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Jan 22, 2025

COURT FILE NUMBER	B301-163430
COURT JUDICIAL CENTRE	COURT OF KING'S BENCH OF ALBERTA CALGARY 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.

SUPPLEMENTAL BOOK OF AUTHORITIES OF THE RESPONDENT, TRAFIGURA CANADA LIMITED

FOR THE HEARING SCHEDULED IN JUDGE'S CHAMBERS ON January 22, 2025, AT 3:00 PM

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TABLE OF AUTHORITIES

Tab	Authority
1.	*Blade Energy Services Corp (Re)*, 2024 ABKB 100, 2024 CarswellAlta 356
2.	*Razor Energy Corp (Re)*, 2024 ABKB 553, 2024 CarswellAlta 2385

Tab 1

2024 ABKB 100
Alberta Court of King's Bench

Blade Energy Services Corp (Re)

2024 CarswellAlta 356, 2024 ABKB 100, [2024] 4 W.W.R. 660, [2024]
A.W.L.D. 1195, 11 C.B.R. (7th) 319, 2024 A.C.W.S. 802, 68 Alta. L.R. (7th) 321

In the Matter of the Notice of Intention to Make a Proposal of

FTI Consulting Canada Inc (Applicant) and Blade Energy Services Corp (Respondent)

In the Matter of the Notice of Intention to Make a Proposal of

FTI Consulting Canada Inc (Applicant) and Razor Energy Corp (Respondent)

In the Matter of the Notice of Intention to Make a Proposal of

FTI Consulting Canada Inc (Applicant) and Razor Holdings GP Corp (Respondent)

In the Matter of the Notice of Intention to Make a Proposal of

FTI Consulting Canada Inc (Applicant) and Razor Royalties Limited Partnership (Respondent)

M.J. Lema J.

Heard: February 16, 2024
Judgment: February 21, 2024
Docket: Calgary B301-0373300, B301-037334, B301-037338, B301-037340

Counsel: Kelly Bourassa, for Applicant (FTI Consulting Canada Inc) Proposal Trustee
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Jessica Cameron, for Arena Investors LP

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.1 Stay of proceedings
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
Operator claimed producer owed $8 million in arrears — Relying on right in operating-procedure agreement, operator notified producer that it intended to disconnect producer from gas-gathering system if it did not clear arrears or agree to satisfactory payment arrangement — Neither happened and operator disconnected producer from system — Shortly after, producer filed notice of intention (NOI) to file proposal under Bankruptcy and Insolvency Act — Producer sought order declaring stay applied and directing reconnection to gas-gathering system and processing of its production on certain payment terms — Order directed operator to discontinue lockout — When it came to future services, parties had same rights and liabilities under their agreements as before and there was no role for court when it came to parties' going-forward arrangements — Operator's lockout step, commenced before NOI stay began, was continuing collection remedy and was stayed when NOI was filed — Lockout step fell within scope of s. 69(1)(a) stay and was not defensible status quo — Operator's actual or possible secured-creditor status made no difference — Scope of "remedy" and "other proceeding" in s. 69(1(a) of Act was broad including both judicial and

extrajudicial debt-collection steps — Stay under s. 69(1)(a) of Act did not have retroactive effect, in sense of undoing completed steps and implied power for court to grant orders to enforce stay and restore parties to pre-breach position as much as possible — Section 65.1 of Act did not apply — Section 65.1(4) of Act did not create freestanding right in creditor to insist on immediate payment post-NOI Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 65.1(4); Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s 69(1)(a).

Table of Authorities

Cases considered by *M.J. Lema J.*:

BCIMC Realty Corp. v. Fernandes (October 4, 2021), Doc. CEL-00543-21 (Ont. L.T.B.) — referred to

Bank of Nova Scotia v. Avramenko (2020), 2020 SKQB 54, 2020 CarswellSask 107, 59 C.P.C. (8th) 216 (Sask. Q.B.) — considered

Canadian Petcetera Ltd. Partnership v. 2876 R. Holdings Ltd. (2010), 2010 BCCA 469, 2010 CarswellBC 2852, 96 R.P.R. (4th) 157, [2010] 12 W.W.R. 189, 10 B.C.L.R. (5th) 235, 70 C.B.R. (5th) 180, 295 B.C.A.C. 201, 501 W.A.C. 201 (B.C. C.A.) — considered

Condominium Plan No. 78R15349 v. Fayad (2001), 2001 SKQB 104, 2001 CarswellSask 152, 206 Sask. R. 78 (Sask. Q.B.) — referred to

Durham Sports Barn Inc. Bankruptcy Proposal (2020), 2020 ONSC 5938, 2020 CarswellOnt 14288, 84 C.B.R. (6th) 293, 22 R.P.R. (6th) 235 (Ont. S.C.J.) — referred to

Ford Credit Canada Ltd. v. Crosbie Realty Ltd. (1992), 12 C.B.R. (3d) 282, 88 D.L.R. (4th) 706, 95 Nfld. & P.E.I.R. 322, 301 A.P.R. 322, 1992 CarswellNfld 19 (Nfld. C.A.) — referred to

Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc. (2005), 2005 CarswellOnt 9935, 29 C.B.R. (5th) 62, 277 D.L.R. (4th) 568 (Ont. S.C.J.) — considered

Goldenkey Oil Inc (Re) (2023), 2023 ABKB 365, 2023 CarswellAlta 1577, 7 C.B.R. (7th) 243 (Alta. K.B.) — referred to

Hutchingame Growth Capital Corporation v. Independent Electricity System Operator (2020), 2020 ONCA 430, 2020 CarswellOnt 9200, 13 P.P.S.A.C. (4th) 102 (Ont. C.A.) — referred to

Hutchingame Growth Capital Corporation v. Independent Electricity System Operator (2021), 2021 CarswellOnt 739, 2021 CarswellOnt 740 (S.C.C.) — referred to

Peel Housing Corp. v. Siewnarine (2008), 2008 CarswellOnt 3807, 45 C.B.R. (5th) 313, 239 O.A.C. 88 (Ont. Div. Ct.) — referred to

Plancher Heritage Ltée / Heritage Flooring Ltd., Re (2004), 2004 NBQB 168, 2004 CarswellNB 358, 3 C.B.R. (5th) 60, (sub nom. *Heritage Flooring Ltd., Re)* 279 N.B.R. (2d) 1, (sub nom. *Heritage Flooring Ltd., Re)* 732 A.P.R. 1, 2004 NBBR 168 (N.B. Q.B.) — referred to

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Schendel Mechanical Contracting Ltd (Re), (2021), 2021 ABQB 893, 2021 CarswellAlta 2828, 38 Alta. L.R. (7th) 406 (Alta. Q.B.) — considered

Vachon v. Canada (Employment & Immigration Commission) (1985), [1985] 2 S.C.R. 417, (sub nom. *Vachon v. Canada Employment)* 63 N.R. 81, 57 C.B.R. (N.S.) 113, 23 D.L.R. (4th) 641, 1985 CarswellNat 12, 1985 CarswellNat 668 (S.C.C.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — considered

s. 65.1 [en. 1992, c. 27, s. 30] — referred to

s. 65.1(1) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(2) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(3) [en. 1992, c. 27, s. 30] — referred to

s. 65.1(4) [en. 1992, c. 27, s. 30] — considered

s. 69 — referred to

s. 69(1)(a) — considered

s. 69(2) — referred to

s. 121 — referred to

s. 244(1) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

s. 11 — referred to

Criminal Code, R.S.C. 1985, c. C-46

Generally — referred to

RULING on whether lockout constituted continuing debt-collection remedy and was stayed under *Bankruptcy and Insolvency Act*.

***M.J. Lema J.*:**

Reasons for Judgment of Honourable Justice M. J. Lema

I. Introduction

1 Is the arrears-triggered disconnection (or lockout) of a gas producer by a gas-plant operator a continuing remedy and accordingly one stayed under the producer's notice-of-intention proceedings under the *Bankruptcy and Insolvency Act*?

2 The producer seeks an order declaring that the stay applies and directing reconnection to the gas-gathering system and processing of its production on certain payment terms.

