COURT FILE NUMBER	B301-163430
COURT	COURT OF KING'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
MATTER	IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, RSC 1985, C B-3, AS AMENDED AND IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF CLEO ENERGY CORP.
APPLICANT	CLEO ENERGY CORP.
DOCUMENT	**BRIEF OF BATTLE RIVER ENERGY LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	**DLA PIPER (CANADA) LLP** 1000, 250 - 2nd Street SW Calgary Alberta T2P 0C1 **Attention: Kevin Hoy** Phone: 403.698.8738 Fax: 403.776.8861 Email: kevin.hoy@dlapiper.com File No.: 114531-00001

Bench Brief of Battle River Energy Ltd.
Commercial List Application Scheduled before the Honourable Justice Lema**,** January 6, 2025

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I. INTRODUCTION

1. Battle River Energy Ltd. ("**Battle River**") is a creditor of Cleo Energy Corp. ("**Cleo**"), the Applicant in these proceedings.

2. Battle River maintains claims against both Cleo and certain of its current and former senior management personnel – namely, Christopher Lewis ("**Lewis**"), Colton Lewis, Andrew Sweerts, and Kellie D'Hondt (collectively with Lewis, the "**Individual Defendants**"). Battle River has thus commenced the action of Court File No. 2401-13128 (the "**Breach of Trust Action**"), wherein it advances claims against Cleo for, *inter alia*, breach of trust, as well as claims against the Individual Defendants in their personal capacities for the tort of knowing assistance in breach of trust.

3. Lewis is a current director of Cleo. Cleo now seeks an Order staying Battle River's claim against Lewis in the Breach of Trust Action. Battle River further understands that Cleo also takes the position that its filing of a Notice of Intention to Make a Proposal (an "**NOI**") pursuant to section 50.4 of the *Bankruptcy and Insolvency Act*[1] automatically stays Battle River's claim against Lewis by operation of *BIA* section 69.31.

4. Battle River files this Brief of Law in opposition to Cleo's position relating to the status of Battle River's claims against Lewis in the Breach of Trust Action. Herein, Battle River argues that the directors' stay set out in *BIA* section 69.31 is not engaged to stay claims made against a tortfeasor who happens to be a director of a debtor in NOI proceedings.

5. Battle River further argues that Cleo's Application for non-party stay in favour of a non-applicant (i.e., Lewis) relies upon jurisprudence applicable solely to the *Companies' Creditors Arrangement Act*[2] and not to the *BIA*.

II. ISSUES

6. Battle River submits that this Honourable Court must resolve the following issues:

   a. Is Battle River's claim against Lewis in the Breach of Trust Action stayed automatically by operation of *BIA* section 69.31(1)?

   b. May this Honourable Court exercise its statutory discretion under the *BIA* or its inherent jurisdiction to grant non-party stays of proceedings in NOI proceedings?

[1] RSC 1985, c B-3, [***BIA***].
[2] RSC 1985, c C-36, [***CCAA***].

c. If this Court is empowered to grant non-party stays, is it appropriate to grant one in favour of Lewis against Battle River's claims in the Breach of Trust Action?

III. ARGUMENT

A. Battle River's claim against Lewis is not stayed automatically by *BIA* s.69.31(1)

7. Section 69.31(1) provides that certain claims against directors of debtors restructuring in NOI proceedings are automatically stayed upon the filing of an NOI. The provision reads:

> 69.31 (1) Where a notice of intention under subsection 50.4(1) has been filed or a proposal has been made by an insolvent corporation, no person may commence or continue any action against a director of the corporation on any claim against directors that arose before the commencement of proceedings under this Act and that relates to **obligations of the corporation where directors are under any law liable in their capacity as directors for the payment of such obligations**, until the proposal, if one has been filed, is approved by the court or the corporation becomes bankrupt.[3]

8. A plain reading of the wording of *BIA* section 69.31 confirms that Parliament only intended for the stay provided for therein to apply in respect of claims against directors arising when "directors are under any law liable in their capacity as directors for the payment of such obligations."

