

Clerk's Stamp

COURT FILE NUMBER 1601-06131

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 **CROSS-APPLICATION**
 (EMKAY LEASE ACCOUNTING)

ADDRESS FOR SERVICE **CASSELS BROCK & BLACKWELL LLP**
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NOTICE TO RESPONDENT(S):

This Application is made against you. You are a Respondent.

You have the right to state your side of this matter before the Master/Judge.

To do so, you must be in Court when the Application is heard as shown below:

Date: October 30, 2017
Time: 2:00 p.m.
Where: Calgary Courts Centre, 601 - 5 Street S.W.
 Calgary, AB T2P 5P7
Before Whom: The Honourable Justice Yamauchi

Go to the end of this document to see what else you can do and when you must do it.

Remedy claimed or sought:

1. If necessary, an Order abridging the time for service of this Cross-Application and supporting materials and declaring service to be good and sufficient;
2. An Order:
 - (a) Directing Emkay Canada Leasing Corp. ("**Emkay**") to forthwith provide a full and detailed accounting to Connacher Oil and Gas Limited ("**Connacher**") and Ernst & Young Inc., in its capacity as Court-appointed Monitor, of the proceeds of the sale of the Leased Trucks (as defined below);
 - (b) Declaring that Emkay is required to pay to Connacher any Net Proceeds (as such term is defined in the Emkay Canada Vehicle Lease Agreement dated October 4, 2012 (the "**Emkay Master Lease Agreement**")) from the sale of the Leased Trucks in excess of the Depreciated Value (as such term is defined in the Emkay Master Lease Agreement) of such Leased Trucks in accordance with section 12 of the Emkay Master Lease Agreement;
 - (c) In addition or in the alternative to clause (b) above, declaring that the proceeds from the sale of the Leased Trucks shall be set-off against or applied to reduce any claims of Emkay against Connacher, including without limitation the Outstanding Funds (as such term is defined in the Application of Emkay Canada Fleet Services Corp. returnable on October 30, 2017 (the "**Emkay Application**")); and
 - (d) Connacher's costs of this Cross-Application.
3. Such further and other relief, advice and directions as counsel may request and this Honourable Court may deem appropriate in the circumstances.

Grounds for making this Application:

4. Connacher and Emkay are parties to the Emkay Master Lease Agreement and certain lease schedules thereto (the "**Lease Schedules**", and together with the Emkay Master Lease Agreement, the "**Emkay Leases**") with respect to the lease by Emkay to Connacher of 21 Ford vehicles as more particularly described on **Schedule "A"** thereto (the "**Leased Trucks**").

5. On May 17, 2016, the Honourable Madam Justice Dario of this Honourable Court granted an Initial Order (the “**Initial Order**”) pursuant to the *Companies’ Creditor Arrangement Act* (“**CCAA**”) which provided for, among other things, a stay of proceedings up to and including June 16, 2016 in favour of Connacher, which has most recently been extended by this Honourable Court to January 31, 2018.
6. Pursuant to the terms of the Initial Order, Ernst & Young Inc. (the “**Monitor**”) was appointed as monitor in Connacher’s CCAA proceeding.
7. Since the date of the Initial Order, Connacher has not paid rent under the Emkay Leases on the basis of Connacher and the Monitor’s determination that the Emkay Leases are finance or capital leases (not true or operating leases) under the established CCAA jurisprudence and therefore that post-filing rent is not payable to Emkay pursuant to section 11.01(a) of the CCAA.
8. Emkay disputes such determination and has brought the Emkay Application seeking a declaration from this Honourable Court that the Emkay Leases are true leases and an order requiring Connacher to pay the monthly rent that has accrued under the Emkay Leases since the date of the Initial Order in the amount of \$199,937.97 (the “**Post-Filing Rent**”) and to continue to pay monthly rent thereafter.
9. While Connacher opposed the Emkay Application, Connacher nevertheless decided to return the Leased Trucks to Emkay.
10. All of the Leased Trucks were returned to Emkay by August 1, 2017.
11. Pursuant to section 12 of the Emkay Master Lease Agreement, upon return of the Leased Trucks, Emkay is required to facilitate the sale of the Leased Trucks. Connacher believes that the Leased Trucks were all in fact sold at auction following return.
12. Section 12 of the Emkay Master Lease Agreement further provides that “[i]f the Net Proceeds of such sale shall exceed the Depreciated Value of the Vehicle, and if Lessee is not in breach or default as provided in paragraph 11, Lessor shall credit, or at its option, pay the excess, less a one and one-half percent disposal fee of gross proceeds to Lessee as a refund of rentals”.
13. Despite demand, Emkay has refused to provide Connacher with an accounting of the proceeds of the sale of the Leased Trucks and has taken the position that it is not required to do

so. Emkay however continues to assert its claim against Connacher for payment of the Post-Filing Rent.