3 The operator characterizes the lockout as a completed step and thus, not offside the *BIA* stay. Alternatively, if the stay applies and reconnection follows, the operator seeks going-forward terms including immediate payment, a critical-supplier's charge, and payment of some of the existing arrears.

4 I find that the lockout was a continuing remedy, that it was stayed when the *BIA* notice of intention was filed, that reconnection is required, and that, with the stay not applying to any post-NOI arrears that may accrue, the parties' existing agreements will govern future services and payments for them i.e., without the Court setting such terms.

II. Background

5 Razor and Conifer are oil and gas producers. Conifer is also the operator of a gas plant in the South Swan Hills area in which both are producing natural gas.

6 Per Conifer, Razor owes approximately $8 million to it, relating in part to processing-charge and capital-cost shortfalls. Razor disputes that figure.

7 After long-running attempts to negotiate the clearance of those arrears, Conifer notified Razor that, relying on a right in their operating-procedure agreement, it intended to disconnect Razor from the gas-gathering system if it did not clear its arrears or agree to a satisfactory payment arrangement.

8 Neither happened, eventually leading to Conifer disconnecting Razor from the system, Razor shortly afterwards filing a notice of intention to file a proposal under the *Bankruptcy and Insolvency Act*, and the current debate over the scope of the resulting stay and its impact (if any) on the lockout.

III. Issues

9 The first issue is whether the lockout constitutes a continuing debt-collection remedy. If so, it is stayed by the *BIA* stay. The second is the appropriate remedy in such case. Assuming it includes reconnection, the third is on what term(s) should future services be provided by Conifer.

IV. Analysis

A. Stay provision

10 Here is the applicable *BIA* provision (para 69(1)(a)):

> Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6 [none of which apply here, at least not currently], on the filing of a notice of intention under section 50.4 by an insolvent person,
>
> > (a) no creditor has **any remedy** against the insolvent person or the insolvent person's property, or shall commence or continue **any** action, execution or **other proceedings**, for the recovery of a claim provable in bankruptcy[.] [emphasis added]

11 Conifer did not argue, and it could not plausibly have argued, that Razor is not an insolvent person, that a notice of intention has not been filed, or that its claim for contractual amounts owing by Razor through to the lockout is not a claim provable in bankruptcy i.e. would not fall within the scope of s 121 *BIA* if a bankruptcy had occurred on the NOI filing date.

12 Leaving the questions of whether the lockout constitutes a remedy or other proceeding (or both) and, if so, whether the stay captures the lockout when it occurred before the NOI was filed.

13 I start by examining the scope of the key terms here.

B. Broad scope of "remedy" and "other proceedings"

14 The scope of "remedy" and "other proceedings" is broad, including both judicial and extrajudicial debt-collection steps. Per *Vachon v Canada Employment and Immigration Commission*, [1985] 2 SCR 417:

> Appellant in my view properly relied upon the English version of s. 49(1) of the *Bankruptcy Act*, where the word *recours* is rendered by the word "remedy", **giving to it and to the words "*autres procédures*" ("other proceedings") a very broad meaning which covers any kind of attempt at recovery, judicial or extrajudicial.** *Black's Law Dictionary* (5th ed. 1979), defines "remedy":
>
> > The **means by which a right is enforced** or the violation of a right is prevented, redressed, or compensated.
>
> and below:
>
> > Remedy means **any remedial right** to which an aggrieved party is entitled with or without resort to a tribunal.
>
> *Jowitt's Dictionary of English Law* (2nd ed. 1977), vol. 2, gives an almost identical definition:
>
> > **the means by which the violation of a right is prevented, redressed, or compensated**. Remedies are of four kinds: (1) by act of the party injured . . . ; (2) by operation of law . . . ; (3) **by agreement between the parties** . . . ; (4)

> by judicial remedy, *e.g.* action or suit. **The last are called judicial remedies, as opposed to the first three classes which are extrajudicial.**
>
> The courts have also interpreted the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act* **very broadly**.
>
> [discussion of cases involving distress for unpaid municipal taxes, incomplete seizures, and bids to cut off utilities].
>
> This Court of course does not have to decide whether the conclusions of these judgments are correct, but in my opinion **the courts were right to give, expressly or by implication, a broad meaning to the stay of proceedings imposed by s. 49(1) of the *Bankruptcy Act*. This broad meaning is confirmed by the fact that the legislator took the trouble to exclude actions against either the creditor or his property.**
>
> As Houlden and Morawetz wrote in *Bankruptcy Law of Canada*, vol. 1, p. F-70.1, under s. 49 of the *Bankruptcy Act*:
>
> > **An ordinary unsecured creditor with a claim provable in bankruptcy can only obtain payment of that claim subject to and in accordance with the terms of the Bankruptcy Act. The procedure laid down by that Act completely excludes any other remedy or procedure.**
>
> The *Bankruptcy Act* governs bankruptcy in all its aspects. It is therefore understandable that **the legislator wished to suspend all proceedings, administrative or judicial, so that all the objectives of the Act could be attained.**
>
> Accordingly, I consider that s. 49(1) of the *Bankruptcy Act* is sufficiently broad to include recovery by retention from subsequent [unemployment-insurance] benefits, such as the recovery at issue here. [paras 21-31] [emphasis added]

15 Recall as well that para 69(1)(a) refers to "*any* remedy" and "*any* . . . other proceedings", without any limitation to legal remedies or proceedings.

16 Further examples of extrajudicial steps found to constitute "remedies" or "proceedings" include:

- *setting off* current payments (for coal deliveries) against pre-existing arrears: *Quintette Coal Ltd v Nippon Steel Corp*, 1990 CanLII 430 (BCCA), found to fall within the scope of a s 11 *CCAA* stay of "proceedings" (see paragraph beginning "Quintette continued to make coal deliveries . . . " and paragraphs from that beginning with "It is evident from the above that . . . " .. up to and including that beginning with "As Thackray, J. has not been shown to have erred . . . "]

- "*sweeping [the debtor's] operating account* and *[capping]* the amount available to [the debtor] [under a *revolving credit facility]: Heritage Flooring BIA Proposal (Re)*, 2004 NBQB 168 (para 82);

- *distraining* for unpaid rent: *Ford Credit Canada Ltd v Crosbie Realty Ltd*, 1992 CanLII 7132 (NLCA) (paras 21-26) and *Durham Sports Barn Inc (bankruptcy proposal)*, 2020 ONSC 5938 (42-49);

- *registering a caveat* as a prelude to enforcing a condominium levy: *Condominium Plan No 78R15349 v Fayad*, 2001 SKQB 104 (paras 23 and 24); and

- seeking an *injunction to enforce continued business operations* in leased premises: *Golden Griddle Corp v Fort Erie Truck & Travel Plaza Inc*, 2005 CanLII 81263 (ONSC) (paras 11-15).

17 The focus of such steps is collection or attempted collection of existing indebtedness i.e. "remedies" or "other proceedings" for the "recovery of claims provable in bankruptcy."

18 By contrast, *terminating an agreement* was found to fall outside the scope of s. 69: *Canadian Petcetera Limited Partnership v 2876 R Holdings Ltd*, 2010 BCCA 469 (paras 20, 28 and 29). For the same (outside scope of s 69) treatment of *contract termination*, see also *Hutchingame Growth Capital Corporation v Independent Electricity System Operator*, 2020 ONCA 430 (paras 32-26) (leave denied: 2021 CanLII 2823 (SCC)). Examples of the same treatment in a landlord-tenant context include

Peel Housing Corp v Siewnarine, 2008 CanLII 31815 (ONSC DC) (paras 12-26) and *BCIMC Realty Corporation v Fernandes*, 2021 CanLII 140640 (ON LTB) (determinations 1-7).

19 The distinction with termination is the focus on ending the commercial relationship, not on recovery of outstanding arrears.

20 I note that Conifer does not argue that the agreement in question has terminated, whether because of Razor's defaults or otherwise.