9. Battle River's claims against Lewis in the Breach of Trust Action do not arise by virtue of Lewis' capacity as a director in Cleo. Rather, they arise as a consequence of Lewis' wrongful or oppressive conduct vis-à-vis Battle River. This is to say, Lewis is being sued by Battle River not as a result of any law providing that Lewis is liable for Cleo's debts in his capacity as a director of Cleo, but because he is a tortfeasor and is civilly liable to Battle River for damages.

10. *Per* the general precept of statutory interpretation, *BIA* section 69.31 must be read in context with *BIA* section 50, which governs the general schemes for Division 1 proposals, including compromises of claims. *BIA* section 50(13), allows for compromises for claims against directors using wording that mirrors *BIA* section 69.31:

> (13) A proposal made in respect of a corporation may include in its terms provision for the compromise of claims against directors of the corporation that arose before the commencement of proceedings under this Act and **that relate to the obligations of the corporation where the directors are by law liable in their capacity as directors for the payment of such obligations.**[4]

[3] *BIA*, *supra*, at s 69.31(1).
[4] *Ibid*, at s 50(13).

11. *BIA* section 50(14), however, clarifies that the *BIA* may not be used to compromise claims against directors "based on allegations of misrepresentation made by directors to creditors or of wrongful or oppressive conduct by directors.[5]" The claims against Lewis in the Breach of Trust Action relate expressly to his wrongful or oppressive conduct and, therefore, cannot be compromised as part of any proposal filed by Cleo in these proceedings. That Battle River's claims against Lewis cannot possibly be compromised by the terms of any proposal supports the contention that Parliament did not mean to provide for the automatic stay of such claims pursuant to *BIA* section 69.31.

12. In *Bear Creek Contracting Ltd. v Pretium Exploration Inc.*[6], the British Columbia Supreme Court ("**BCSC**") specifically found that claims for knowing assistance in breach made against directors of a company in *CCAA* proceedings were not stayed by operation of a *CCAA* initial order made pursuant to provisions of the *CCAA* with similar wording to *BIA* section 69.31. In *Bear Creek*, a subcontractor sought leave to amend its pleadings to assert claims against the directors of a prime contractor that had entered into *CCAA* proceedings. The plaintiff subcontractor's proposed claims against the directors included claims for knowing assistance in breach of trust. [7]

13. While the BCSC ultimately determined that claims against directors in *Bear Creek* were stayed by a Claims Procedure Order, the BCSC expressly found that the directors' stay provision in the *CCAA* Initial Order (which contained language analogous to the wording in *BIA* section 69.31) did not operate to stay the plaintiff subcontractor's claims against directors for knowing assistance in breach of trust, amongst various other causes of action:

> 124 All proceedings against the Applicants' directors and officers were stayed by the Amended Initial Order, in the following terms:
>
> > ... except as permitted in subsection 11.03(2) of the CCAA, no Proceeding may be commenced or continued against any of the former, current or future directors or officers of the applicants with respect to any claims against the directors or officers that arose before the date hereof and that relates to any obligations of the Applicants whereby the directors and officers are alleged under any law to be liable in their capacity as directors or officers for the payment of such obligations.
>
> …
>
> 127 Nevertheless, I agree with Bear Creek that its proposed new claims against the Directors are not stayed by the terms of Hainey J.'s orders. Bear Creek does not allege that the Directors are liable under any law *in their capacity as directors and officers* for the payment of a Rokstad obligation. Rather, Bear Creek alleges that they are liable for a Rokstad obligation *in their personal capacity* by virtue of their wrongful conduct. **In other words, the fact that they also happened to be**

[5] *Ibid*, at s 50(14).
[6] 2020 BCSC 1523(CanLII), [***Bear Creek***].
[7] *Ibid*, at para 21(d).

