragraph 23(1)(b), if any.
>
> *CCAA,* s. 11.2(4) **[TAB 1]**

47. Courts in this jurisdiction have approved interim facilities to facilitate CCAA sales processes.

> *Re Argent Energy Trust et al.*, Amended and Restated Initial Order granted February 17, 2016 as amended and restated March 9, 2016, Court File No 1601-01675 (ABQB), at paras 32-37 [*Re Argent Energy Trust*] **[TAB 7]**

48. The relief sought by the Applicant with respect to the Interim Financing and Interim Lenders' Charge is appropriate in the circumstances and will ensure that the Applicant will have sufficient cashflow to continue operations while under *CCAA* protection. Without the proposed interim financing, the Applicant would very quickly run out of liquidity and could be forced to cease operations, which would have a material adverse effect on the Applicant's stakeholders. In addition:

    (a) the Applicant does not anticipate a lengthy *CCAA* process. The predominant purpose of this *CCAA* proceeding is to give the Applicant sufficient time to complete the SISP or identify an alternate stakeholder driven solution;

(b) the Applicant's business is intended to continue to operate on a going concern basis during the *CCAA* proceedings under the direction of existing management with the assistance of the Applicant's advisors and the Monitor;

(c) the Applicant's management has the confidence of its senior creditors, including the First Lien Agent;

(d) the proposed Interim Financing does not just enhance the prospects for a viable compromise or arrangement; it is absolutely essential for one. The proposed Interim Financing is needed to allow the Applicant to continue production and maintain value and maximize the Company's options during the SISP;

(e) the Interim Lenders will not provide the proposed Interim Financing if the Interim Lenders' Charge is not approved; and

(f) the proposed Monitor has stated that the terms of the proposed Interim Financing and the Interim Lenders' Charge are, in its opinion, fair and reasonable.

E. Directors' Charge

49. Courts have recognized that director resignations during a restructuring can be destabilizing and detract from the restructuring process.

> *Re Canwest Global Communications Corp.*, [2009] OJ No 4286 (SCJ), at para 48 [*Canwest Global*] **[TAB 8]**

50. To address this concern, Section 11.51 of the *CCAA* affords the Court the jurisdiction to grant a charge relating to directors' and officers' indemnification on a priority basis:

> 11.51(1) *Security or charge relating to director's indemnification*
>
> On application by a debtor company and on notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of the company is subject to a security or charge -- in an amount that the court considers appropriate -- in favour of any director or officer of the company to indemnify the director or officer against obligations and liabilities that they may incur as a director or officer of the company after the commencement of proceedings under this Act.

> 11.51(2) *Priority*
>
> The court may order that the security or charge rank in priority over the claim of any secured creditors of the company.
>
> 11.51(3) *Restriction -- indemnification insurance*
>
> The court may not make the order if in its opinion the company could obtain adequate indemnification insurance for the director or officer at a reasonable cost.
>
> 11.51(4) *Negligence, misconduct or fault*
>
> The court shall make an order declaring that the security or charge does not apply in respect of a specific obligation or liability incurred by a director or officer if in its opinion the obligation or liability was incurred as a result of the director's or officer's gross negligence or wilful misconduct or, in Quebec, the director's or officer's gross or intentional fault.
>
> *CCAA*, s. 11.51 **[TAB 1]**

51. The test for granting a directors' charge was described in *Canwest Global* as follows:

> I have already addressed the issue of notice to affected secured creditors. I must also be satisfied with the amount and that the charge is for obligations and liabilities the directors and officers may incur after the commencement of proceedings. It is not to extend to coverage of wilful misconduct or gross negligence and no order should be granted if adequate insurance at a reasonable cost could be obtained.
>
> *Canwest Global,* at para 46 **[TAB 8]**

52. The Court should also consider whether the proposed Monitor has reviewed the quantum of the charge and whether the proposed Monitor considers the amount to be reasonable in relation to the potential quantum of liability.