21 Other "outside scope" examples noted in *Canadian Petcetera* are seeking *Criminal Code compensation orders*, pursuing a *contempt order*, or *enforcing post-bankruptcy indebtedness* (paras 30 and 31), all found not to involve claims provable in the insolvency proceeding. (I discuss the latter aspect later, with "post-bankruptcy" translated to "post-NOI".)

C. Purpose of stay

22 *Golden Griddle* (cited above) accurately describes the purpose of staying such remedies and proceedings in a proposal setting:

> While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, **giving**, in the words of E.B. Leonard and K.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 - Stays of Proceedings, under the *Bankruptcy and Insolvency Act"* (for the 1995 Insolvency Institute of Canada lectures), **"a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."**
>
> A purposive definition of the word "remedy" in section 69(1)(a) would suggest that, **remedies which in any way hinder or could impair that process are caught within the section and are stayed**. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the **impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed**, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.
>
> The nature of the injunctive relief sought here is to restrain the defendants from operating a restaurant other than a Golden Griddle and a convenience store other than a Nicholby's, and to restrain the defendants from terminating the lease arrangements. It is, in a sense, a **mandatory injunction that is sought to continue to have the defendants operate the outlets as a Golden Griddle restaurant and as a Nicholby's**. To operate as a Golden Griddle restaurant requires compliance by the defendants with the franchise agreement provisions such as meeting certain standards and operating procedures, selling only approved products and services, purchasing food products and supplies from designated suppliers and maintaining adequate inventory and adequately trained personnel.
>
> **To enforce such provisions during the proposal period, in my view, would be a remedy which would interfere with the "breathing space" that section 69(1)(a) was meant to create, and, could have implications for and could impair the debtor's ability to restructure and put forth a proposal.**
>
> I, therefore find that the **nature of the injunctive relief sought here is such that because of its potential impact on the restructuring process it is caught by the wording of section 69(1)(a) and is, therefore, stayed**. [paras 11-15] [emphasis added]

D. Nature of lockout per Conifer

23 Conifer itself recognizes the remedial nature of its lockout step. Per the February 15, 2024 Affidavit of its deponent (Heather Wilkins - Conifer's VP Finance):

> On or around December 23, 2023, **after multiple attempts to get Razor to address its arrears**, Conifer exercised its rights under section 602(b)(ii) of the [Construction, Ownership and Operation Agreement], and **stopped receiving and processing Razor's gas by physically closing and locking valves** at 16 separate points within the South Swan Hills Gas Gathering System **on the basis of close to $8 million in unpaid arrears**. [para 8]
>
> Conifer has not received any payments and **no further enforcement steps** were taken following the disconnecting of services. [para 9]
>
> **Due to Razor's unwillingness to address its obligations**, on or about November 2, 2023, conifer notified Razor that Conifer would **revoke Razor's privileges and disconnect services** at the Judy Creek Gas Plant in seven days . . . **if Razor failed to remedy its arrears and bring its account into good standing.** . . . [para 28]
>
> . . . Conifer reiterated that **it would disconnect Razor's Services within seven days if Razor did not implement a monthly payment plan to bring its account into good standing**. [para 31]
>
> On December 20, 2023, Conifer wrote . . . to Razor that [a certain] proposal was not acceptable, and that **Conifer would follow through with Service Disconnection if Conifer did not receive at least $2.5 million to pay towards Razor's arrears** by December 22, 2023. . . . [para 34]
>
> On December 29, 2023 . . . , Conifer completed the Fuel Disconnection. At that time, **service to Razor's South Swan Hills Unit assets was completely disconnected from the fuel supply at the Judy Creek Gas Plant** with the exception of one generator running for building heat and pipeline tracers to preserve infrastructure integrity. [para 42]
>
> I confirm that **Conifer has taken no further steps to enforce payment of Razor's arrears since the Fuel Disconnection** on December 29, 2023. [emphasis added]

24 Conifer did not argue that its exercise of the described disconnection step, one its contractual rights under the agreement in question with Razor (and other parties), was not a "remedy" or "other proceeding" within the meaning of para 69(1)(a).

25 Nor could it plausibly have done so, given the above-described breadth of the provision and the clearly acknowledged use of the lockout right to recover, or try to recover, Razor's arrears. Per *Vachon*, this was undoubtedly "[a] kind of attempt at recovery, judicial or extrajudicial" of amounts qualifying as a "provable claim in bankruptcy."

26 By invoking the lockout provision of its agreement with Razor (and others), Conifer was attempting to extract payment from Razor of the approximately $8 million in arrears claimed by Conifer (not all of which are acknowledged by Razor) or some subset satisfactory to Conifer and accompanied by a satisfactory payment arrangement for the balance.

27 As was acknowledged by Conifer's counsel in the bolded passages below:

> . . . Conifer is preserving the *status quo*, which as of the date of Disconnection means **no further Services will be provided without the substantial past accounts being paid or satisfactory arrangements being reached.**
>
> The key question in determining this [legitimacy-of-disconnection] issue is whether or not Conifer **already exercised its rights** prior to Razor filing its NOI. If it has, the issue is moot; **Conifer cannot breach the stay for an action taken prior to the existence of the Stay**, which was only triggered by the filing of the NOI.
>
> Conifer agrees that the Stay was created pursuant to section 69(1)(a) of the *BIA*; however, Razor's submissions fail to acknowledge two key points: (1) **the remedy, in this case the Disconnection and cessation of the Services, was exercised on notice and prior to January 30, 2024 when Razor filed the NOI**; and (2) the Disconnection was implemented to prevent further costs from being incurred in the face of Razor's continued payment arrears. . . .

> Conifer reasonably exercised its rights by ceasing to provide Services at a loss through implementing the Disconnection when Razor failed to provide a viable plan to address its arrears. **The Disconnection was not a continuing action as characterized by Razor but rather a one-time permanent step** taken in December 2023 resulting from the disconnection at 16 separate points within the South Swan Hills Gas Gathering System. [Conifer brief, paras 12-15] [emphasis added]

28 As seen here, Conifer is not arguing that its lockout step was not a remedy or other proceeding per para 69(1)(a), instead that the remedy was taken *and completed* before the NOI was filed and, having no ongoing effect, is thus beyond the reach of the NOI-triggered stay. (It also anchors the lockout in the anticipated avoidance of further losses, which I discuss later.)

29 It is common ground that the lockout occurred, or at least began, before the NOI was filed.

30 It is also common ground that the para 69(1)(a) stay does not have retroactive effect, in the sense of undoing completed steps. For instance, the stay did not reach back to undo Conifer's accomplished set-offs (pre-NOI) of amounts owing to Razor against the latter's debts to Conifer. Same if Conifer had obtained a judgment against Razor, obtained proceeds from execution, and applied them to Razor's debts. Or Conifer had otherwise taken and completed a collection step before the NOI was filed.

31 It is also common ground, or at least cannot be disputed, that para 69(1)(a) captures, and stays, both the commencement *and continuation* of proceedings to recover provable claims. (Per *Vachon*, "remedies" and "other proceedings" are effectively synonymous, at least in the case of extrajudicial recovery steps i.e. the bar on commencing or continuing "other remedies" is equally a bar on commencing or continuing extrajudicial "remedies" generally.)

32 Was the lockout here a completed remedy?

E. Lockout a continuing remedy

33 The answer is no: it was an ongoing (i.e. continuing) remedy.

34 Despite Conifer's characterization of the lockout as a "one-time permanent step", it was anything but. Per Conifer's counsel's February 6, 2024 letter to Razor:

> **Should Razor desire access** to the Judy Creek Facility, **Razor must make acceptable provisions to address its arrears** and provide pre-payment for all costs associated with obtaining access to the facility, fuel gas and processing costs going forward. We have been advised by Conifer that **should an acceptable arrangement be met, . . . it would take approximately 3 business days for its to reinstate production for Razor**. [emphasis added]

35 That paragraph reflects the true nature of the lockout: a reversible step designed to stay in place until Razor cleared or otherwise addressed its pre-NOI debt to Conifer's satisfaction.

36 It was the very ongoing effect of the lockout - daily preventing Razor from producing from the field(s) in question - that constituted Conifer's (contractually-permitted) leverage here.