> **directors and officers of Rokstad at the time is not the basis for the alleged liability, so as to bring those claims under the rubric of the stay**.[8]

B. This Court is not empowered by statutory discretion or inherent jurisdiction to grant a non-party stay

14. In support of its Application for a non-party stay Order, Cleo points to the Ontario Superior Court of Justice's (the "**ONSC**") decision in *McEwan Enterprises Inc.*[9] That matter pertained to an order staying claims against non-parties to *CCAA* proceedings, not NOI proceedings under the *BIA*. The distinction between statutes is not one without a difference, as the ONSC in *McEwan* stipulated that courts will rely on "the broad jurisdiction granted under Sections 11 and 11.02 of the CCAA and the Court's inherent jurisdiction to grant a stay of proceedings in favour of third parties that are not themselves applicants in a CCAA proceeding."[10]

15. While they serve similar remedial purposes, the *CCAA* and the *BIA* remain separate statutes with different parameters – notably, superior courts are afforded far greater statutory discretion under the *CCAA* than they are under the *BIA*. As was recognized by the Supreme Court of Canada in *Canada v Canada North Group*,[11] NOI proceedings under the *BIA* are inherently less flexible than are *CCAA* proceedings:

> To realize its goals, the *BIA* is strictly rules-based and has a comprehensive scheme for the liquidation process …. It "provide[s] an orderly mechanism for the distribution of a debtor's assets to satisfy creditor claims according to predetermined priority rules" …. The *BIA*'s comprehensive nature ensures, among other things, that there is a single proceeding in which creditors are placed on an equal footing and know their rights. It also ensures that, post-discharge, the bankrupt will have enough to live on and can have a fresh start…. While proposals under the *BIA*'s restructuring regime similarly serve a remedial purpose, "this is achieved through a rules-based mechanism that offers less flexibility"…[12]

16. In a 2021 article, Professor Roderick J. Wood discusses the nature and extent of courts' powers deriving from inherent jurisdiction or statutory discretion in *CCAA* and *BIA* proceedings.[13] Therein, Professor Wood directly engages with the question of whether the *BIA* affords courts the discretion to grant non-party stays:

> Consider the following situations where courts have invoked their general discretionary power under section 11 of the CCAA:
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> …

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[8] *Ibid*, at paras 124 and 127, underling in original, bolding added.
[9] 2021 ONSC 6453 (CanLII), [***McEwan Enterprises***].
[10] *Ibid*, at para 42.
[11] 2021 SCC 30 (CanLII).
[12] *Ibid*, at para 140, citations omitted.
[13] Wood, Roderick J., ""Come a Little Bit Closer": Convergence and its Limits in Canadian Restructuring Law," (2021) 10 Journal of the Insolvency Institute of Canada 1.

- extending the stay to non-corporate entities

…

> Can a supervising judge in BIA commercial proposal proceedings make similar orders?[14]

17. Professor Wood observed that the consequence of *CCAA* courts' shift in reliance on inherent jurisdiction to statutory discretion is material. That *CCAA* courts now rely on the authority afforded to them by way of statutory discretion, as opposed to inherent jurisdiction, is important to the instance case, as it speaks to the necessary distinction that this Court must draw between *CCAA* and *BIA* proceedings. Speaking to the gravity of the inclusion of *CCAA* section 11 Professor Wood states:

> The shift from a theory of inherent jurisdiction to one of statutory discretion in restructuring law was not a mere exercise in rebranding that simply substituted one term for another. There are two important consequences connected with this shift. The first concerns the availability of the powers. Although inherent jurisdiction is not necessarily limited to the control of the court's own processes, the doctrine is to be used "sparingly and with caution." Statutory discretion under the CCAA is tested against the requirements of appropriateness, good faith, due diligence. Appropriateness is to be assessed by inquiring whether the order sought advances the policy objectives underlying the CCAA. The shift from inherent jurisdiction to statutory discretion put an end to any notion that the judicial powers were extraordinary or limited in availability. The second consequence of the shift concerns conflicting provincial statutes. Under a theory of inherent jurisdiction, a court is unable to make an order that conflicts with a provincial statute. Under a theory of statutory discretion, a court is not so limited, and the provincial statute will be inoperative under the paramountcy doctrine.
>
> In 2009, the shift from inherent jurisdiction to statutory discretion became firmly cemented in place in the CCAA through the inclusion of an express statutory provision that gave the court the authority to make any order so long as it is not inconsistent with any of the restrictions set out in the legislation.[15]