> *iMarketing Solutions Group (Re)*, 2013 ONSC 2223, at para 20 **[TAB 9]**

53. The Alberta Model Template *CCAA* Initial Order contemplates a directors' charge that does not duplicate coverage already in place pursuant to directors and officers insurance. That formulation has not been changed in the Initial Order being sought by the Applicant. It is submitted that the Directors' Charge being proposed is reasonable and appropriate.

54. The Directors' Charge is appropriate and necessary for the following reasons:

    (a) the beneficiaries of the Directors' Charge may be subject to potential liabilities in connection with these *CCAA* proceedings and have expressed their desire for certainty with respect to potential liability if they continue in their current capacities;

(b) the Applicant's D&O Insurance Policy contains several exclusions and limitations, and there is potential for there to be insufficient insurance coverage in respect of potential liabilities;

(c) the Directors' Charge would only cover obligations and liabilities that the directors and officers may incur after the commencement of these proceedings, and is not intended to apply to wilful misconduct or gross negligence;

(d) the beneficiaries of the Directors' Charge have been actively involved in the efforts taken by the Applicant to address their current financial circumstances and difficulties;

(e) in order to continue to carry on business during the *CCAA* proceedings and in order to implement the SISP, the Applicant require the continued active and committed involvement of the directors and officers;

(f) the amount of the Directors' Charge has been calculated considering the potential exposure of the directors in the event of a sudden shut-down of the Applicant, and has been reviewed with the proposed Monitor;

(g) the First Lien Agent is consenting to the proposed Directors' Charge; and

(h) the proposed Monitor supports the proposed Directors' Charge.

F. KERP/LTIP and KERP/LTIP Charge

55. There is no express statutory jurisdiction in the *CCAA* for the Court to approve a key employee retention or incentive plan. However, the Courts have recognized that the approval of such plans is within their statutory jurisdiction under the *CCAA*.

> *Grant Forest Products Inc. (Re)* (2009), 57 CBR (5^{th}) 128, at para 8 (Ont SCJ [Comm List]) [*Grant Forest*] **[TAB 10]**

Re Lone Pine Resources Canada Ltd., et al, Initial Order granted September 25, 2013, Court File No 1301-11352 (ABQB), at paras 40-41 [*Re Lone Pine*] **[TAB 11]**

Re Laricina Energy Ltd., et al, Order granted April 22, 2015, Court File No 1501-03351 (ABQB), at paras 5-9 **[TAB 12]**

Re Argent Energy Trust, at paras 38-39 **[TAB 7]**

56. Key employee retention and incentive plans have been approved in *CCAA* proceedings where the continued participation of key employees is crucial to a successful restructuring.

Nortel Networks Corp. (Re), [2009] OJ No 1044 (Ont SCJ [Comm List]), at para 4 **[TAB 13]**

57. In *Grant Forest,* the Court considered the following factors in approving a key employee incentive plan and related charge:

(a) whether the Monitor supports the key employee retention plan and related charge;

(b) whether the beneficiaries of the key employee retention plan are likely to consider other employment opportunities if the plan is not approved;

(c) the support of the creditors;

(d) whether the beneficiaries of the key employee retention plan are crucial to the successful restructuring of the debtor company;

(e) whether a replacement could be found in a timely manner should the beneficiary elect to terminate his or her employment with the debtor company; and

(f) the business judgment of the board of directors of the debtor company.

Grant Forest, at paras 8-24 **[TAB 10]**

58. In *Grant Forest,* the Court noted the importance of the business judgment of the board of directors of a debtor company in this context:

> ...The business acumen of the board of directors of the [debtor company], including the independent directors, is one that a court should not ignore unless there is good reason on the record to ignore it. This is particularly so in light of the support of the Monitor and [the Chief Restructuring Advisor] for the KERP provisions. Their business judgment cannot be ignored.

Grant Forest, at para 18 **[TAB 10]**

59. The Board has approved, subject to approval of the Court, a key employee retention plan (the "**KERP**") for certain of its key employees. The KERP is designed to incentivize those key employees to remain in their employment during the CCAA proceedings and throughout the implementation of the SISP. Without the retention of the key employees, the Company's ability to successfully maintain its business operations, preserve asset value in the CCAA proceedings and successfully conduct the SISP would be seriously compromised. The key employees would also be critical in the event a shutdown of operations became necessary.