37 This was not a completed step i.e. a *former* remedy no longer providing leverage or pressure to pay.

38 It was a continuing step, creating ongoing leverage and resulting in or contributing to Razor's decision to pursue a *BIA* proposal, starting with filing a NOI and triggering the para 69(1)(a) stay of proceedings.

39 How can the lockout fairly be regarded as a completed remedy, having no ongoing effect, when its express purpose - clearance of Razor's arrears or at least some portion (with a satisfactory payment arrangement for the balance) - was not achieved to any degree? And when (per the quoted letter) Conifer stood ready to reverse the lockout i.e. following a hoped-for clearance of Razor's arrears or a subset with a satisfactory payment arrangement for the balance? And until that happened, Conifer continued the lockout?

40 The lockout is functionally equivalent to a judgment creditor seizing and removing the judgment debtor's key equipment and advising that will restore the equipment if the judgment debt is cleared in full or satisfactory payment arrangements are made.

41 The common feature is a creditor step interrupting the debtor's business operations, designed to pressure the debtor to clear or arrange to clear the debt.

42 In both cases the genesis of the pressure is a legal right i.e. a contractual right in the first case and a judgment-enforcement right in the second.

43 The question is not whether the creditor has the given right or whether it was appropriate to exercise it.

44 It is whether the remedy pursued was completed (in which case the stay does not reach it) versus being an ongoing step (in which case it does), with the *BIA* aiming to quell such creditor actions pending (at minimum) preparation and circulation of a proposal.

45 I return to this point after examining two other arguments from Conifer defending its lockout step.

F. Continuing lockout not a permissible status quo

46 Conifer argued that continuing the lockout after post-NOI simply maintained the pre-NOI status quo.

47 But that ignores para 69(1)(a)'s bar on commencing *or continuing* debt-collection steps. Given that bar, an in-progress collection action cannot be the status quo to be preserved. Otherwise, the only question would be whether the collection action had started pre-NOI. If that were right, any already-started collection action would be permitted to continue e.g. an ongoing effort to seize the debtor's property via writ, an in-progress auction to sell seized property, a garnishment continuing to attach a periodic receivable, and so on.

48 But (as explained earlier) para 69(1)(a) shuts down in-progress collection actions, leaving no room for preservation of a "continuing action status quo."

49 For an example of status-quo-maintaining step not breaching a *BIA* stay, see *BNS v Avramenko*, 2020 SKQB 54 (Elson J.), where an unsecured creditor sought to renew its judgment despite the bankruptcy of the debtor:

> I am compelled to add, perhaps in *obiter*, that I would have granted the renewal [of the unsecured creditor's judgment under SKQB rules], even if the trustee had not been discharged. In my view, and construing s. 69.3(1) purposively**, the stay of proceedings does not apply to steps a judgment creditor takes to preserve a position it already enjoys**. As much as s. 7.1 of *The Limitations Act* and Rule 10-12 contemplate active steps by commencing a proceeding on the judgment, **the reality is that these are steps to preserve a judgment. They are neither new proceedings nor are they steps to execute on the judgment.** To conclude otherwise would be to force a judgment creditor to stand aside while its judgment expires through circumstances that may well be beyond its control. [para 17] [bold emphasis added]

50 The renewal step so authorized allowed the judgment creditor to continue as such; it did not extend to enforcing the judgment, which would have offended the stay.

51 Conifer did not point to this kind of status-quo-maintaining step here, only to its ongoing collection action via the lockout.

G. Conifer not a secured creditor in this context

52 At the application, Conifer's counsel argued that Conifer is a secured creditor of Razor, pointing to a lien and charge provision (s 602(a)) in the operating agreement.

53 Per that provision, Conifer indeed has a lien and charge "with respect to the *Functional Unit Participation* of each Owner in the *Facility* and such Owner's share of Facility Products, to secure payment of such Owner's proportionate share of the costs and expenses incurred by the Operator for the Joint Account."

54 "*Functional Unit Participation*" means "with respect to any *Functional Unit*, the percentage interest ownership of each Owner in such Functional Unit as set forth opposite such Owner's name under the Appendix entitled "FACILITY AND FUNCTIONAL UNIT PARTICIPATION"[.]

55 "*Functional Unit*" means a separate component of the Facility described under the Appendix entitled "DESCRIPTION OF FACILITY AND FUNCTIONAL UNITS AND SCHEMATIC", and all real and personal property of every nature and kind attached to, forming part of or used in connection with the operation thereof"[.]

56 "*Facility*" means "all real and personal property of every nature and kind attached to, forming part of or use in connection with Joint Operations, maintained and held by Operator in accordance with this Agreement and as described under the Appendix entitled "DESCRIPTION OF FACILITY AND FUNCTIONAL UNITS AND SCHEMATIC"[.]

57 The lien and charge, focused on Razor's ownership stake in the described oil and gas assets, is not the root of Conifer's lockout right. The latter arises under a separate provision (s 602(b)(ii)) and focuses on denial of one of Razor's "privileges" under the operating agreement.

58 In any case, Conifer did not argue that its lockout right arises from or is otherwise a feature of the lien and charge.

H. No difference if Conifer secured

59 Instead, Conifer appeared to argue that its status as a secured creditor (arising from the lien and charge) conferred general immunity from the stay i.e. even if the lockout right is not security-based itself.

60 However, the stay analysis would remain the same, whether Conifer is a secured creditor "at large" or even if the lockout right itself should be characterized as or stemming from security.

61 Paragraph 69(1)(a) applies to "creditor[s]" generally, whether secured, preferred, or unsecured.

62 Subsection 69(2) contains an exception to the stay in para 69(1)(a) for secured creditors; however, it is limited to the following circumstances:

> *(2)* The stays provided by subsection (1) do not apply
>
> (a) to prevent a *secured creditor who took possession of secured assets of the insolvent person for the purpose of realization* before the notice of intention under section 50.4 was filed from dealing with those assets;
>
> (b) to prevent a *secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security against the insolvent person* more than ten days before the notice of intention under section 50.4 was filed, *from enforcing that security*, unless the secured creditor consents to the stay; [or]
>
> (c) to prevent a *secured creditor who gave notice of intention under subsection 244(1) to enforce that creditor's security from enforcing the security* if the insolvent person has, under subsection 244(2), *consented to the enforcement action*[.]

63 Conifer did not "[take] possession of secured assets of [Razor]" here or, if it did, did not do so "for the purpose of realization" of such assets. Conifer was exercising its lockout right, not attempting to somehow dispose of that right to others for proceeds.

64 Neither did Conifer issue a prescribed form notice under ss 244(1) *BIA*. (See *BIA* General Rule 124 and Form 88 for the prescribed form.)

65 Accordingly, even if characterized as a secured creditor for the purposes of para 69(1)(a), Conifer still falls within its scope, with no ss 69(2) or other secured-creditor exception applying.

I. Conclusion on stay and lockout

66 For these reasons, I find that the lockout step was a continuing remedy or "other proceeding", that it accordingly fell within the scope of the para 69(1)(a) stay, that continuing that remedy was not a defensible status quo, and that Conifer's actual or possible secured-creditor status makes no difference here.

67 The net result is that Conifer's lockout step, commenced before the NOI stay began, was a continuing collection remedy and was thus stayed when the NOI was filed.