14. Connacher is entitled to a full and detailed accounting of the proceeds of the sale of the Leased Trucks (i) in accordance with its rights under the Emkay Master Lease Agreement and (ii) in any event, in order for Connacher and the Monitor (and this Honourable Court) to know whether Emkay has already recovered all or portion of the Post-Filing Rent from the sale of the Leased Trucks.

15. In addition, if the sale of the Leased Trucks generated proceeds in excess of Emkay's claims, Connacher is entitled to payment of such excess proceeds.

16. Such further and other grounds as counsel may advise and this Honourable Court may permit.

Material or evidence to be relied on:

17. The Affidavit of Jeff Beeston sworn on July 24, 2017, including the exhibits thereto.

18. The Affidavit of Jeff Beeston sworn October 16, 2017, including the exhibits thereto.

19. Such further and other material as counsel may advise and this Honourable Court may permit.

Applicable rules:

20. *Alberta Rules of Court*, AR 124/2010.

Applicable Acts and regulations:

21. The *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 as amended (the "CCAA").

22. *Judicature Act*, R.S.A. 2000, c. J-2.

23. Such further and other acts and regulations as counsel may advise and this Honourable Court may permit.

Any irregularity complained of or objection relied on:

24. None.

How the Application is proposed to be heard or considered:

25. In person.

WARNING

If you do not come to Court either in person or by your lawyer, the Court may give the applicant(s) what they want in your absence. You will be bound by any order that the Court makes. If you want to take part in this application, you or your lawyer must attend in Court on the date and time shown at the beginning of the form. If you intend to give evidence in response to the application, you must reply by filing an affidavit or other evidence with the Court and serving a copy of that affidavit or other evidence on the applicant(s) a reasonable time before the application is to be heard or considered.

SCHEDULE "A" TO APPLICATION

List of Emkay Trucks

Vehicle Description	Serial Number	Emkay Vehicle Number
2013 Ford F150 S/CREW	1FTFW1EF8DFB55121	671399
2013 Ford F150 S/CREW	1FTFW1EFXDFB55122	671400
2013 Ford F150 S/CREW	1FTFW1EF1DFB55123	671439
2012 Ford E150 XLT WAGON	1FMNE1BL2CDA03513	680199
2013 Ford F250 CREW CAB	1FT7W2B68DEA81798	671389*
2013 Ford F250 CREW CAB	1FT7W2B67DEA94686	671390
2013 Ford F250 CREW CAB	1FT7W2B69DEA94687	671391
2013 Ford F250 CREW CAB	1FT7W2B69DEB01301	671392
2013 Ford F250 CREW CAB	1FT7W2B60DEB01302	671393
2013 Ford F250 CREW CAB	1FT7W2B67DEB05900	671394
2013 Ford F250 CREW CAB	1FT7W2B69DEB05901	671395
2013 Ford F250 CREW CAB	1FT7W2B60DEB05902	671396
2013 Ford F150 S/CREW	1FTFW1EFXDFB55119	671397
2013 Ford F150 S/CREW	1FTFW1EF6DFB55120	671398
2014 Ford F150 REG CAB	1FTMF1EMXEFC19215	673329
2013 Ford E-350	1FBSS3BL7DDA60503	671401
2013 Ford ESCAPE TITANIUM	1FMCU9J92DUB73824	681112*
2014 Ford F150 REG CAB	1FTMF1EM8EFC19214	673328
2014 Ford F150 S/CREW	1FTFW1EF7EFA64732	682520
2014 Ford F150 S/CREW	1FTFW1EF2EFB21774	682579
2013 Ford F150 S/CREW	1FTFW1ET2DFB93725	682317
2013 Ford F150 S/CREW	1FTFW1EF9DFD20092	681993
2011 Ford F350 CHASSISCAB	1FDRF3H68BEB50293	32178J

* The trucks bearing vehicle numbers 671389 and 681112 were returned in December 2016