60. In addition to the KERP, the Applicant is seeking authority to pay, and a charge to secure, incentive payments previously granted to employees under the Company's long term cash incentive plan ("**LTIP**"), provided that the beneficiaries agree to amend payment terms which match the payment timing terms under the KERP (the "**Amended LTIP**") and incentivize the employees to remain during the CCAA process, which is crucial to ensure that the Applicant is able to continue operations in the ordinary course while it conducts the SISP (defined below).

61. In this case, the KERP and LTIP and the KERP/LTIP Charge are appropriate and necessary for the following reasons:

    (a) the proposed Monitor supports the KERP and the Amended LTIP and the KERP/LTIP Charge;

    (b) the beneficiaries of the KERP, who are crucial to the SISP, the ongoing operations of the business and, if necessary, a safe shut-in of the wells, are highly skilled individuals who will likely have access to and consider other employment opportunities if the KERP is not approved;

    (c) because of their specialized skills and knowledge, the Applicant cannot readily replace the beneficiaries of the KERP if they choose to terminate their employment;

    (d) the beneficiaries of the KERP are highly skilled individuals who will likely have access to other employment opportunities and it would be very difficult to replace them in the current circumstances, given these individuals' specialized skills and intimate knowledge of the Company's affairs;

(e) the directors of the Applicant exercised their business judgement in developing the KERP; and

(f) the Interim Financing Agent and the First Lien Agent support the KERP and Amended LTIP and the KERP/LTIP Charge.

G. Restricted Cash

62. The Applicant is seeking orders recognizing and preserving certain restricted cash which is provided from in the Applicant's cash flow forecasts (and approved in the interim financing budget) for:

(a) $7.1 million in respect of potential costs associated with any hibernation or shut down of the Applicant's business or operations, including a shut in of its producing wells, and

(b) $1 million in respect of potential employee-related obligations in the event they are not paid notwithstanding the terms of the proposed Initial Order.

63. Under Section 11 of the *CCAA*, the Court may make any order that it considers appropriate in the circumstances.

CCAA, s. 11 **[TAB 1]**

64. In the present circumstances, ensuring that adequate cash is available to satisfy unpaid employee-related obligations and to properly and safely implement any shut down or hibernation of the Applicant's wells is appropriate given the limited financial resources of the Applicant. The consequences of inadequate cash reserves in either of the those scenarios could be disproportionately great for the affected parties.

H. Payments of Certain Pre-Filing Amounts

65. The Applicant is seeking an order authorizing it to pay amounts owing for goods and services supplied prior to the CCAA filing, up to an aggregate amount of $750,000, if in the Applicant's opinion the supplier or vendor that provided such goods and services is critical to the preservation of the Applicant's property or the continuation of the business.

The proposed Initial Order would require the Applicant to obtain the Monitor's consent for any such payments.

66. Because of the location of the Applicant's business and the "just in time" nature of its production, the Applicant may not be able to timely or efficiently replace suppliers who refuse to continue to supply without payment of their pre-filing invoices. Although the Applicant expects that its suppliers will continue to conduct business in good faith and will abide by the terms of the Initial Order, the Applicant seeks this relief in an abundance of caution and to avoid any potential delays related to obtaining further relief from the Court.

67. Courts in this jurisdiction and others have granted similar relief to facilitate the restructuring process.

> *Re Argent Energy Trust*, at para 5 **[TAB 7]**
>
> *Re Cinram International Inc.,* 2012 ONSC 3767, at para 37 and Schedule "C" at para 66 **[TAB 14]**

68. The Applicant submits that in the circumstances, the relief sought is appropriate and necessary to allow the Applicant's business operations to continue uninterrupted after its application for the Initial Order. The Applicant is seeking this authorization to pay certain critical suppliers based on the uniqueness of their supply and the possible serious material consequences of a disruption of supply.