68 Conifer's continuation of the lockout since then has been in breach of the stay.

69 The question becomes: what can and should be done in response?

J. Parties' positions on appropriate response

70 Per Razor:

> . . . the appropriate relief , in the circumstances is to cure the breach of the Stay by ordering Conifer to: (i) **permit Razor . . . to access the Judy Creek Gas Plant**; and (ii**) resume providing Services on terms** that include Conifer continuing its practice of marketing [Razor's] production, setting off the revenue against post-filing amounts, and calling upon $200,000 security if there is a shortfall [as particularized in Razor's counsel's February 1, 2024 letter]

71 Per Conifer (making alternative submissions i.e. "if Conifer must supply"):

> If this Court holds that Razor's rights under the Ownership Agreement compel Conifer to continue processing and selling their products, then Razor must **pay for those Services up front and in advance.** The *BIA* is clear that a party providing post-filing services may **require immediate payment for those services** and that service providers are not required to advance further money or credit. Specifically, section 65.4(1) states:
>
> > . . . Nothing in subsections (1) to (3) shall be construed
> >
> > (a) as prohibiting a person from *requiring immediate payment for* goods, *services*, use of leased or licensed property or other valuable consideration provided after the filing of
> >
> > (i) the notice of intention, if one was filed . . . or
> >
> > (b) as requiring the further advance of money or credit . . . .
>
> . . . Forcing Conifer to provide the Services without guaranteeing payment up front is equivalent to forcing Conifer to provide the Services on credit, a requirement that is expressly prohibited under [para] 65.1(4)(b).
>
> As Razor is seeking a declaration [that the stay applies], which is an equitable remedy, this Court must consider the equities of both parties. [bold emphasis added]

72 Conifer also seeks a "critical suppliers" charge and repayment of some "cure costs" (i.e. some of the pre-NOI arrears, as detailed in paras 29-42 of its brief.

K. Remedies for stay breach

1. Court's power to remedy breach of stay

73 The *BIA* does not expressly endow the Court with powers to remedy a stay breach.

74 However, many examples exist of courts granting orders undoing or reversing a stay-breaching action or pulling the proceeds of such actions into the proposal or bankruptcy estate (as applicable): see the cases summarized in 5:289 - Proceedings Taken Without Leave in Bankruptcy and Insolvency Law of Canada, 4th Edition (online edition), which feature remedial orders such as reversing a property seizure, barring further proceeding in offside actions, and turning over garnishment recoveries,

75 I find that para 69(1)(a) implies a power for the Court to grant such orders i.e. to enforce the stay and, as much as possible, restore the parties to their pre-breach position.

2. Remedy appropriate here

76 In this case, the stay breach did not generate any proceeds.

77 The clear remedy for the breach here - continuing an arrears-collection lockout in the face of the stay - is an order directing Conifer to discontinue the lockout i.e. restoring the system connections Razor had before the lockout.

78 Given Conifer's estimate of "approximately 3 business days" to reconnect Razor, I direct Conifer to perform the reconnection work by 6 pm on Friday, February 23, 2024 or such other deadline as the parties may agree on.

3. Payment terms for future services

79 The other relief suggested by the parties (alternatively, in Conifer's case) goes to the *terms on which future services are to be provided by Conifer*.

80 As noted, Razor suggested continuation of the pre-lockout set-off arrangement or situation, bolstered by a $200,000 deposit. Conifer argued in favour of immediate payments, a critical-supplier charge, and payments towards arrears.

81 I do not see any role for the Court when it comes to the parties' going-forward arrangements.

82 Paragraph 69(1)(a) focuses on shutting down collection steps on pre-NOI arrears, as reflected in the above order reversing the lockout.

83 It says nothing about the terms on which services must, should or may be provided going forward.

4. Section 65.1 inapplicable

84 As noted, Conifer invokes s. 65.1. However, that section does not apply here. Per ss 65.1(1), it only applies where a person "terminate[s] or amend[s] any agreement . . . with the insolvent person, or claim[s] an accelerated payment, or a forfeiture of the term, under any agreement . . . with the insolvent person", limiting the moving party's rights to take any such steps in certain circumstances.

85 In invoking its lockout right, Conifer did not engage in any of the noted activities.

86 As a result, nothing in s. 65.1 applies here.

87 That includes ss. 65.1(4) (quoted above). The purpose of that provision is to shelter a creditor's immediate-payment right (if it exists) from limitations imposed by one or more of ss. 65.1(1), (2) and (3). As noted, ss. 65.1(1) does not apply here. And neither does ss. 65.1(2) (leases and licensing agreements) or 65.1(3) (public utilities).

88 If (for example) we were dealing with a public utility, and the utility had the right under its contract with its customer to require immediate payment (versus extending credit) for services provided, ss. 65.1(4) tells us that that right survives the imposition of no-discontinuance-for-arrears limitation imposed under ss. 65.1(3).

89 In other words, while the utility cannot discontinue service for arrears, it can rely on its immediate-payment-required term for ongoing utility services.

90 In yet other words, ss. 65.1(4) does not create a freestanding right in a creditor to insist on immediate payment post-NOI.

91 It depends on whether the creditor has that right under its contract with the debtor.

92 I cannot tell from the materials filed whether Conifer has the right to require immediate payment for future services, whether under the Accounting Procedure described in s 902 of the Ownership and Operation Agreement, Article VI of the Operating Procedure (Accounting Measures), or otherwise.

5. Conifer's enforcement rights not stayed re debts for future services

93 The critical point here is that Conifer's use and enforcement of its timing-of-payment and enforcement-of-payment rights, relating to future services, are not subject to the para 69(1)(a) stay.

94 The reason is simple: the NOI filing created two distinct eras, the period leading up to the filing and the period after. Claims existing in the first era are subject to the stay; claims arising in the second are not.

95 Here see *Canadian Petcetera Limited Partnership* (cited above):

> [An earlier-described] interpretation of s. 69(1) is also demonstrated by the jurisprudence dealing with **new indebtedness incurred by a debtor after he or she has gone bankrupt**. It has been held that leave is not necessary for a creditor to have a remedy against the debtor because the **new indebtedness is not a claim provable in the bankruptcy**. (See *Richardson & Co. v. Storey* (1941), 1941 CanLII 334 (ON SC), 23 C.B.R. 145, [1942] 1 D.L.R. 182(Ont. S.C.); *Re Bolf* (1945), 26 C.B.R. 149(Que. S.C.); *Venneri v. Bomasuit* (1950), 31 C.B.R. 150(Ont. S.C.); and *Greenfield Park Lumber & Builders' Supplies Ltd. v. Zikman* (1967), 12 C.B.R. (N.S.) 115(Que. S.C.). Also see *Wescraft Manufacturing Co. (Re)* (1994), 1994 CanLII 2883 (BC SC), 27 C.B.R. (3d) 28(B.C.S.C.), which appears to have held, correctly in my view, that **s. 69.1(1) (the stay provision triggered upon the filing of a proposal) did not stay the termination of a lease on account of arrears of rent due after the filing of a proposal** . . . .[para 31] [emphasis added]

96 And *Schendel Mechanical Contracting (Re)* 2021 ABQB 893 (Mah J.):

> . . . it is known that Hatch **supplied goods** to various Schendel projects **during the post-NOI period** to the tune of $34,476.75. Hatch advised the Receiver of which specific invoices to which the $40,000 was applied. That information was not provided to the Court. It is known that apart from those specific invoices, there was a balance that was applied to indebtedness on the Paul Band School project, where one invoice related to the post-NOI period.
>
> **The stay would not apply in respect of indebtedness arising from goods and services supplied to Schendel after the date of filing the NOI as such indebtedness would not be "a claim provable in bankruptcy"** per section 69(1): ***Wosk's Ltd Re***, 1985 CanLII 624 (BC SC), 1985 Carswell BC 807 (SC), 58 CBR 312; ***728835 Ontario Ltd., Re***, 1998 CanLII 2019 (ON CA), 1998 CarswellOnt 2576, 3 C.B.R. (4th) 214.; and ***Jones, Re***, 2003 CanLII 21196 (ON CA), 2003 CarswellOnt 3184, 2003 CarswellOnt 3184, [2003] O.J. No. 3258. [paras 25 and 26] [emphasis added]

97 Accordingly, when it comes to future services, Conifer and Razor have the same rights and liabilities under their agreements as before i.e. without any limitations arising from or otherwise affected by the stay of proceedings.

98 It may be that Conifer will choose to proceed on the basis suggested by Razor (setoffs accompanied by deposit). Conifer might choose to rely on other payment-enforcement rights it has under the agreements i.e. as they may be triggered by Razor's payment performance or non-performance. The parties may end up agreeing to new or varied payment arrangements.