18. Professor Wood goes on to argue that Parliament cannot have intended to afford courts in *BIA* proceedings the same degree of statutory discretion as is expressly granted to courts in *CCAA* proceedings by virtue of extraordinary broad power set out in *CCAA* section 11, which has no analogue in the *BIA*:

> It seems clear that the availability of judicial authority to make such orders in BIA restructuring proceedings must now fall to be determined on a theory of implied statutory authority or gap-filling. What this means is that the question ultimately comes down to an exercise in statutory interpretation and whether an expansive interpretation of the statute is capable of being supported. This introduces a real challenge for those who wish to argue that the BIA contemplates that same wide powers in BIA restructuring proceedings as are exercised in CCAA restructuring proceedings. The first hurdle that will need to be overcome is the argument that a

[14] *Ibid*, at page 8.
[15] *Ibid*, at page 11, underlining added.

> supervising judge in BIA proceedings is limited to those powers that are expressly conferred by statute.
>
> This argument centres upon a comparison the two legislative restructuring regimes. Both contain express statutory powers that authorize a court to make order concerning a variety of issues. However, the CCAA has an additional provision — section 11 — that is not contained in the BIA that confers on the court the authority to make any other that it thinks appropriate. The argument is that if Parliament wanted to confer similar powers to courts in BIA proceedings, it would have included a similar provision in the commercial restructuring provisions of the BIA. The fact that it did not do so is proof that Parliament intended to limit courts in BIA proceedings to the powers expressly provided for in the statute. If additional judicial powers are to be given to courts in BIA proceeding this must be done through legislative amendment of the BIA.

19. Cleo is thus left with two challenges in establishing a right to a non-party stay order in its *BIA* proceedings. First, absent express statutory authority for a non-party stay, Cleo must point to specific provisions in the *BIA* from which this Honourable Court may assume statutory discretion to grant a non-party stay. Cleo's materials do not point to any provisions within the *BIA* that afford the Court the express authority or statutory discretion to grant the relief it seeks.

20. Second, in the absence of statutory authority (either express or discretionary), Cleo must satisfy this Honourable Court that it may appropriately exercise its inherent jurisdiction to grant a novel remedy under the *BIA*. Cleo does not satisfy the clearly articulated test for this Court's exercise of inherent jurisdiction to grant relief in *BIA* proceedings.

21. In *Golfside Ventures Ltd (Re)*[16], this Honourable Court recently re-articulated the test for granting relief in *BIA* proceedings pursuant to the doctrine of inherent jurisdiction. There, Associate Chief Justice Nielsen spoke to the sparing and limited circumstances in which this Court may rely on its own inherent jurisdiction in *BIA* proceedings:

> 28 The Trustee also relies on several tenets of Canadian bankruptcy law expressed in *Residential Warranty* . For example, at para 25, Topolniski J noted the: "fundamental tenet of *BIA* proceedings is that fairness should govern". Further, at para 26:
>
> > The *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers. Accordingly, inherent jurisdiction is maintained and available as an **important but sparingly used tool**. There are two preconditions to the Court exercising its inherent jurisdiction: **(1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively**; and (2) after balancing competing interests, the benefit of **granting the relief must outweigh the relative prejudice to those affected by it**. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfillment of the substantive

[16] 2023 ABKB 86 (CanLII), [***Golfside***].

> objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.[17]

22. Cleo cannot establish either of the two preconditions set out in *Golfside* required for this Court to exercise its inherent jurisdiction. Respecting precondition (1), the *BIA* is decidedly not silent regarding the nature and extent of stays of proceedings resulting from the filing of an NOI. To the contrary, *BIA* section 69 deals with the nature and extent of stays of proceedings in *BIA* matters exhaustively. Respecting precondition (2), Battle River submits that Lewis' evidence does not establish that relieving Lewis from the obligation participate in the filing of a Statement of Defence along with the remaining Individual Defendants in the Breach of Trust Action will materially benefit Cleo's NOI proceedings.

C. There are no grounds to stay Battle River's claims against Lewis

23. Should this Honourable Court determine that it does have the authority to grant a non-party stay respecting claims made against Lewis, Battle River nevertheless argues that it is not appropriate to grant such relief in the instant case.

24. Cleo relies upon the test for granting a non-party stay in *CCAA* proceedings set out in *McEwan Enterprises*. There, the ONSC sets out a non-exhaustive list of seven factors that Courts have considered in determining whether to grant a non-applicant non-party stay order. Those factors are produced at paragraph 21 of Cleo's December 23, 2024, Brief.

25. As they are framed in Cleo's Brief, all Cleo's grounds for staying claims against Lewis, set out at paragraph 22 of its Brief, appear to relate to specifically to claims made against Lewis as a guarantor of Cleo's debts. Battle River's claims against Lewis do not result from any personal guarantee, but rather from Lewis' tortious and oppressive misconduct. As Cleo's grounds for the imposition of a non-party stay pertain solely to guarantee claims, Battle River submits that there exists no reason to impose a stay against Battle River in respect of its claims against Lewis in the Breach of Trust Action.

26. Were Cleo to argue that the grounds applicable to stays of guarantee claims likewise apply to Battle River's claim, Battle River nevertheless submits that the factors outlined in *McEwan Enterprises* do not militate in favour of granting a non-party stay in respect of the Breach of Trust Action. To this point, Battle River argues as follows:

[17] *Ibid*, at para 28, emphasis added.

a. Cleo has put forward no evidence to suggest that Lewis' continued engagement as a director of Cleo during its restructuring is contingent upon Lewis obtaining a non-party stay;

b. It is not realistic that Battle River's claim against Lewis will resolve prior to Cleo's exit from NOI proceedings. Accordingly, there is no material risk that Battle River alone will successfully petition Lewis into bankruptcy prior to the completion of Cleo's restructuring;

c. At this time, Battle River only requires Lewis to finalize his Statement of Defence by January 20, 2025. *Per* Alberta's Rules of Court, Lewis will not be under an obligation to complete his Affidavit of Records for two months from the time of Battle River's filing of its own Affidavit of Records following the close of pleadings in the Breach of Trust Action;

d. It is unlikely that Lewis will be compelled to attend Questioning prior to the completion of Cleo's restructuring proceedings. Moreover, were Battle River to seek to Question Lewis during a critical juncture of Cleo's restructuring, Lewis would be entitled to seek a discretionary Order of this Court in the Breach of Trust Action temporarily postponing his Questioning while he attends to matters in these proceedings;

e. The balance of convenience militates against a stay, given that Battle River is in a position to compel the remaining Individual Defendants' filing of a Statement of Defence; and

f. Cleo fails to point to any fact about the circumstances of its restructuring or about the nature of Battle River's claims against Lewis that are extraordinary or unusual. Cleo's application for a non-party stay against Lewis thus stands for the proposition that such stays should be granted against directors as a *proforma* matter in each and every NOI proceeding. In so doing, Cleo proposes to upend the current status of the law, in which stays against directors are expressly limited to the claims described in *BIA* section 69.31.

IV. CONCLUSION

27. In light of all of the foregoing, Battle River submits that this Honourable Court must find that its claims against Lewis are not stayed by operation of *BIA* section 69.31 and that this Court cannot, or should not, grant a non-party stay in favour of Lewis against Battle River's claims advanced in the Breach of Trust Action.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of January, 2025.

DLA PIPER (CANADA) LLP

Per: 

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Kevin Hoy,
Counsel to Battle River Energy Ltd.