69. The Interim Financing Agent, the First Lien Agent and the proposed Monitor support this request.

I. SISP

70. Pursuant to the SISP, the Applicant, with the assistance and supervision of the Monitor, will seek to identify one or more purchasers of or investors in the Applicant's business or assets through a broad marketing to all potential purchasers.

71. The *CCAA* is to be given a broad and liberal interpretation to achieve its objectives and to facilitate the restructuring of an insolvent debtor. A sale by, or an investment in, a debtor, which preserves its business as a going concern is consistent with these

objectives, and the court has the jurisdiction to authorize such a sale under the *CCAA* in the absence of a plan.

> *Re Sino-Forest,* 2012 ONSC 2063, at para 40 [*Sino-Forest*] **[TAB 15]**
>
> *Re Nortel Networks Corp.,* [2009] OJ No. 3169 (SCJ), at paras 47-48 [*Re Nortel Networks Corp.*] **[TAB 16]**
>
> *Re Argent Energy Trust*, at paras 46-49 **[TAB 7]**

72. The following questions may be considered when determining whether to authorize a sale under the *CCAA* in the absence of a plan:

    (a) Is the sale transaction warranted at this time?

    (b) Will the sale benefit the "whole economic community"?

    (c) Do any of the debtors' creditors have a bone fide reason to object to the sale of the business?

    (d) Is there a better alternative?

> *Re Nortel Networks Corp.*, at para 49 **[TAB 16]**
>
> *Sino-Forest*, at para 40 **[TAB 15]**

73. Like in *Sino-Forest,* in this case the Applicant is not asking for the approval of an actual sale. The Applicant is only seeking approval of a process by which offers will be elicited in the marketplace. Notwithstanding current commodity prices, the process is warranted at the present time given the extreme liquidity constraints facing the Applicant.

74. The terms of the SISP have been developed in cooperation with the proposed Interim Financing Agent, the First Lien Agent and the proposed Monitor, all of whom support the SISP.

75. The Applicant expects to work closely with its stakeholders to identify the appropriate solution for the Company, either through a sale, investment or other plan transaction with its existing stakeholders.

J. Extension of Time for Holding the Annual General Meeting

76. Under the CBCA, this Honourable Court has the jurisdiction to grant an extension of time for calling an annual general meeting.

77. The directors of a corporation may apply to the court for an order extending the time for calling an annual general meeting under Section 133(3) of the CBCA. In *Imax*, the court held that the burden of proof rests on the company to establish legitimate and compelling reasons warranting an extension, and that the Court should consider:

> ...the interests of the company balanced against any meaningful risk of harm to the shareholders arising from the granting of an extension...

> *IMAX Corp., Re*, 2007 CarswellOnt 8860 (Ont SCJ [Comm List]), at paras 21 and 23 [*IMAX*] **[TAB 17]**

78. Courts commonly grant extensions of time for calling an annual general meeting when a company seeks protection under the *CCAA* and is devoting their time to stabilizing their business and implementing a restructuring plan. The time required to prepare for an annual general meeting diverts scarce resources away from these goals, and an extension is justified when preparation could impede the timely and desirable restructuring of the entities seeking protection.

> *Canwest Global*, at para 54 **[TAB 8]**

79. In light of the company's insolvency, shareholders have limited, if any, economic interest in the Company. Requiring a shareholders meeting at this time is not in the best interest of shareholders, but detrimental as it will further deplete the Company's limited resources and distract management from conducting the SISP. Given these priorities and the other avenues for recourse provided through the CCAA, it would be in the best interests of Connacher and its stakeholders to be granted an extension of time for calling an annual general meeting until further of the Court

K. Foreign Representative

80. Section 56 of the *CCAA* affords the Court the jurisdiction to appoint a foreign representative:

> 56 *Authorization to act as representative of proceeding under this Act* — The court may authorize any person or body to act as a representative in respect of any proceeding under this Act for the purpose of having them recognized in a jurisdiction outside of Canada.