99 It is not the Court's role, in a stay-enforcement context, to get involved in those going-forward business decisions.

6. Critical-supplier charge and "cure" payments

100 While Conifer requested a critical-supplier charge, it did not apply for such relief. I recognize that the application heard last Friday (February 16th) was brought forward with very tight timing and that Conifer was already dealing with accelerated timelines.

101 I simply note that I did not have the benefit of any written submissions from Razor on the critical-supplier aspect, with none required i.e. with no application for such cross-relief.

102 As well, I am not convinced that every gap or difference between the *BIA* (which does not provide for critical-supplier charges, at least expressly) and the *CCAA* (which does) is necessarily answered by filling in the gap i.e. by finding that a feature or aspect in one is necessarily to be read into the other. I would (ideally) have more fulsome submissions from each side on this point before considering such a charge further.

103 Same for Conifer's request for payment of a portion of Razor's pre-NOI arrears. This is at odds with the equality-of-unsecured-creditors approach under the *BIA*. It too would benefit from an application and more fulsome submissions from both sides.

104 If Conifer continues to seek either or both forms of relief, I invite its counsel to so advise, following which I will provide procedural directions for a follow-up application (with which I am seizing myself), on accelerated timelines, if necessary.

7. Lockout to avoid anticipated future arrears

105 As noted, Conifer attempted to explain its lockout decision in part by a wish to avoid or pre-empt anticipated future arrears. Per its brief (para 14):

> . . . the Discontinuance was [also] implemented to prevent further costs from being incurred in the face of Razor's continued payment arrears. [I added "also" given the clear evidence, recited earlier, that Conifer was also seeking, via the lockout, to enforce collection of all or at least some of the pre-NOI arrears.]

106 I do not see anything in the agreements here authorizing a lockout for *anticipated* arrears, even with Razor's arrears history.

107 As explained above, the parties are effectively back to square one when it comes to future services. If Razor allows new arrears to accrue, it faces the prospect of Conifer taking any, some or all of the enforcement steps available to it under the agreements, without any impediment from the para. 69(1)(a) stay.

108 Absent further defaults, I do not see Conifer having any lockout power.

V. Closing note

109 I thank the parties for their excellent written materials and oral submissions.

110 On costs, if either side seeks a ruling other than "bear own costs", on which *Goldenkey Oil Inc (Re)*, 2023 ABKB 365 may provide some guidance, I invite counsel to contact my assistant to arrange for a phone conference to discuss and set procedural directions for costs submissions.

Order accordingly.

Tab 2

2024 ABKB 553
Alberta Court of King's Bench

Razor Energy Corp (Re)

2024 CarswellAlta 2385, 2024 ABKB 553, [2024] A.W.L.D. 4242

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of the Plan of Compromise or Arrangement of Razor Energy Corp, Razor Holdings GP Corp, and Blade Energy Services Corp

Douglas R. Mah J.

Heard: September 11, 2024
Judgment: September 19, 2024
Docket: Calgary 2401-02680

Counsel: Keely Cameron, Sarah Aaron, for Applicant, Conifer Energy
Sean Collins, for Razor Energy Corp, Razor Royalties Limited Partnership, Razor Holdings GP Corp., and Blade Energy Services Corp.
Kelly J. Bourassa, for Monitor, FTI Consulting Canada Inc.
Jessica Cameron, for 405 Dolomite ULC, as agent to certain lenders (Arena Investors LP)
Randal Van de Mosselaer, for Canadian Natural Resources Limited
Corey Luda, for Vulcan County
Michael Swanberg, for Big Lakes County and Municipal District of Greenvew
Stacey McPeak, for Alberta Petroleum Marketing Commission
Philip LaFair, for Sabre Energy Ltd.
Daniel Segal — Justice Canada
Marianne Panenka, for Indian Oil and Gas Canada
Kristopher Lensink — Government of Alberta, Alberta Energy and Mineral Energy Legal Team

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Miscellaneous
Creditor and debtor co-owned gas plant along with other parties — Debtor defaulted in its obligations to pay its share of plant's operating costs — Creditor partially locked debtor out of plant and they could not agree on terms by which debtor could return — Debtor declared bankruptcy and was granted stay under s. 11.02 of Companies' Creditors Arrangement Act — Debtor continued to owe creditor and debt was escalating monthly — Debtor advised court that corporate transaction was underway with third-party purchaser which would result in creditor being paid post-filing arrears in full — Creditor brought application for payment of post-filing obligations and priming charge to secure payment — Application dismissed — Allowing creditor's application would cause corporate transaction to collapse — Granting application would not have provided conditions under which debtor could execute corporate transaction but rather would hasten its bankruptcy or receivership — Creditor would be given unfair advantage by authorizing preferential payment and/or artificially elevating its priority position — Granting application would not provide constructive solution to any stakeholders other than creditor — If granted, creditor's application would permit interests of single post-filing creditor to determine fate of entire proceedings under Act to detriment of remaining stakeholders.

2024 ABKB 553, 2024 CarswellAlta 2385, [2024] A.W.L.D. 4242

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s. 11.01 [en. 2005, c. 47, s. 128] — considered

s. 11.02 [en. 2005, c. 47, s. 128] — considered

s. 11.4 [en. 1997, c. 12, s. 124] — considered

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 69(1)(a) — referred to

APPLICATION by creditor for payment of post-filing obligations and priming charge to secure payment.

***Douglas R. Mah J.*:**

Reasons for Decision

A. Background

1 Within the ambit of ***CCAA*** [1] proceedings, a creditor (Conifer Energy Inc) of the debtor corporation (Razor Energy Corp) seeks an Order under s 11 for payment of post-filing obligations and a priming charge to secure that payment.

2 Here is a brief factual synopsis:

• Razor and Conifer are oil and gas producers. Conifer operates the Judy Creek Gas Conservation Plant where Conifer, under an ownership and operating agreement (OOA) with Razor, received and processed a major portion of Razor's gas production.

• Razor and Conifer, along with others, are owners of the gas plant. The OOA requires Razor to pay its share of the plant's operating costs and to pay for ongoing processing services in respect of its gas processed there. There are 8 other owners who have ownership interests in the functional units comprising the facility.

• In December 2023, after Razor defaulted in its obligations under the OOA, Conifer physically locked Razor out of the gathering system at 16 separate points within the South Swan Hills Gas Gathering System, thus preventing processing of about two-thirds of Razor's gas.

• Conifer was unable to completely lock out Razor because the configuration of the infrastructure did not allow Conifer to do so without adversely affecting third-party interests. Conifer set-off and continues to set-off the revenue from the one-third of Razor's gas that continues to be processed against Razor's obligations.

• Razor filed a Notice of Intention to Make a Proposal (NOI) under the ***BIA*** [2] in January 2024, thus invoking the statutory stay provided in s 69(1)(a) of the ***BIA***.

• Justice Lema in a February 21, 2024 decision reported as ***Blade Energy Services Corp (Re)*, 2024 ABKB 100** determined that Conifer's lockout action was contrary to the statutory stay so far as any pre-NOI amounts were concerned, but not any post-NOI amount owing. He determined that Conifer continues to enjoy any contractual remedies it may have with regard to unpaid post-NOI obligations.

• Following Justice Lema's decision, Conifer and Razor were unable to reach terms by which Razor could revert to full access to the plant. Razor had determined that it could continue to carry on business even without access to the Judy Creek plant. Thus, the lockout of the two-thirds of Razor's output continues and the set-off by Conifer of the revenue from the remaining one-third also continues.

• On February 28, 2024 Razor converted its NOI proceedings into a ***CCAA*** proceeding, engaging a new stay under s 11.02. There have been extensions applied for and granted. The current stay period expires on October 13, 2024. The amounts sought to be paid (or secured) relate to the period on and after February 28, 2024 or the "post-filing" period.

• Razor advises that its plan in the ***CCAA*** proceedings takes the form of a pending "Corporate Transaction" with a third-party purchaser which, according to Razor's affiant (Mr. Bailey, affidavit of September 6, 2024 at para 6), will come together on or about September 20, 2024 and will result in Conifer being paid the post-filing arrears in full. For reasons of commercial confidentiality, the details of the Corporate Transaction have not been disclosed.