CCAA, s. 56 **[TAB 1]**

81. While not currently contemplated, Connacher may determine that a filing under Chapter 15 of the United States Bankruptcy Code is appropriate. Because certain of the Applicant's loan documents are governed by New York law, Connacher believes that creditors may seek to exercise remedies in the New York courts if this proceeding is not recognized in the United States. If such a recognition proceeding were necessary, the Company may not have time to seek a further order of this Court appointing a foreign representative.

82. It is contemplated that Connacher will act as the foreign representative because it has US counsel familiar with the Company that could prepare a filing expeditiously.

83. Courts in this jurisdiction have approved debtors to act as foreign representatives of themselves and other subsidiary debtors for the purposes of filing a Chapter 15 proceeding.

Re Lone Pine, at para 57 **[TAB 11]**

L. Sealing

84. This Honourable Court has the jurisdiction to order that certain materials filed with the Court be sealed on the Court file. The Supreme Court of Canada has stated that such orders can be granted where:

    (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and

(b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the right to free expression, which in this context includes the public interest in open and accessible court proceedings.

Sierra Club of Canada v Canada (Minister of Finance), 2002 SCC 41, at para 45 **[TAB 18]**

85. The Applicant is requesting that the Court seal on the court file information related to the KERP and LTIP payments to employees. Such information is not only commercially sensitive to the Applicant but contains sensitive, personal financial information concerning each of the Applicant's employees.

86. Accordingly, it is submitted that the Confidential Exhibits are of the type covered by the test set out in *Sierra Club* and no parties will be prejudiced by the sealing of the information, and thus they ought to be sealed on the Court file.

V CONCLUSION AND RELIEF SOUGHT

87. The Applicant seeks an Initial Order under the *CCAA* substantially in the form as attached to the Originating Application.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of May, 2016.

CASSELS BROCK & BLACKWELL LLP

Per: ______________________________

Shayne Kukulowicz/ Ryan Jacobs/ Jeffery Oliver
Solicitors for the Applicant

Estimated Time for Argument: 60 minutes

TABLE OF AUTHORITIES

Legislation

1. *Companies' Creditors Arrangement Act,* RSC 1985, e C-36.

Jurisprudence

2. *Re Stelco Inc.,* [2004] OJ No 1257 (Sup Ct); leave to appeal to CA refused, [2004] OJ No 1903; leave to appeal to SCC refused, [2004] SCCA No 336.

3. *Meridian Developments v. Toronto Dominion Bank,* 1984 CarswellAlta 259 (QB).

4. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada,* [1990] BCJ No 2384 (CA).

5. *Re Lehndorff,* [1993] OJ No. 14 (Gen Div).

6. *Re Canwest Publishing Inc.*, 2010 ONSC 222.

7. *Re Canwest Global Communications Corp.,* [2009] OJ No 4286 (SCJ).

8. *iMarketing Solutions Group (Re),* 2013 ONSC 2223.

9. *Grant Forest Products Inc. (Re)* (2009), 57 CBR (5th) 128 (Ont SCJ [Comm List]).

10. *Re Lone Pine Resources Canada Ltd., et al,* Initial Order granted September 25, 2013, Court File No 1301-11352 (ABQB).

11. *Re Laricina Energy Ltd., et al,* Order granted April 22, 2015, Court File No 1501-03351 (ABQB).

12. *Re Argent Energy Trust et al*; Amended and Restated Initial Order granted March 9, 2016, Court File No 1601-01675 (ABQB).

13. *Nortel Networks Corp. (Re),* [2009] OJ No. 1044 (Ont SCJ [Comm List]).

14. *Re Cinram International Inc.,* 2012 ONSC 3767.

15. *Re Sino-Forest,* 2012 ONSC 2063.

16. *Re Nortel Networks Corp.,* [2009] OJ No 3169 (Ont SCJ).

17. *Imax Corp., Re*, 2007 Carswell Ont 8860 (Ont SCJ [Comm List]).

18. *Sierra Club of Canada v. Canada (Minister of Finance),* 2002 SCC 41.