• It is Conifer's surmise (affidavit of Ms. Wilkins affirmed September 3, 2024 at para 16) that Razor's interest in the Judy Creek gas plant and South Swan Hills Unit form part of the assets under sale in the Corporate Transaction.

• Razor continues to not pay Conifer under the OOA. Razor says it is insolvent and unable to do so. Conifer says that Razor is getting a "free ride" with respect to the one-third of gas output that continues to be processed at the Judy Creek plant and with regard to its ownership obligations. Furthermore, Conifer advises that Razor's obligations to another owner, CNRL, are now being allocated by CNRL to Conifer, thus jeopardizing Conifer's financial status.

• The amount owed to Conifer by Razor for the post-filing period as of September 2, 2024 for services is $1.89 million, including Razor's share of the plant's operating costs. The debt is escalating at a rate of $250,000 per month after set-off. The amount reallocated by CNRL to Conifer in respect of Razor is more than $4.15 million which includes approximately $360,000 for post-filing amounts charged by CNRL.

B. Principles underlying the CCAA

3 The Supreme Court of Canada in ***Century Services Inc v Canada (Attorney General),* 2010 SCC 60**, by its majority at paras 57-60, set out the foundational precepts of decision-making under the ***CCAA***:

• The ***CCAA*** is "skeletal in nature" and does not "contain a comprehensive code that lays out all that is permitted or barred." Thus, ***CCAA*** decisions are often based on discretionary grants of jurisdiction. Judicial discretion in this regard must be exercised in furtherance of the ***CCAA***'s purposes.

• The purpose of the ***CCAA*** is remedial "in the purest sense" in providing a means whereby the devastating social and economic effects of bankruptcy or creditor-initiated termination of ongoing business operations can be avoided while a Court-supervised attempt to reorganize the financial affairs of the debtor company is undertaken.

• The Court engaged in judicial decision-making under the ***CCAA*** must "first of all provide the conditions under which the debtor can attempt to reorganize." This can be achieved by staying enforcement action to allow the debtor's business to continue, preserving the *status quo* while the debtor readies itself to present the restructuring or reorganization plan to creditors, and supervising the process and advancing it to the point where it can be determined whether it will succeed.

• The Court must be cognizant of and weigh all stakeholder interests and the public interest that may come into play in any decision of whether to allow a particular action.

4 I consider this application against the backdrop of the above principles.

C. Conifer's Position

5 Conifer seeks this Order from the Court:

• requiring Razor to pay Conifer all amounts owing under the OOA for the post-filing period;

• requiring Razor to pay Conifer all post-filing amounts owed by Razor to CNRL that CNRL intends to seek from Conifer;

• that such payments be made in priority to any other creditors of Razor and be paid by September 20, 2024 (coinciding with the date that the Corporate Transaction is supposed to be signed); and

• that Conifer be granted a charge against Razor's property to secure the post-filing amounts, ranking only behind the administration charge and directors' charge, or a declaration of constructive trust against Razor's property, for the post-filing amounts. (This appears to be alternative relief to a Court Order for an immediate in-full cash payment.)

6 As justification for the relief sought, Conifer says:

• The amounts are owed by Razor to Conifer under the OOA.

• Both s 11.01 of the ***CCAA***, as an exception to the stay provision, and para 19 of the Amended and Restated Initial Order (ARIO) permit Conifer to require immediate payment from Razor for post-filing amounts.

• Conifer notes that Razor is paying certain partners and service providers their post-filing invoices but not Conifer, resulting in Conifer facing risk while those other creditors receive ongoing payment, contrary to the spirit of insolvency legislation as expressed in ***Québec Inc v Callidus Capital Corp*, 2020 SCC 10** at para 75.

• The Court has broad jurisdiction under section 11 of the ***CCAA*** to make the Order sought. When assessed against the policy objectives of the ***CCAA***, Conifer notes the purpose of the ***CCAA*** is not to disadvantage creditors but rather to provide a constructive solution for all stakeholders and where all stakeholders are treated as advantageously and fairly as circumstances permit: ***Sun Indalex Finance, LLC v United Steelworkers*, 2013 SCC 6** at para 205.

• Under its inherent powers, the Court can create a security interest for creditors who supply goods and services to the debtor after the filing of a ***CCAA*** petition and can provide for the priority and ranking of such a security interest with respect to other security holders: ***Arrangement relatif à Gestion Éric Savard inc,*** 2019 QCCA 1434 at paras. 17-24; Houlden, Morawetz and Sarra, ***The 2024 Annotated Bankruptcy and Insolvency Act***, Toronto: Thomson Carswell, 2024, pp. 1464-1465, commenting on ***Re Smoky River Coal Ltd*, 2000 ABQB 621**, aff'd in 2001 ABCA 209.

• Further, or in the alternative, the Court may declare a constructive trust in respect of the supplier's entitlement to be paid for post-filing goods and services provided under an executory contract: ***General Motors Corporation v Peco, Inc.,*** 2006 CanLII 4758 at paras. 17-31.

7 In its brief at paragraph 41, Conifer invoked s 11.4 the ***CCCA***, which provides the Court the ability to declare a charge in favor of a "critical supplier" but did not press that position during the hearing. The evidence before me was that Razor was carrying on business without support from Conifer and Conifer was not cutting off services completely only because of the configuration of the infrastructure and its obligations to other parties. In this sense, Conifer was not a critical supplier of Razor.

8 CNRL appeared by counsel at the hearing. No argument was made on its behalf regarding whether the Orders sought should be granted or not. Counsel confined his remarks to saying that if the Court was inclined to grant the Orders in favour of Conifer, then payment of the amounts earmarked for reallocated obligations by CNRL should be paid directly to CNRL. Counsel for CNRL also suggested that if Conifer was successful, then one might expect CNRL and other operators involved with Razor to make the same application.

D. Razor's position

9 In response, Razor submits the following:

• The OOA between Conifer and Razor provides the remedies for breach and non-payment. The Court should not be rewriting the OOA by giving Conifer new remedies and rights, nor does the ***CCAA*** **confer jurisdiction on the Court to do so:*Allarco Entertainment Inc, Re,*** 2009 ABQB 503 at paras 52-54. (As noted, Conifer is presently exercising the existing right of set-off.)

• Enforcement of the post-filing amounts remain stayed. No application has been made to lift the stay. The remedy inherent in s 11.01 is not an Order for payment but rather stoppage of supply.

• The Court should remain alive to the principle that the *status quo* should be maintained until a conclusion is reached under the ***CCAA***. Accordingly, there is no basis for Conifer to obtain the Court's assistance to either improve its position by enhancing priority or effect collection of amounts owing: ***Agro Pacific Industries Ltd, Re*, 2000 BCSC 879** at para 17.

> • Case law establishes that s 11.01 must be construed narrowly. In order for a creditor to fit within the exception to the stay of proceedings found in s 11.01, the creditor must be compelled by ***CCAA*** Order to continue supply of services during the post-filing period. The *quid pro quo* for this compulsion is the statutory obligation for the debtor to continue paying on a current basis during the post-filing period: ***Smith Brothers Contracting Ltd (Re) (Trustee of)***, 1998 CanLII 3844 (BCSC) at para 14; ***Royal Bank v Cow Harbour Construction Ltd*, 2012 ABQB 59**.
>
> • The granting of Conifer's application in either form, says Razor, would basically sound the death knell for the Corporate Transaction. Razor says that it is insolvent and lacks the ability to pay Conifer as requested in the application. Further, the granting of a priority charge to Conifer would make the Corporate Transaction untenable. There is no reason to elevate Conifer's position at the expense of all remaining creditors standing to benefit if the Corporate Transaction is concluded.

10 Razor was supported in its opposition to the application by Arena Investors LP, one of Razor's secured creditors, and by Big Lakes County and the Municipal District of Greenview. The two municipalities, among others, are owed municipal taxes on a priority basis. All of these objecting parties echo that Conifer seeks to improperly elevate its priority status either by actual payment before anyone else or the granting of a priming charge, to the prejudice of other creditors.

11 Arena's counsel submitted that Conifer's post-filing claim is unsecured or at best forms the basis of an Operator's Lien, still subordinate to Arena's security: ***Cansearch Resources Ltd v Regent Resources Ltd*, 2017 ABQB 535** at para 42. Arena also contends that a single post-filing creditor should not be allowed to determine the fate of the entire ***CCAA* proceeding:*Essar Steel Algoma Inc, Re***, 2016 ONSC 6459 at para 26. Finally, with regard to constructive trust, Arena's counsel says that even if enrichment of Razor and deprivation on Conifer's part are made out, there is a juristic reason not to pay Conifer and that is the ***CCAA***.

E. Does Section 11.01 apply?

12 I accept that s 11.01 must be construed narrowly *per* ***Smith Brothers*** and ***Cow Harbour***. Yamauchi J noted at para 16 of the latter case:

> While a debtor corporation is proceeding through the ***CCAA*** restructuring process, it must still carry on its business. It hardly seems fair to require a person to continue to supply the debtor corporation with goods or services, or to allow the debtor corporation to continue to use leased property, without that person being compensated for those goods, services or use. Section 11.01(a) of the ***CCAA*** allows for that compensation.

13 I understand the sentiment of the unfairness of non-payment when the services are connected to the debtor corporation carrying on business while under the ***CCAA***. Here, the evidence before me is that Razor has not asked Conifer to provide services. In fact, Conifer has cut off Razor to the extent it can. All of the gas ostensibly produced by Razor that is processed at the plant is being processed for Conifer's benefit, not Razor's. The only reason the services continue on Razor's account is because of the physical configuration of the system infrastructure and Conifer's obligations to other parties, neither of which Razor control. Indeed, the evidence is that Razor is getting by without any help from Conifer.

14 I am not ready to say that the *quid pro quo* of compulsion under a ***CCAA*** Order is required to engage s 11.01 as suggested by Razor but in the least the services being claimed must be at the debtor's request and of some utility to the debtor in conducting its business, even if the claimant is not a "critical supplier" under s 11.4. It is true that the plant continues to be operated and that Razor's interest in the plant may be part of the assets sold in the Corporate Transaction. But Conifer's continued operation of the plant arises not from Razor's request to do so but rather Conifer's obligations to others and its self-interest in the plant's operation.

15 As the evidence shows, Razor has undergone a process of determining who it needs to pay in order to remain in business and work toward achieving the Corporate Transaction. Examples were given in Mr. Bailey's affidavit of electrical supply and the services of other operators who are processing Razor's gas *and* providing Razor with revenue for use as the ***CCAA*** proceedings advance. Razor has determined that it does not need Conifer's help to conduct business during the stay period or to advance the Corporate Transaction under the ***CCAA***.

16 To be sure, Conifer is in an unwieldy predicament and that is through no fault of its own. It cannot completely shut off Razor's access and it cannot shut down the plant. Unfortunately for Conifer, it has already taken its best available remedy, which is the set-off. I agree that *if* s 11.01 is engaged then Conifer's remedies under s 11.01 itself are as contained in the OOA or stoppage of supply (if it were possible). Beyond that, Conifer must apply for an Order under s 11 (or s 11.4 if "critical supplier" status was made out). Such an application in either event engages the foundational precepts of decision-making under the ***CCAA*** discussed above.

F. Monitor's Report

17 These points are notable from the Monitor's Report:

- (at para 24) Razor has sufficient liquidity to remain in business for the duration of the stay. If Conifer were successful in obtaining its Order directing payment of the post-filing arrears by September 20, 2024 Razor would not have the necessary cash flow to remain in business.

- (at para 25) The Monitor's fifth report and sixth (and current) cash flow statement, and others filed in these proceedings, do not contemplate payment of the post-filing amounts owed to Conifer.

- (at para 28) The Monitor views the Corporate Transaction as the best alternative for all stakeholders as it would avoid a bankruptcy and potentially no recovery for stakeholders.

- (at para 29) The Monitor understands that the estimated proceeds from the Corporate Transaction are expected to be sufficient to pay the post-filing arrears owed to Conifer, not including the deposit of $680,000 that is requested, which would only be required if Conifer were to reconnect Razor to the system.

- (at para 32) If Conifer were successful in this application, Razor will likely be unable to complete the Corporate Transaction which would result in significant losses for stakeholders, including significant abandonment and reclamation obligations.

18 I remind myself of the Monitor's role in these proceedings. The Monitor is a Court officer subject to OSB supervision. The Ontario Court of Appeal summarized the nature of the Monitor's role in ***Ernst & Young Inc v Essar Global Fund Limited*, 2017 ONCA 1014** at para 109, as:

> The monitor is to be the eyes and the ears of the Court and sometimes, as is the case here, the nose. The monitor is to be independent and impartial, must treat all parties reasonably and fairly, and is to conduct itself in a manner consistent with the objectives of the ***CCAA*** and its restructuring purpose. In the course of a ***CCAA*** proceeding, a monitor frequently takes positions; indeed it is required by statute to do so.

19 The Monitor's financial presentation and its statements about the effect of the Corporate Transaction if it comes to fruition (or not) were not controverted by Conifer or any other evidence. Accordingly, I accept what the Monitor in its September 10, 2024 report says about the financial condition of Razor, its liquidity, and the prospects for all of Razor's stakeholders if the Corporate Transaction is realized or is not.

G. Ruling

20 Even if Conifer's post-filing claim falls within s 11.01, I am still required to exercise my discretion to make an appropriate Order under s 11 in accordance with the ***CCAA***'s overall policy objectives.

21 In making my ruling, I have regard to the following factors:

- The mere fact that Razor is under the ***CCAA*** means it is insolvent.

• No provision in the latest cash flow statement, which extends to the end of the current stay, is made for payment to Conifer for any post-filing amounts.

• The granting of Conifer's application in either form would trigger similar applications by CNRL and other operators, which the Court would be hard-pressed (given the precedent set) to deny.

• The Corporate Transaction contemplates full payment of post-filing arrears to both Conifer and CNRL (less only the deposit for future services which would not be required).

• The documentation for the Corporate Transaction is scheduled to be completed and signed as of September 20, 2024, which is a scant day away. Mr. Bailey (Razor's CEO) expresses optimism that the Corporate Transaction will actually come to pass. There is no contrary information before me.

• Conifer is not left dangling indefinitely. There are milestone dates looming: September 20, 2024 for the signing of the Corporate Transaction and October 13, 2024 for the expiry of the current stay.

22 Based on the evidence before me, I conclude as follows:

• Allowing Conifer's application (and the other similar applications that would inevitably follow) will likely have the effect of causing the Corporate Transaction to collapse.

• In the words of ***Century Services***, granting the Order sought would not "provide the conditions" under which Razor can execute on the Corporate Transaction but rather would hasten its bankruptcy or receivership.

• Granting the Order sought would give Conifer an unfair advantage now and in any subsequent bankruptcy or receivership by authorizing a preferential payment and/or artificially elevating its priority position. It would not provide a constructive solution to all stakeholders, only Conifer.

• Granting the Order would in effect permit the interests of a single post-filing creditor to determine the fate of the entire ***CCAA*** proceeding to the detriment of remaining stakeholders.

23 In exercising my discretion under the ***CCAA***, I remain cognizant of the remedial purpose of the ***CCAA*** and the requirement to consider broad stakeholder interests. I appreciate the Corporate Transaction, if signed, is still subject to Court approval but, on the basis of the evidence before me, it does represent the best and fairest outcome for all stakeholders.

24 In the result, I find that Conifer's post-filing claim does not fall within the narrow exception created by s 11.01. Whether it does or not, I would still exercise my discretion against granting the Order for the reasons given above. In consequence, I dismiss Conifer's application.

25 If the parties/counsel so wish, they may address costs with me within 30 days of the date of this decision by submitting a written submission not longer than two single-spaced pages, excluding exhibits and authorities, and including a draft Bill of costs.

Application dismissed.

Footnotes

1 ***Companies' Creditors Arrangement Act***, RSC, 1985, c C-36 as am.

2 ***Bankruptcy and Insolvency Act***, RSC 1985, c B-3 as am.